

LAW À LA MODE

Issue 17 – October 2015

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NEW PRC ADVERTISING LAWS – WHAT YOU NEED TO KNOW



Fashion, Retail and Design Group

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Editorial

The Netherlands editorial team is delighted to bring you the 17th 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.

Hot off the press in this quarter's edition is a must-read summary provided by our UK colleagues of the key changes introduced by the recent Consumer Rights Act, which you can read from **page 4**. Continuing the focus on consumers, there is an outline of the developments to the law in Hong Kong on sexual harassment by customers at **page 20**.

In this issue we give you our six top tips to master the relationship between luxury brand and fashion blogger to help avoid tripping into commercial, legal and taxation pitfalls (see **page 10**). We also examine recent developments to the Dutch law on leases (**page 22**), which will be of note to those who are either tenants or landlords in the Netherlands.

Advertising is a vital tool for those in the retail, design and fashion sectors, and key information about the impending changes to the law and regulations on advertising in China is at **page 24**. An innovative way to pay less tax on intangible assets is explored by our Amsterdam colleagues (**page 14**), and you can find ideas for protecting the get-up of websites and online shops in Spain at **page 15**.

Finally, brand protection is paramount to many in this industry. The article on **page 12** suggests ways in which brands can protect their image without falling foul of European

competition law. In addition, the article on **page 18** provides advice on how brands can best manage and control their online retail sales in the EU, which is of relevance to all brand owners regardless of where they are based, who are operating within the EU.

Looking ahead to Spring 2016, our US colleagues advise on the protectability of next season's most popular pantones on **page 8**.

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.

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CONSUMER RIGHTS ALL CHANGE?

By Matthew Duncombe (Leeds)

The last 12 months have seen significant change to the consumer law landscape in the UK, culminating most recently with the Consumer Rights Act 2015 (which came into force in October 2015). Changes in consumer law commenced last year with the implementation of the Consumer Rights Directive into English law by the Consumer Contracts Regulations 2013. The 2013 Regs brought into law further rules relating to distance and online selling, including:

- extending the “cooling-off period” for consumers to change their mind from 7 to 14 days
- cutting the period for refunding customers from 30 to 14 days
- making it a requirement that “pay” buttons on traders’ websites must clearly signpost the customer’s obligation to pay rather than simply ‘order’
- a prohibition on pre-ticked boxes on traders’ websites meaning further up-sells must be actively agreed to
- a maximum 30-day window for the delivery of goods and services, unless the customer agrees otherwise and
- a ban on premium rate helplines: all must charge the basic rate



While the reforms implemented by the 2013 Regs have helped harmonize online selling rules across the EU (all EU countries should now have implemented the underlying EU directive), the UK Government has also been keen to update and simplify general UK consumer rules. The Consumer Rights Act, which received royal assent on 26 March 2015, consolidates and reforms the myriad of UK legislation, which provides protections and rights for the consumer, into a single act and also brings into effect certain online rules from the 2013 Regs into all consumer contracts. For example, any changes made before a consumer enters into a contract are not effective unless agreed to, and delivery is 30 days unless otherwise agreed.

This article highlights the key changes implanted by the Consumer Rights Act.

PRE-CONTRACT INFORMATION

Change: *pre-contract information required under Consumer Contracts Regulations will form part of the implied terms.*

When the Act comes into force, it will be an implied term of the contract that the pre-contract information currently required under the Consumer Contracts Regulations will be provided to the consumer.

Sellers should therefore be aware that a failure to provide this information – which is currently listed in the Schedules to the Consumer Contracts Regulations and includes things such as the identity of the trader; total price of the goods, delivery charges and the trader’s complaint handling policy – will leave them open to having to refund the customer. Sellers should review their terms and conditions accordingly.

PROMINENT AND TRANSPARENT KEY TERMS

Change: *terms governing price and subject matter must be “prominent” and “transparent”.*

Under existing law, the following two categories of core terms are not subject to the fairness test:

1. the adequacy of price against the goods or services
2. the main subject matter of the contract

This position will remain the same under the new regime but with the added caveat that those terms must be *transparent* (i.e. use plain and intelligible language) and *prominent* (i.e. brought to the consumer’s attention in such a way that the average consumer would be aware of the terms). Failure to adhere to this requirement will leave such provisions open to the fairness test. Businesses should review terms and conditions as well as customer facing websites, apps and notices to ensure that at the point of sale these terms are clearly brought to a consumer’s attention.

QUALITY STANDARDS APPLYING TO GOODS

Change: *the standards around quality currently implied as standard terms by existing legislation will be replicated under the Act and extended to cover any goods purchased based on a model of the final product.*

The requirements that goods must be of satisfactory quality, fit for purpose and meet the expectations of the consumer, currently implied into all trader-to-consumer contracts by the Sale of Goods Act 1979, will be replicated in the Act. These remain statutory rights that cannot be excluded.



This standard currently expressly applies to all goods that are bought on the basis of a description or a sample. However, a further category of goods – those purchased following the viewing or examination of a model of the final product – will be added to this list under the Act. Vendors should therefore be aware that any sales of goods based on prototypes or models must meet this standard or the consumer will be entitled to a refund.

UNFAIR CONTRACT TERMS

Change: *streamlining of the existing law and addition of new categories of terms that are likely to be considered unfair to a so-called gray list.*

At present, the law on unfair contract terms is enshrined in the Unfair Contract Terms Act and the Unfair Terms in Consumer Contract Regulations. The Act will consolidate what is deemed “unfair” in consumer contracts.

The “fairness test” remains at the center of the law. Essentially, a term that causes a significant imbalance in the parties’ rights and obligations, to the detriment of the consumer, will be excluded from the contract and will not be binding on the consumer. But see comments above on the requirement for certain terms to be “prominent” and “transparent”.

As with previous legislation, the Act provides a blacklist of terms that will always be considered unfair as well as a gray list of terms likely to be considered unfair. The blacklist remains largely the same (e.g. restriction of liability for death or PI resulting from negligence). The Act does add the following three terms to the gray list that may be considered unfair:

- disproportionately high prices where the consumer decides not to conclude or perform the contract (e.g. disproportionate cancellation charges)
- terms which allow the trader to determine characteristics of the goods after the consumer has entered into the contract and
- terms which allow the trader to determine the price of the goods after the consumer has entered into the contract

Traders should review their standard terms and conditions ahead of the Act coming into force for any terms that may fall under one of these new categories.

CONSUMER NOTICES

Change: *non-contractual notices will be subject to the fairness test. Those deemed “unfair” will be unenforceable.*

The Act governs notices that do not form part of a contract but limit a trader’s liability to the consumer in some way. Currently, consumers have very limited scope to claim a non-contractual notice is unfair.



However, the Act subjects “consumer notices” to the fairness test set out above. Breaching this will render the notice unenforceable.

Traders should review their product range and customer facing literature for any notices or statements – safety warnings for example – that serve to alert the consumer to a particular point. If deemed “unfair” the notice will be unenforceable.

