K&L GATES

FASHION LAW

"Fashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, what is happening."

Coco Chanel

AUGUST 2022

WELCOME

Welcome to a new edition of *Fashion Law*.

As the impacts of the Russian-Ukraine war continue to ricochet across the globe, we discuss the effects the conflict will have on luxury products and the fashion industry, as well as the legal developments likely to affect businesses and consumers worldwide.

In Part 1 of this edition, we summarize the sanctions imposed by United States President Joe Biden on Russian and Belarusian luxury goods; the prohibition of the importation of Russian-origin fish, alcohol, and diamond imports; and the U.S. banknote restrictions.

In Part 2 we take a look at how the Federal Trade Commission warned businesses about the use of fake endorsements and consumer reviews.

In Part 3, we delve into the ASA's new tactic of naming and shaming non-compliant influencers and the extension of the French Labour Code to regulate the commercial exploitation of images of children on online platforms. Additionally, included is a discussion around an influencer's breach of advertising regulations and the key learning points for brands looking to avoid breaching the ASA's rules on Instagram.

In Part 4, we turn to Australia and the legislation changes that brands should be aware of. As the Australian government has purchased the Australian Aboriginal Flag copyright, we consider the issue of moral rights attached to relating artistic work and whether there are any restrictions on the use of the flag. Finally, looking to the decision in the Federal Court of Australia, who reaffirmed that a registered trade mark can only be infringed by the primary user of a trade mark, we discuss the significance of this decision for both trade mark owners and third parties.

In Part 5, we answer the most commonly asked questions about the introduction of new EU and UK brand distribution rules. We move then to discuss the copyright dispute over Andy Warhol's portrait of Prince and the surge of antitrust enforcement against manufacturers of branded consumer goods. Staying focused on key legal developments, we talk though whether reputation ensures a distinctive character of a trade mark, the change to wine labelling regulations in the EU and whether U.S. copyright law can cover AI created artwork. Finally, moving to Marks and Spencer, who find themselves on the other side of a lawsuit, our team examines the possible learnings that may come from the case. We also explore the rise of digital payments and the Governmental response to a changing landscape, including the FCA's proposed "new consumer duty" and the evolving federal regulation of the digital asset, cryptocurrency, and DeFi community.

We hope you find this edition insightful. If we can be of any assistance, no matter where you are in the world, please contact us.

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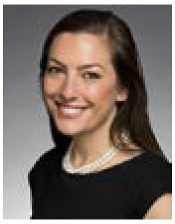

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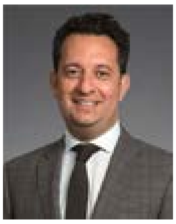

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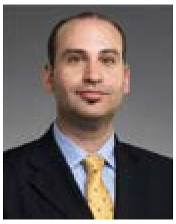

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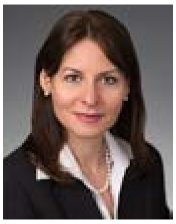

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IN THIS ISSUE

IMPLICATIONS OF THE RUSSIAN-UKRAINE WAR ON THE LUXURY PRODUCTS AND FASHION INDUSTRY

U.S. SANCTIONS ON RUSSIA AND BELARUS IMPOSE TRADE AND INVESTMENT RESTRICTIONS ON LUXURY GOODS SECTOR

By Jeffrey Orenstein, Steven Hill, Stacy Ettinger, Jerome Zaucha, and Donald Smith

The war led to a rapid response from governments, who imposed sanctions that have had a significant impact on operations of fashion companies navigating the ever-evolving rules that carry significant penalties. On 11 March 2022, United States President Joe Biden issued executive orders (EOs) imposing additional sanctions against Russia, which we provide an overview of below.

The order, **EO 14068** restricts:

1. Exports of luxury goods to Russia and Belarus;
2. U.S. imports of Russian alcohol, seafood, and diamonds; and
3. The supply of U.S. dollar-denominated banknotes to Russia and the Russian government worldwide.

Luxury Exports, Russian Imports, and Restrictions on U.S. Banknotes

EO 14068 contains the following import and export restrictions for luxury goods, seafood, diamonds, and U.S. banknotes.