REMEDIES AVAILABLE TO THE CONSUMER

Changes: *consumers will have a right to reject, within 30 days, goods that do not meet the statutory standard. A new “tiered” remedy system gives the consumer a further, final right to reject.*

1. *Refund within first 30 days:* consumers have the right to reject any item that does not conform to the contract within the first 30 days of receiving it (shorter for perishable goods) and receive a full refund.
2. *Repair or replacement within first 30 days:* should the consumer choose instead to have the goods repaired or replaced, the time limit for the right to a refund is ‘paused’ until the goods are returned to the consumer. If, upon return, the item still does not conform to the contract, then the consumer’s right to reject is extended by a minimum of seven days.
3. *Repair or replacement after first 30 days:* if a fault is discovered after the 30-day rejection window, the consumer has the right to a repair or a replacement. The trader has one opportunity to provide the consumer with a product that conforms to the contract.

4. *Refund or price reduction following first repair or replacement:*
if repair or replacement is impossible, the attempt at repair fails or the replacement is also defective, the consumer has a final right to reject, or a right to a reduction in price.

Consumers' rights have been enhanced in this regard as the Act gives consumers a clear window for a refund in contrast to the existing "reasonable" timeframe. This is in addition to the recent changes brought in by the 2013 Regs: a 14-day period for consumers to change their minds and the reduction from 30 to 14 days for the period in time in which traders must be provide a refund.

Given the substantive change in this area, traders should review their refund and repair policies to ensure that they remain fully complaint.

DIGITAL CONTENT

Change: *digital content must meet quality standards equivalent to those currently required for goods and services.*

Digital content will be introduced as a new distinct category of product alongside goods and services that must meet a minimum standard. Currently the protections are much greater for products where the digital content is sold on a tangible good (a DVD, for example) than those where it is intangible (such as an MP3 download) so the reforms aim to address this inconsistency.

The product itself could be anything within the broad spectrum of digital content – defined as "data which are produced and supplied in digital form" – including eBooks, MP3s and in-app purchases from "freemium" computer games – that is, essentially anything with a digital element.

Upon purchasing digital content, it will be implied in the contract that the product will be of satisfactory quality, fit for purpose and compliant with any description. These implied terms will apply whether or not the consumer paid money for the digital content or the digital content came free with other goods for which the customer had paid. If the digital content fails to meet the implied terms, the consumer is entitled to a repair, a replacement or (in limited circumstances) a price reduction of up to 100 percent. There is no direct right to a refund unless the digital content is in a physical item, for example a DVD, in which case the usual remedies for goods (see above) apply.

Sellers should review their product ranges for any goods with a digital content element. If these are sold and the digital content does not conform to the contract (i.e. by meeting the quality standards), the goods themselves will be deemed to not conform to the contract and the consumer will be entitled to remedies, as set out above.

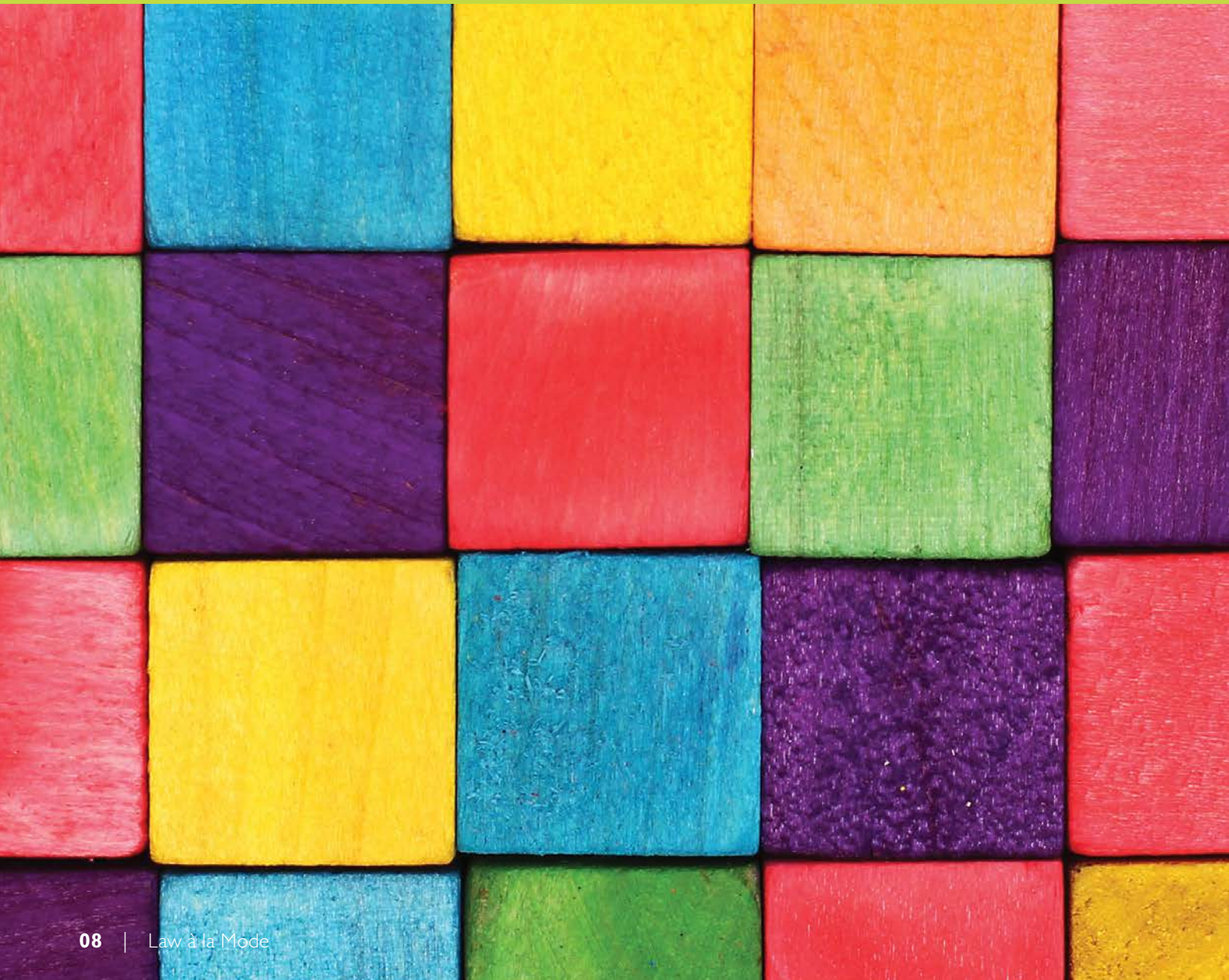




COLOR CONFUSION

DEFINING THE LIMITS OF TRADEMARK PROTECTION FOR COLORS IN THE UNITED STATES

By David Kramer and Ashley Green (Washington DC)



In September, Pantone LLC, an international authority on color and provider of a standardized color system for the design industry, published its semi-annual Fashion Color Report for Spring 2016. Released to coincide with New York Fashion Week, the report features an overview of the anticipated top ten colors in fashion for Spring 2016. The shades highlighted in the report range from a vibrant, high-energy “Fiesta” red to a calming “Serenity” inspired by a clear blue sky. To read the report, please click [here](#).

While fashion designers and marketing professionals agree that colors have the power to transform the look and feel of a product, whether it be shoes or candy wrappers, courts have long struggled to identify the circumstances under which a color alone can serve as a source identifier or trademark. The nature of the fashion industry itself, where a design element such as color can serve an essential aesthetic function, further complicates the matter under US law.

Undoubtedly color can serve as a source indicator under the right circumstances. For example, when a color is used as a symbol only, and serves no functional purpose, the color can serve as a trademark once it has acquired ‘secondary meaning’ in the marketplace. Under US law, this means that if the color at issue is not essential to the use or purpose of the product, and does not affect the cost or quality of the product, the color may be protectable upon a showing of acquired distinctiveness.

However, in situations where a color is chosen primarily for aesthetic reasons, the question becomes much more complicated. Because aesthetics can significantly impact the commercial success of a product, these elements are often unprotectable. That said, in limited circumstances aesthetic elements such as color may be entitled to trademark protection. When assessing the registrability of elements such as color, the main considerations are whether granting a single entity exclusive rights in the color would have a significant negative impact on competition, and, if not, whether the element has acquired secondary meaning. Not unexpectedly, this analysis can be complicated, particularly in the fashion context, because it can be difficult to distinguish between a merely decorative design feature and one distinct enough to actually serve as a source identifier.

Because color choices are often aesthetic in the context of fashion and design, in the past courts have suggested that protection of color in the fashion industry in particular is not

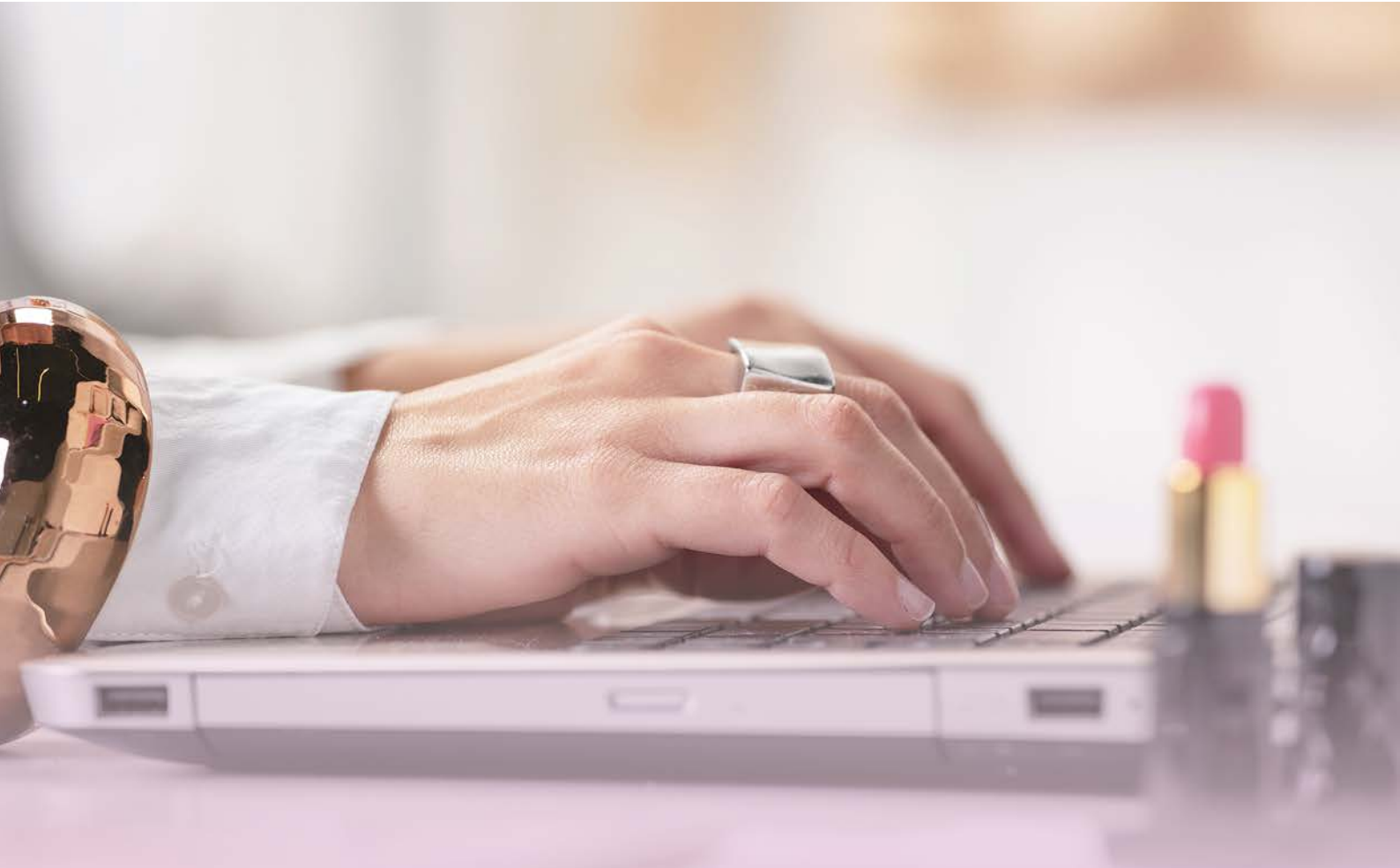
possible. While subsequent high-profile cases have proven this suggestion to be false, there is little doubt that the fashion industry presents unique considerations when it comes to colors.

That said, when considering whether a color may potentially be protectable, it is important to keep the following questions in mind:

- Have you used the color consistently in connection with specific design elements?
- Have you made longstanding and exclusive use of the color in this way?
- Is the color likely to be linked with your product in the mind of consumers?
- Have your product promotions featured the product?
- Is the product a commercial success?
- Has media coverage of the product made reference to the color?
- Have any third-parties attempted to use a similar or identical color in a similar way?

If you answered “yes” to the majority of these questions, it could make sense to take a closer look at whether it may be possible to obtain trademark rights in the color at issue.

Thinking creatively when selecting trademarks and branding strategies is critical in any industry. In the fashion industry, each season brings with it a new color palette intended to catch the eye of consumers. While powerful, these seasonal palettes are fleeting. By identifying, promoting, and protecting non-traditional trademarks such as color, you can create an iconic, lasting image of your brand that consumers will be passionate about for seasons to come.



MASTERING THE BRAND AND FASHION BLOGGER RELATIONSHIP

OUR SIX TOP TIPS

By **Leonie Kroon** and **Stephanie van der Schaft** (Amsterdam) and **Elena Varese** (Milan)

Many brands have formed strategic partnerships with one or more influential fashion bloggers in sponsorship arrangements and design collaborations. Brand-blogger collaborations can seriously add to brand engagement and awareness: the brand benefits from the blogger's social media networks and online fame and receives positive exposure to a new audience. But to achieve the desired effect, it is important for the brand to handle the brand-blogger relationship correctly. This article contains our top six tips to help brands avoid legal issues when collaborating with bloggers.