Luxury Exports to Russia and Belarus

The EO bars the exportation, re-exportation, sale, or supply (directly or indirectly) from the United States, or by a U.S. person (wherever located), of "luxury goods" to Russia or Belarus, unless licensed. This prohibition is implemented by a new **final rule**, issued by the Bureau of Industry and Security, which identifies the significant number of goods subject to this restriction, listed by Schedule B number. In addition to barring the export of listed luxury goods to Russia and Belarus, the final rule restricts exports to certain Russian and Belarusian oligarchs and other individuals worldwide.

It is important to note that these export restrictions apply to more than just U.S.-origin luxury goods. First, the restrictions apply to all goods listed under the final rule that are subject to the Export Administration Regulations (EAR). This includes products that are:

1. U.S.-origin (wherever they are located);
2. Located in the United States (whatever their origin);
3. Produced outside the United States with more than 25% (by value) U.S.-controlled content; and
4. Produced outside the United States and covered by the special "foreign direct product rules" for Russia, which was discussed in a **prior alert**.

Second, even with regard to products that are not subject to the EAR, the text of the EO indicates that U.S. persons, wherever they are located, are barred from the exportation, re-exportation, sale, or supply of covered luxury goods to Russia, Belarus, and designated parties, although further clarification on this point may be forthcoming.

Seafood, Alcohol, and Diamond Imports

Additionally, the EO prohibits the importation into the United States of Russian-origin fish, seafood, seafood preparations, alcoholic beverages, and nonindustrial diamonds. To aid in identifying goods subject to this import ban, the Office of Foreign Assets Control (OFAC) issued guidance identifying specific codes in the Harmonized Tariff System of the United States, which can be found **here**. OFAC has made clear that non-U.S. persons are not prohibited under the EO from importing covered Russian goods into jurisdictions outside the United States. OFAC also issued General License 17, which authorizes the wind down of transactions related to the above prohibited imports if they are pursuant to existing contracts and concluded by 25 March 2022 at 12:01 AM EST. In addition, U.S. importers are permitted to sell or redirect shipments previously destined for U.S. ports to parties outside the United States.

U.S. Banknote Restrictions

Finally, the EO prohibits the exportation, re-exportation, sale, or supply (directly or indirectly) from the United States, or by a U.S. person (wherever located), of U.S. dollar-denominated banknotes (i.e., paper currency) to Russia and to the "Government of the Russian Federation" worldwide. The "Government of the Russian Federation" is defined broadly to include any subdivision, agency, instrumentality, or party owned, controlled, directed by, or acting on behalf of the Russian government. OFAC issued General License 18 to authorize transactions necessary for the transfer of U.S. dollar-denominated banknotes for noncommercial, personal remittances from:

1. The United States or a U.S. person, wherever located, to an individual located in the Russian Federation.
2. A U.S. person who is an individual located in the Russian Federation.

Signaling additional sanctions to come, the EO authorizes the U.S. Department of Commerce to impose import restrictions on additional goods, and authorizes the U.S. Department of the Treasury to impose restrictions on new investments in other sectors of the Russian economy.

Conclusion

The firm will continue to follow the impact and changes to the United States' imposition of economic sanctions with respect to Russia. If you have any questions regarding the sanctions discussed in this article, please do not hesitate to contact our International Trade team.

This is one in an ongoing series of sanctions alerts produced by K&L Gates for the U.S., Europe, and UK. To stay up-to-date on the latest sanctions rules, **click here**.

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MONEY, MONEY, MONEY – THE RISE OF DIGITAL PAYMENTS: THEIR REQUIREMENTS AND PROTECTIONS NEEDED

FTC IMPOSES MULTIMILLION-DOLLAR PENALTIES FOR DECEPTIVE CONSUMER REVIEWS; BEST PRACTICES REMINDERS ON ENDORSEMENTS AND TESTIMONIALS

By Susan Kayser and Kristin Wells

In a widely distributed Notice of Penalty Offense (Notice) sent to over 700 companies last year, the Federal Trade Commission (FTC) warned businesses about use of fake endorsements and consumer reviews. "Forewarned should be forearmed" is a continuing reminder to companies to have systems in place to ensure endorsements and reviews comply with FTC guidelines. Companies that are found to be in violation after receiving a "we're watching you" letter can face civil penalties of up to US$46,517 per violation.

Recipients of the FTC's letter included major consumer products companies, retailers, and advertising agencies. Recipients were not accused of any wrongdoing, but they were put "on notice" of their responsibilities under the FTC Act of 1914 (FTC Act) and the FTC's increased focus on specific advertising practices, particularly endorsements.