1. DEFINE THE CONTRACTUAL RELATIONSHIP

For sponsorships or collaborations with bloggers, a contract that clearly sets out the nature and duration of the relationship and the mutual rights and obligations of the parties is a necessity. For example, any requirements by a brand that a blogger must not wear any clothing from its competitors or only wear clothes in a particular way (and not together with competitors' brands), on certain occasions, frequency, or with a given visibility, and any sanctions for non-compliance should be proportionate and appropriate.

2. CLEAR COPYRIGHT

Brands often want to use photos and/or dedicated content created by fashion bloggers they co-operate within street-style spreads in their catalogs or on their websites. The brand will usually be responsible for production and distribution of the fashion items and the brand is also likely to be best equipped to take action in case of design infringement. Brands should avoid getting into copyright-related disputes by clearing the use of materials and/or seeking the assignment of any copyright up front.

It is also important to consider copyright ownership when the collaboration involves the actual design of fashion items by the blogger in collaboration with the brand. Brands should ensure they enter into clear copyright ownership arrangements with the blogger.

3. REGULATION OF VIDEOS AND PHOTOS TAKEN FROM RUNWAYS

Increasingly, brands are inviting fashion bloggers to take front-row seats at their fashion shows. In these circumstances, care must be taken because the quality of materials created by the show's attendees may not necessarily meet the brand's standards. Some luxury brands are already known for optimising their runway shows for mobile streaming. Brands should decide and communicate from the outset whether or not they will allow bloggers to take and circulate their own photos and/or videos of these runway shows and, if so, under what conditions.

4. CONSIDER A FASHION BLOGGER TRADEMARK USE POLICY

It is not beyond the realms of imagination that a fashion blogger's use of the brand's trademark can be (or become) detrimental to, or even become an infringement of, the brand's trademark rights. It may be worth considering a general 'fashion blogger trademark use' policy. Such a policy could, for instance, cover the way a blogger may describe the relationship with the brand: if the relationship is not a collaboration, for instance, then the blogger should be forbidden to describe it as such. In cases of sponsorship or collaboration agreements with fashion bloggers, it is advisable to include a trademark use policy in the agreement, controlling proper use of trademarks.

5. BEAR IN MIND POSSIBLE VAT IMPLICATIONS WHEN ITEMS ARE SENT TO BLOGGERS FOR FREE

It is common for brands to provide bloggers with free items of clothing and accessories in the hope that a dedicated blog post will follow. Given that no remuneration is received from the bloggers in return, there may be an expectation that no VAT obligation for the brands arises. However, this is not always the case. For VAT purposes, the provision of free items may be treated as supplies of goods (so-called "deemed supplies"), and may be subject to VAT in the hands of the grantor (here, the relevant brand). For gifts of low value or samples/promotional items, no VAT is due. When gifts are frequently provided to the same bloggers, it is advisable to verify with local lawyers to make sure the brand is compliant with local VAT legislation.

6. CHECK ADVERTISING LAWS: POSSIBLY APPLICABLE TO GIFTS AND FREE PRODUCTS

Whether or not a gift is given to a blogger with the expectation that the blogger will provide positive coverage in return, the brand needs to be aware that in some jurisdictions the blogger, and even the brand, is required by advertising laws to disclose the gift. Here transparency is key. An elegant solution might be for the brand to provide the gift together with a note asking the blogger to thank the brand for having provided the gift in a dedicated blog post, to help the brand avoid breaching any applicable advertising rules.



BRAND PROTECTION AND EUROPEAN COMPETITION LAW

By Martijn van Wanroij and Firda Pasaribu (Amsterdam)



Image has value. For many luxury products, the image is the component of the product with the highest value. Consumers enjoy luxury products largely because of their reputation, exclusivity and the shopping experience.



The scenario of the luxury branded product turning up in a discount sale or a shabby down-market outlet is the brand owner's nightmare. When a luxury product can routinely be snatched out of jumbled bins in cramped stores, it quickly loses its cachet. And when the product image is compromised, demand by high-end consumers drops.

So what can brand owners do to protect their image? Does the law allow them to influence the retail price of their products? Are there ways for manufacturers to prevent their products from being sold at mass discounter outlets without violating the law? For these sorts of questions, the cartel prohibition (article 101 of the Treaty on the Functioning of the European Union and its equivalents in national legislation) is relevant. It prohibits anti-competitive agreements between competitors, but also certain agreements between producers, wholesalers and resellers (so-called vertical agreements) that govern the conditions under which the parties may purchase, sell or resell goods or services.

Restrictions on competition in vertical agreements may result in various competition restrictions. Exclusivity arrangements and non-compete obligations, for instance, can cause market foreclosure for alternative suppliers or buyers. They may reduce inter-brand competition between different sales channels and they may limit the freedom of consumers to purchase goods or services in certain locations.

However, vertical agreements may also provide positive effects, which can justify an otherwise prohibited restriction of competition. Consequently, some restrictions in vertical agreements may be justifiable (for a defined period) where, for example, certain retailers in certain sectors have a reputation for stocking only quality products, or where a producer can increase its sales by imposing a standard of uniformity and quality on distributors. This enables manufacturers to create a brand image and thereby attract consumers.

One of the most far-reaching ways to protect brand image is to set fixed or minimum retail prices for branded products. In European competition law, such resale price maintenance (RPM) is absolutely prohibited, despite the objective



advantages it may have (like being able to reward retailers that do extensive promotion or provide high-quality service). European competition law gives prevalence to the principle that retailers should be able to compete on price. Producers or wholesalers may make non-binding recommendations or set maximum retail prices, but in order to prevent luxury products being sold at discount outlets, they have to take other measures.

Restrictions designed to create and protect brand image are, in some circumstances, allowed in the context of selective distribution. In a selective distribution system, products are sold only to authorized resellers that are selected on the basis of pre-defined qualitative and/or quantitative criteria. Sales to non-authorized distributors are prohibited, which leaves only authorized resellers and final customers as possible buyers of the products. Selective distribution thus prevents products from ending up with retailers that do not meet the standards.

Setting up a selective distribution system requires preparation. The selection criteria should be carefully drafted, to ensure they are reasonable and proportionate to the brand image they seek to protect. Suppliers may set quality criteria for the locations from which their products are sold and may even prohibit sales from any location that has not been pre-approved. While Internet sales may not be prohibited, quality criteria may be set for the websites used by authorized resellers.

Of course, there are some limits. Even selective distribution agreements may not include so-called hardcore restrictions of competition. It is, for example, not allowed to impose exclusive or minimum purchase obligations, although resellers may be required to stock a minimum volume or to carry a certain product range. Also, clauses that restrict the territories in which resellers are allowed to sell the products are prohibited. Authorized distributors should be free to conduct marketing activities and to approach and to sell to any customer, regardless of the customer's location. The general principle that no fixed or minimum resale prices may be set also applies to selective distribution.