Since distributing the Notice, the FTC reached a US$3.5 million settlement agreement with Hubble, a New York City-based contact lens subscription service that offered existing customers free contacts in exchange for positive reviews on third-party websites. Hubble allegedly failed to disclose this material connection with many of its endorsers—that it offered compensation for many positive product reviews.

The FTC also found fast-fashion company Fashion Nova, LLC in violation of product review and endorsement rules. In March 2022, the FTC ordered Fashion Nova to pay US$4.2 million in relief for its practice of blocking or deleting negative product reviews that purchasers submitted to its website. The FTC also ordered Fashion Nova to submit compliance reports and notices to ensure the company amends its advertising practices to comply with the FTC Act.

Although notices of penalty offenses are initially distributed as informational warnings, they serve as key indicators that the FTC is interested in policing certain types of advertising. Businesses should take steps to review and audit their use of endorsements, testimonials, and product reviews in their marketing practices. Suggested actions include, but are not limited to:

- Confirm all endorsements and testimonials are truthful and substantiated;
- Disclose connections between endorsers and businesses, including situations where the business provides compensation other than monetary payment—e.g., free product samples or entering the endorser into a sweepstakes or raffle—in exchange for merchandise promotion;
- Confirm endorsers' testimonials do not claim to represent typical or ordinary experiences of all consumers of the businesses product or service; and
- Regularly monitor to remove fake reviews.

As quick reminders to advertising and marketing teams, the following acts and practices are deceptive or unfair under the FTC Act:

- Falsely claiming endorsement by a third party (directly or indirectly);
- Misrepresenting that an endorsement reflects the experiences, views, or opinions of users or purported users;
- Misrepresenting an endorser as an actual, current, or recent user of a product;
- Continuing to advertise an endorsement if the business has reason to believe the endorser no longer subscribes to views expressed in the endorsement;
- Falsely insinuating that the endorser's experience represents consumers' typical and ordinary experience;
- Using an endorsement to make false or misleading product performance claims; and
- Failure to disclose a material connection with an endorser.