It should be noted, finally, that the fashion sector is currently under the magnifying glass of numerous competition authorities throughout Europe. In March 2015, the UK's Competition and Markets Authority opened an investigation into suspected anti-competitive arrangements in the clothing, footwear and fashion sector. Also that month, the Italian Competition Authority opened an investigation into fashion agencies and a trade association. Then in May, the European Commission launched an antitrust competition inquiry into the e-commerce sector in the EU, focusing on sectors where e-commerce is most widespread, including clothing and shoes. If contractual restrictions are imposed on resellers to protect brand image, it is more important than ever to ensure that these remain within the boundaries of competition law.



PAYING LESS TAX

THE INNOVATIVE WAY

By **Paulus Merks**, **Stephanie van der Schaft** and **Wouter Kolkman** (Amsterdam)

Easy-iron dress shirts, odor-free sports gear, waterproof and breathable fabric: even when it comes to sportswear, the fashion and clothing industry is in a constant state of development. These days, many European countries, including the Netherlands, United Kingdom, Belgium, Luxembourg and France, have special tax regimes addressing profits derived from specific types of intellectual property rights. These regimes, called the Patent Box or Innovation Box, impose a special, ultralow tax rate on business income that derives from intellectual property. The fashion and clothing industry may find these regimes helpful.

THE DUTCH INNOVATION BOX REGIME

The Dutch Innovation Box, for example, provides for a special tax regime under which all income allocable to qualifying intellectual property is subject to an effective Dutch corporate tax rate of 5 percent (instead of the statutory rate of 25 percent). Since its introduction in 2007, the Innovation Box has provided significant tax benefits to numerous companies, both small and large. The Innovation Box can be used for intangible assets, developed or created in-house, for which a patent has been granted in the Netherlands or elsewhere, or acquired patented assets. Trademarks and logos do not qualify for the Innovation Box.

CONDITIONS AND CHARACTERISTICS

To benefit from the Innovation Box facility, the main requirement is that the intangible asset is either (i) self-developed; or (ii) a result of further development of an acquired intangible asset.

The Innovation Box is optional. The taxpayer may choose whether or not to apply for the Innovation Box facility for a particular intangible asset. Once an intangible fixed asset has been placed “in the box” this choice cannot be reversed. However, the intangible asset can be removed from the box if it is sold.

The level of profit attributable to the particular intangible asset depends on the importance and the level of R&D activities within the company, as well as the number of patents and R&D certificates (i.e. a transfer pricing exercise).

EU INFLUENCE

In March 2014, the European Commission issued enquiries regarding the possibility of granting a selective advantage, using an Innovation Box regime, to a particular group of companies that were in breach of EU state aid rules to several EU member states. In November 2014, an Anglo-German proposal for rules on preferential intellectual property tax regimes was announced. It is currently being implemented in the UK and Germany.

Based on talks at the EU’s Economic and Financial Affairs Council (“ECOFIN”) and the Organization for Economic Co-Operation and Development (“OECD”) last year, we expect international restrictions to be placed on the applicability of Innovation Boxes for certain intangible assets. If that happens, it is likely that alternative preferential Innovation Boxes may be introduced, as well as grandfathering provisions to enable companies already making use of the current Innovation Boxes, including the Dutch one, to benefit for several more years.

SPAIN

SAFEGUARDING YOUR VIRTUAL SHOWCASE

By **Diego Ramos** and **Gonzalo Santos** (Madrid)

Websites and online shops have become more than a simple marketplace. They are a worldwide showcase for a company's products and, as such, part of a company's brand image. This is why they need to be carefully protected.



Although websites are not specifically protected in Spain's intellectual property legislation, these digital creations are not devoid of protection. In addition to the rights over HTML code, front-end elements can also be protected. If a site's elements were to be considered as original when used or displayed together, the look and feel of the website would be protected as an artistic creation. Furthermore, the Spanish Patent and Trademark Office considers web designs, in certain cases, suitable for registration as Spanish industrial designs and/or as European Community designs, should they meet certain requirements. Even unregistered Community designs can be protected for three years after they have been made public inside the European Union, although with some exceptions. This is a very positive factor for websites, since it allows the protection of designs with a short life span, without the burden of registration.

Should a competitor use a substantially similar web layout, Spanish intellectual property legislation allows the owner of the copied webpage to exercise cease-and-desist actions and to claim damages. In the event that the copied website is registered as a Spanish industrial design or as a Community design, the Spanish Industrial Design Act would offer additional protection.

There is always a risk that the web design might not be considered original and/or not qualify as a Spanish or Community design. However, its owner would still be able to exercise some of the actions contained in Spanish unfair competition laws in certain circumstances (for example, cease and desist actions, as well as requesting damages). It is also possible to request that the court decision be published at the infringing company's expense.

It must be noted that an infringement of these unfair competition laws can only occur when both websites are aimed at the Spanish market. This must be determined on a case-by-case basis, although there are some elements which can be used as guidance (for example, whether the website is in Spanish or uses a local ".es" domain). All of the aforementioned actions for unfair competition acts can also be filed jointly with actions for infringement of intellectual property and industrial design rights, should these be available.

INDEMNITY CLAIM FOR FRANCHISEES?

By Silke Goschler (Munich)

GOOD NEWS AND BAD NEWS FROM GERMANY

Some people say franchising doesn't play a big role in Germany. A number of recent court decisions have, however, proven the opposite. Franchise systems have long been an important factor in the German economy. As a consequence, the need for clear rules governing such relationships is enormous. Unlike other European countries (such as France, Belgium and Spain), Germany does not have specific franchise laws, and therefore, many legal aspects of franchising are still under discussion.

German distribution law is currently a hot topic and came before the German Federal Court of Justice (*Bundesgerichtshof* or **BGH**) in February 2015. The BGH had to decide the highly debated question of whether or not a franchisee may claim an indemnity for loss of clientele similar to the claim that a commercial agent may bring upon expiry or termination of the franchise agreement. Clearly, indemnity payments to a person who is no longer in a franchise relationship are not desirable. On the other hand the franchisor may benefit from the customer base that was developed by the franchisee. Disputes on the existence of an indemnity claim for the franchisee are therefore not unusual. It was hoped that the court's decision would bring more clarity for both sides.





The **bad news** is: the court has not settled that burning question. The **good news for the franchisee** is that the decision strongly indicates that a franchisee may have an indemnity claim if certain requirements are fulfilled (details below). The **good news from a franchisor's perspective** was the clear message that the barriers for such an indemnity claim by the franchisee are quite high. In particular, in businesses that mainly serve large numbers of walk-in customers, it will be very difficult for a franchisee to comply with the requirements set by case law, meaning that an indemnity claim is unlikely to succeed in such cases.

Over the years, German case law has developed specific rules that apply to franchise relationships. It is settled case law that specific statutory rules governing agency contracts may by analogy also apply to other distribution relationships, including franchising, if the business relationship is more than a simple seller-purchaser relationship. For instance, in the case of distributors it is settled case law that the distributor may claim an indemnity in the same way as a commercial agent if two conditions are met:

- the distributor is *integrated into the distribution organization* of the principal, similar to an agent and
- the distributor has the contractual obligation to *disclose customer data* to the principal upon termination of the agreement at the latest, which will allow the principal to continue the business with those customers

In the case at hand, the BGH expressly left open the highly disputed question of whether the same rules may apply to franchise relationships. According to the BGH, that question did not need to be decided, as the second requirement was not fulfilled anyway, i.e. an obligation for the franchisee to transfer customer data to the franchisor was not provided in the franchise agreement. Interestingly, the franchisee was, however, obliged to return the premises to the franchisor, which could then factually continue the business and benefit from the existing, mainly anonymous, customer base there. The BGH held that such factual continuity of the customer base is not sufficient to justify an indemnity claim. The court also rejected the franchisee's argument that in such cases the transfer of customer data is useless or impossible, which should not discriminate against the franchisee. According to the court, the mutual interests are not comparable to the interests of agents and principals. Therefore, the agency rules governing the indemnity claim cannot be applied as an analogy.

Only shortly before this decision, in December 2014, a Higher Regional Court (*OLG Schleswig*) rendered a similar decision in another case. This may indicate the clear trend that courts will increasingly apply stricter requirements to the existence of an indemnity claim outside of agency relationships. Having said that, this does not mean that franchisors in the fashion and retail mass business can relax. Courts will still consider each individual case. For the time being, the safest way for the franchisor to avoid an indemnity claim will be to avoid any contractual obligation for the franchisee to disclose customer data to the franchisor. Vice versa, the franchisee will have an interest to agree on a corresponding obligation, which may, however, be nearly impossible to fulfill in mass businesses. It should be noted that such a disclosure obligation does not need to be explicitly stated in the franchise agreement to trigger the indemnity claim; it may be sufficient that the franchisee in fact discloses the information and the franchisor accepts it. With those principles in mind, both sides have a certain level of certainty regarding their mutual rights, which ultimately is good news for all.

HOW BRANDS CAN SHAPE THEIR ONLINE RETAIL SALES IN THE EU

By **Léon Korsten** and **Martijn van Wanroij** (Amsterdam)

E-commerce in the main European economies is expected to grow by approximately 20 percent in 2015 and 2016. As a result of the rise of online retail, both manufacturers (brands) and retailers are facing unique problems, such as limited product experience by potential customers, price erosion and free riding. To prevent such problems, brands may wish to impose online sales restrictions in their distribution contracts. This article addresses the compatibility of such policies with European Competition Law.

COMPETITION CONCERNS WITH RESPECT TO ONLINE SALES

The ultimate goal of competition law is protecting the interests of consumers. When consumers enjoy a free choice among the product offerings of rival suppliers, market forces ensure that an optimal ratio between quality, quantity and price is achieved. Unsurprisingly, the authorities are wary of restrictions imposed by brand owners on the sale of their products online.

CAN INTERNET SALES BE RESTRICTED?

The short answer to this question is prohibited: no; restricted: yes. Nevertheless, there are certain limited exceptions in which such a prohibition can occur, for example when a retailer makes substantial investments in developing a new market. Protection against competition from other retailers (including in online sales channels) may then be permissible for a limited amount of time (generally up to two years).

Restrictions can be imposed in a selective distribution system. Provided that both parties to the selective distribution agreement have a market share that does not exceed 30 percent, in the EU an automatic exemption to the competition rules applies, allowing brands to bind retailers to quality requirements and to prohibit sales to non-authorized retailers or resellers. Examples of permissible quality requirements include (i) requiring the retailer to have at least one physical (offline) shop or showroom; (ii) requiring the retailer to sell a certain minimum number of goods (or a minimum sales value) offline, in order to guarantee that the physical store works properly; and (iii) imposing quality requirements for the websites used by retailers or requiring a certain service level for online sales that is normally associated with offline shopping. Such requirements may include:

- Standards for the design of the website
- Site functionalities, like navigation
- Customer service, such as accessibility of a multilingual helpdesk or service team

It should be kept in mind, though, that any such requirements must be equivalent to the standards set for offline sales and must not amount to an indirect restriction on internet sales.

WHAT ABOUT PROHIBITIONS TO SELL ON ONLINE MARKET PLACES?

A specific form of quality requirement used by some brands is a ban on sales via online market places like eBay and Amazon. Often the justification for such restrictions centers around protecting the premium nature of the brand. Although such

concerns are real, in two recent investigations into the online sales policies of Adidas and Asics, the German competition authority was very critical of this kind of restriction.

This underscores that the use of online market places may be necessary in particular for small retailers in order to compete online with more powerful retailers. The negative effect on competition must be carefully weighed against any perceived advantages for brand owners. The recent German investigation suggests that outright prohibitions on the use of online market places are very hard to justify, in particular where less restrictive measures (such as imposing quality requirements) may alleviate brand owners' concerns.

CAN EXCLUSIVE TERRITORIES BE PROTECTED AGAINST INTERNET SALES?

When brands make use of exclusive distribution, they agree to sell products to only one distributor for resale in a certain territory. In order to protect such distribution exclusively in a territory, some brands request that retailers in other territories take action to prevent sales by them to customers in the reserved territory, for instance by geo-blocking or by compulsory re-routing of customers to a national website. Such measures may conflict with competition law. In the EU, only *active sales* (i.e. actively targeting customers in other territories) may be restricted. *Passive sales* (i.e. responding to an unsolicited request from a customer outside the territory) may not be restricted. Internet sales are considered passive. However, it can be prohibited for online sellers to specifically target customers in another territory, for instance by direct mailing, by using territory-based banners and territory-based advertisements via search engines.

CONCLUSION

Brand owners should be aware that competition authorities in the EU are paying close attention to online sales. The European approach to sales restraints is becoming stricter. Also, brand owners based outside the EU should check their policies for EU-based retailers and resellers to ensure they are in compliance with EU competition laws.

“Why can a French tourist buy a pair of Italian shoes in Rome, while she is re-routed to a French website when she tries to buy them online from home?”

**Margarethe Vestager,
EU Competition Commissioner**



CUSTOMER SERVICE

WHO IS AT RISK OF SEXUAL HARASSMENT CLAIMS IN HONG KONG? 5 PRACTICAL TIPS

By Julia Gorham and Bethan Lloyd (Hong Kong)

Retail is one of Hong Kong's most important industries and a key provider of all levels of employment opportunities. Most major international retailers have offices in Hong Kong, and leading international designers and high street brands are represented in the country's many retail malls. However, this environment is now fraught with legal difficulties following Hong Kong's amendments to its laws on Sexual Harassment (under the Sex Discrimination Ordinance) in December 2014.

Prohibitions against the sexual harassment of one employee by a colleague are well established, but these new amendments protect staff in the services and retail sectors from sexual harassment by **customers**. The implication for employers is that liability for harassment by a customer may pass to them if they fail to address it. Such liability might be embarrassing or might negatively impact future business. Action should be taken now to deal with the issue of inappropriate behavior by customers.

“I WAS ONLY BEING FRIENDLY”

The boundaries between personal and professional lives (driven in part by the prevalence of social media) are increasingly blurry; in such a landscape, sexual harassment between customer and retail employee can easily arise. The law generally recognizes harassment as unwelcome or uninvited sexual behavior which is viewed as offensive, humiliating or intimidating. At its most obvious, harassment

could be an unwelcome sexual advance by a customer to an employee, but harassment can take much more subtle forms, such as creating an environment which one person views as hostile. The unwelcome behavior does not need to be repeated or continuous; depending on the circumstances, a single incident can be sufficient to constitute sexual harassment.

Common examples that employers may be required to deal with include:

- sexual comments, including those made in jest or as innuendo
- unwelcome requests for sex (even if the individual believes this is welcomed by the recipient) or
- physical contact, even if the person doing the touching believes it to be innocuous



Most people recognize that such conduct between two employees would give rise to an internal employment issue. But making customers liable for such behavior is a potential headache for managers overseeing staff (such as sales assistants) who deal with customers on a daily basis. In an environment where customer satisfaction is paramount, it will no longer be possible for retailers to hide behind the “customer is king” mantra and ignore the risk that customers are harassing their staff.

EMPLOYER'S LIABILITY

A customer accused of harassment would be personally liable to the individual. S/he may also be guilty of a criminal offense (for example if the harassing behavior comprised indecent assault or indecent exposure). However, if an employee reports sexual harassment by a customer, and the employer either ignores this or fails to prevent future unwanted attention, then the employer could also be liable.

Further, if an employer tries to prevent an employee from bringing a complaint of sexual harassment against a customer, or treats the employee less favorably because of such complaint, then the employer may be liable for discriminating against that employee by way of victimisation.

Additionally, an employer may be vicariously liable for acts of sexual harassment committed by **its** employees as customers. For example, if a company representative inappropriately

touches a flight attendant during a business trip, or an employee who is employed as a buyer makes lewd and sexist comments towards a representative of the company with whom s/he is dealing, the company may be vicariously liable for the act of their employee. This is irrespective of whether or not the act is done with the company's knowledge or approval.

FIVE PRACTICAL TIPS

To avoid liability, companies should:

- make clear to staff what behavior is inappropriate (via staff policies, compliance manuals and complaints systems);
- update or implement a comprehensive anti-harassment policy, stating that any act of sexual harassment will not be tolerated, and informing victims of sexual harassment of their right to make a complaint without fear of reprisal;
- investigate complaints promptly, and in accordance with the anti-harassment policy;
- train all staff on the recent changes. Supervisors and managers should be particularly alert to potential customer harassment; and
- in the case of a persistent problem, consider refusing the customer future access to the store, or demanding an alternative representative is sent from the customer's company.

DEVELOPMENTS IN DUTCH LEASE LAW

By Hans-Mark Giezen and Marlies van Schoonhoven-Sloot
(Amsterdam)

Dutch lease law is changing. In this article a few interesting developments are identified.

Greater flexibility in the cancellation process: leases can be canceled by email

In April 2014, an interesting judgment was rendered by the District Court of Rotterdam (reference ECLI:NL:RBROT:2014:3333), in which the sub-district court judge approved the cancellation of a lease by email, despite the lease explicitly stating that cancellation was possible only by bailiff's notification or by registered letter and not by email.

In good order

The tenant purported to cancel the lease by email, an email which the landlord had received in good order. The landlord nevertheless relied on the substance of the lease, arguing that the lease had not been canceled in accordance with its own provisions.

Applying the standards of reasonableness and fairness, the court rejected the landlord's argument, stating that the formal requirement is no longer observed in practice. In addition the law does not explicitly prescribe that failure to comply with this requirement renders the cancellation void.

Flexibility

This judgment means that parties cannot ignore notices of cancellation sent by email, even if they are not followed up with a formal cancellation letter (i.e. a registered letter or a bailiff's notification). This judgment opens up the possibility to cancel a lease by email at the last minute where doing so by registered post or by bailiff's notification is no longer



possible. In order to do so, the party canceling the lease must be able to demonstrate that the email was in fact received by the other party.

In short, this judgment offers more flexibility for giving notice to landlords which represents a significant improvement for tenants in the Netherlands.

Non-standard clauses in leases: must the court approve them?

There is a visible trend in the Dutch retail market of an increasing number of international operators establishing themselves in the Netherlands. They are such large tenants that they do not really need the protection offered under Dutch landlord and tenant law and are often willing to come to commercial arrangements with their landlords that are contrary to legislation. The question is whether the law permits this.

It is possible to agree on 'non-standard clauses', so long as these clauses are approved by the sub-district court. If the clauses are not approved by the court, the tenant may nullify them, rendering them useless to the landlord.

When can the court approve the clauses?

Non-standard clauses can only be approved if they do not seriously jeopardize the tenant's rights or if the tenant's societal position in relation to the landlord is such that it does not need the protection.



Providing proper information is key

In short, the law does allow for the possibility for parties to reach more commercial arrangements under which the tenant enjoys less protection. However, it is essential that the tenant be properly informed, that the arrangements are described clearly and that the parties' intentions are evident from the lease. Clauses that fulfill these conditions stand the best chance of being approved by the court.

Guarantees under landlord and tenant law: Is a change underway?

Following the *Aukema/Uni-Invest* judgment (Supreme Court judgment of 14 January 2011, ECLI:NL:HR:2011:BO3534) it seemed as though it was no longer possible for landlords to hold banks or third parties liable for future loss of rental income resulting from a tenant's bankruptcy. The Supreme Court had ruled that a tenant's bankruptcy is a legitimate form of termination, which means that a landlord is not entitled to damages (consisting of future loss of rental income until such time as the lease would normally have terminated). Practitioners also assumed that future rent could no longer be claimed under bank guarantees and corporate guarantees.

In the more recent *Romania* judgment (Supreme Court judgment of 15 November 2013, ECLI:NL:HR:2013:1244) the Supreme Court seems to have clarified the impact of *Aukema/*

Uni-Invest for landlords and tenants. The Supreme Court ruled that, generally speaking, a tenant's bankruptcy does not change a guarantor's obligations. This means that a landlord may hold a bank or a guarantor liable for damages resulting from vacancy and that said party is also obliged to pay out the guarantee. However, given that this may not worsen the position of the bankrupt company (i.e. the estate), the bank or third party may not take recourse against the estate. It would seem that the bank and/or the third party will be the victims rather than the landlord.

Naturally, the question is whether the Supreme Court also intended for banks (which often have "strong" counter-guarantees) to remain the victims. That will have to be decided in the future when proceedings are conducted between an estate on the one hand and a bank on the other.

In the recent case of *Hansteen/Verwiel* on this point, the Amsterdam District Court upheld the Supreme Court's decision in the *Romania* case. However, the Court of Appeal has referred only to *Aukema/Uni-Invest* and decided that the landlord cannot claim under the bank guarantee for the future loss of rental income. It is unclear whether the parties in this matter will go to the Supreme Court.



NEW PRC ADVERTISING LAWS WHAT YOU NEED TO KNOW

By Edward Chatterton (Hong Kong)

The existing PRC Advertising Law (“Existing Law”) entered into force on 1 February 1995 and until recently had not been amended since. The 20 years that have passed since the initial law have seen the exponential growth of the Internet, including pervasive use of social and online media and a massive change to the advertising landscape as a result of this. Legislators around the world, not just in China, are playing catch up. The recent amendment to the Existing Law in the PRC seeks to modernize the legal framework for advertising and address particular issues which exist in modern day China.

The amended PRC Advertising Law (“Amended Law”) was officially approved on 24 April 2015 and came into force on 1 September 2015. Retailers need to get to grips with the revisions and the practical implications of the Amended Law.

Key criticisms of the existing law are that it is very short and too vague. The Amended Law is almost double in length and much more prescriptive, with one of the key aims being to reduce the number of gray areas that

exist in the advertising space in China, making compliance, and the imposition of sanctions for non-compliance, much more straightforward.

The key changes that were introduced by the Amended Law are in relation to “Misleading Advertising”, which provides specific examples of what constitutes misleading advertisements and provides further detail on the scope of what is otherwise a very broad and un-prescriptive definition. Specifically, advertisements that provide

incorrect information in relation to the performance, function, origin, uses, quality, size, composition, prices, manufacturers and expiration dates of products will be considered misleading.

The Amended Law also introduced more controls on advertising aimed at children. All advertising in schools is prohibited, as is advertising in textbooks, exercise books, on school uniforms and school buses. Additionally, children under the age of 10 cannot be used to endorse products or



services, although this does not mean children under the age of 10 cannot feature in advertisements, they just must not specifically endorse the products or services being advertised. Advertisements targeting children under 14 must not contain content which persuades their parents to purchase the goods or services being advertised. It is however unclear at this stage what constitutes “content which persuades” but this will hopefully be made clear when the implementing regulations are published later this year. The Amended Law also prohibits the advertising of cosmetics, medicines, medical apparatus, online games, alcoholic beverages and tobacco to children.

Advertisements must not be sent to home addresses without prior consent. In addition, other forms of electronic direct marketing are also prohibited unless an individual’s consent is first obtained. Any advertisement must also not interfere with people’s normal usage of the internet, meaning care needs to be taken when using pop-up advertising. Under the Amended Law, a pop-up advertisement must be capable of being closed in one click. Furthermore,

an electronic advertisement must also include the sender’s true identity, contact details and information as to how to un-subscribe from receiving further advertisements.

In addition to the above, the Amended Law also imposes liability on service providers (e.g. telecoms companies) responsible for communicating advertisements which breach the Amended Law if they were aware of the content and did not take action to stop the advertisement. Anyone who endorses a product may be held jointly liable for infringement of the Amended Law if they ought to have known the advertisement infringed the Amended Law. Anyone found guilty of endorsing a false advertisement can be banned from endorsing other products or services for a period of three years.

Finally, the Amended Law introduced wider ranging sanctions including fines of up to RMB 1,000,000 (circa USD 150,000) and the imposition of criminal liability and revocation of business licences for serious instances of infringement.

The Amended Law introduced much more stringent controls on the advertisement of pharmaceuticals, medical devices, health foods, alcohol, tobacco and agricultural products and introduces new controls in relation to the advertisement of breast milk substitutes, educational services and financial services.

There is definite intent by PRC authorities to police advertising more stringently, specifically in those areas outlined above. Businesses operating in these sectors should ensure they are fully cognizant of the Amended Law in these areas and should make any changes to their operational processes that are required to ensure they don’t fall foul of the Amended Law.

The Amended Law also introduces much tighter control around online and social media advertising and businesses who engage in this type of advertising in China should review their online and social media operating procedures and guidelines to ensure they comply with the Amended Law.

BUSINESS ROUND-UP

THE NEWS AND
THE VIEWS

EUROPEAN E-COMMERCE SECTOR INQUIRY

By Sarah Smith, Michelle Boles and Chris Wall (London)

In May 2015, the European Commission launched an inquiry into the e-commerce sector in the EU as part of a number of initiatives connected to its Digital Single Market Strategy. The Commission is concerned by slow growth in cross-border online sales within the EU, and so the inquiry will focus on potential barriers to cross-border online trade in high volume e-commerce goods such as clothing, shoes and accessories.

The Commission is set to analyze obstacles faced by online retailers, which are not necessarily faced by traditional bricks-and-mortar retailers and territorial restrictions placed on resellers. The inquiry is in the data gathering phase at the moment, with the Commission sending lengthy questionnaires to many manufacturers, wholesalers and retailers across Europe. It is expected that these questionnaires will focus on distribution arrangements. The Commission is due to publish a preliminary report in mid-2016 with a final report due in early 2017.

What can your business do to prepare?

- Alert senior management that they may receive a questionnaire and that there will be a limited time period for a response.
- Check your dawn raid and/or compliance training is up to date.
- Review your distribution arrangements and ensure appropriate regulatory intervention clauses are in place.





CAN A US PATENT BE USED TO INVALIDATE AN EU DESIGN?

By Ruth Hoy and Jack Randles (London)

Joined Cases T-22/13 and T-23/13 – Senz Technologies BV v OHIM

Senz applied to register EU Community designs for its “storm proof” umbrellas. The umbrellas carry a unique tapered shape with an asymmetrical design to decrease wind resistance, some of which are allegedly windproof up to 100km/h.

Impliva BV filed an application that the designs should be invalid due to the lack of “individual character”. Impliva relied on a US patent for an umbrella with a similar shape and offset handle, arguing the designs did not produce a different overall impression on the informed user.

OHIM found that the US patent had been “made available to the public” on the USPTO website and that the designs were devoid of distinctive character due to the limited differences to the patent. Senz appealed to the Board of Appeal, which upheld the decision noting that the USPTO is known to the sector and freely accessible. The Board noted it would be unwise not to check the American register “one of the most important registers of intellectual property rights in the world” and an important trading partner for the EU.

Senz appealed to the General Court which found that the earlier right relied on could be a patent where a patent contained the characteristics of a design. In this case the patent covered the lines, contours, angles and shape of an umbrella and contained a description of the appearance.

The patent had been made available to the public as it had been published and it would be reasonable for a designer to undertake searches. The fact that the patented umbrella had never been produced was irrelevant and the sector could have knowledge of it through searches.

However, the court took a different view on the overall impression and found the patent and designs were different when viewed laterally and from above.

It is important to note that searches in key jurisdictions are vital, particularly where a new design has functional or technical characteristics and searches should not be limited to the EU or specific jurisdictions.

Calendar

OCTOBER 2015 – DECEMBER 2015



October 2015

Baltic Fashion & Textile – Vilnius, Lithuania:
15 – 17 October

Belgrade Children's Fair:
15 – 18 October

Fashion + Beauty Finland:
16 – 18 October

Mercedes-Benz Beijing Fashion Week 2015:
25 – 31 October

November 2015

Global Sources Fashion Apparel & Fabrics
Show Johannesburg:
12 – 14 November

Fashion Philosophy: Fashion Week Poland
Spring/Summer 2015:
12 – 15 November

Modaprima, Firenze:
20 – 22 November

December 2015

Denim: Fashion's Frontier Exhibition, New York:
1 December – 7 May 2016

FFANY The New York Shoe Expo, New York:
2 – 4 December

Swahili Fashion Week, Dar es Salaam:
4 – 6 December

The Clothes Show, NEC Birmingham:
4 – 8 December

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