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CALIFORNIA IMPOSES ADDITIONAL REQUIREMENTS ON MONEY TRANSMITTERS

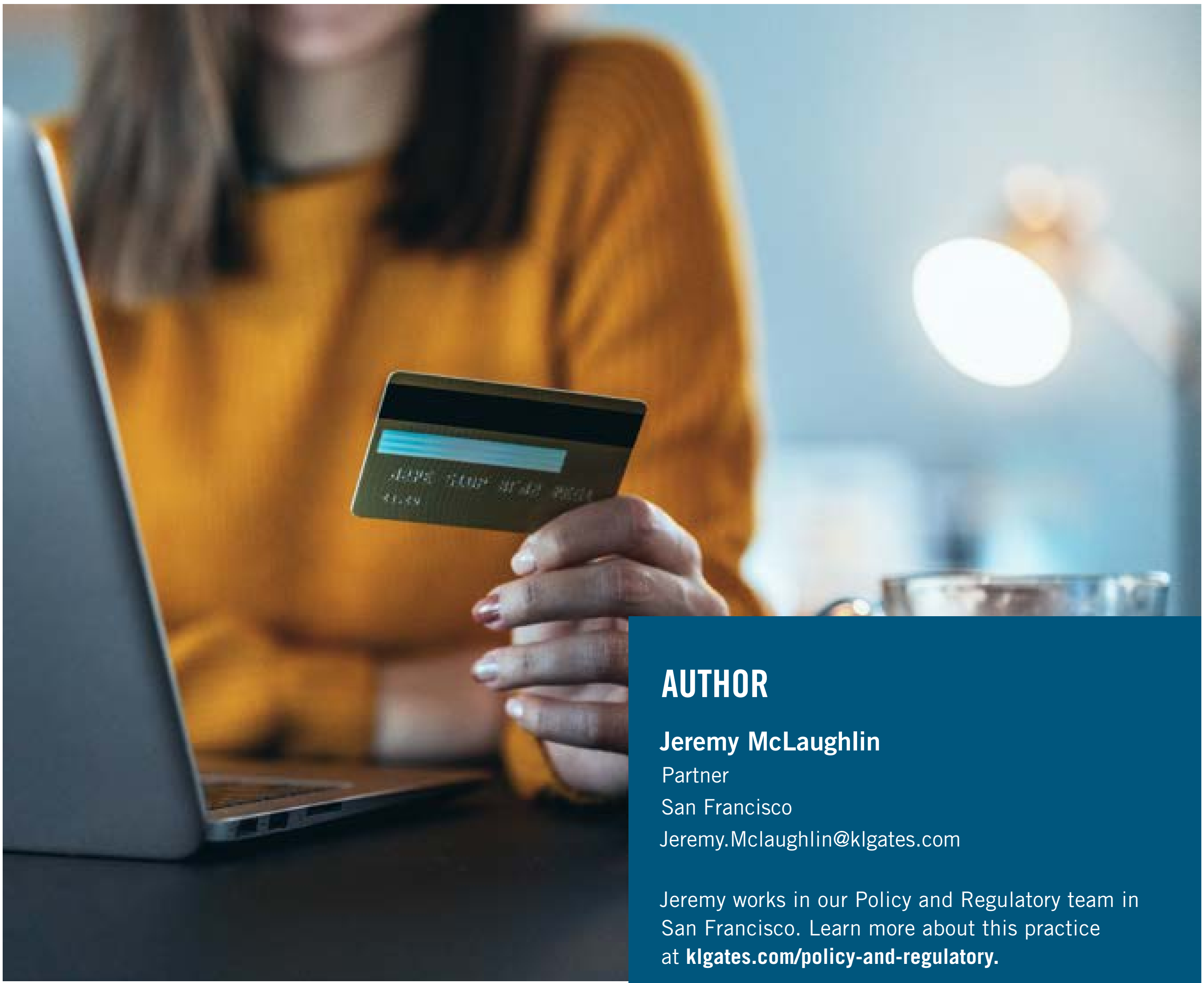
By Jeremy McLaughlin

Under a newly enacted law, money transmitters licensed in California must comply with new customer service requirements starting on 1 July 2022.

Under the requirements, a licensee must "prominently display on its internet website a toll-free telephone number through which a customer may contact the licensee for customer service issues and receive live customer assistance."

The line must be operative at least 10 hours a day, Monday through Friday.

In addition, California law currently requires a money transmitter to provide a receipt for transactions. Under the new requirements, the receipt must also provide the telephone number through which the customer may contact the licensee for customer service issues.



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USING SOCIAL MEDIA "INFLUENCERS" TO PROMOTE YOUR BRAND? TAKE NOTE OF THESE IMPORTANT RULES

NAME AND SHAME ON INSTAGRAM – THE ASA'S NEW TACTIC FOR NON-COMPLIANT INFLUENCERS

By Simon Casinader and Georgina Rigg

In June 2021, the United Kingdom's Advertising Standards Authority (ASA) began naming and shaming certain influencers for "consistently failing to disclose ads on their Instagram accounts, despite repeated warnings and help and guidance on sticking to the rules" on their website (**see here**).

The name and shame list was created as a result of the ASA Influencer Monitoring report, which found inconsistent ad disclosure by influencers on Instagram through stories, posts, and reels, with the disclosure rules being followed only 35% of the time (see here). The influencers listed on the webpage are subject to enhanced monitoring and remain on there for a minimum of three months.

Currently, there are six people listed on the list (see here), with the most recent added on 30 June 2022. However, the ASA has now gone even further by publishing advertisements on Instagram itself warning consumers of these non-compliant influencers.

The advertisements state:

> "[Name] has been sanctioned by the UK's ad regulator for not declaring ads on this platform. Be aware that products and services recommended or featured by this influencer may have been paid for by those brands. Our non-compliant social media influencer page at asa.org.uk is regularly updated to inform consumers of those who break these rules."

The taking out of these advertisements show the ASA is escalating its sanctions against non-compliant influencers. If the non-compliance persists, the ASA could consider further sanctions, including working with social media platforms to remove content or referring influencers to Trading Standards for prosecution, including possible fines.

This development shows just how seriously the ASA takes the disclosure of advertisements on social media, and is a sharp reminder to brands to ensure that their influencers are compliant. To guarantee that all marketing communications are clear, brands and influencers should make sure to include #ad (or similar) in an upfront and prominent manner or to use a platform's own disclosure tools.

By way of a reminder, when a brand gives an influencer a "payment," which can be monetary payment or commission, a free product or service, or any other incentive, any content produced as a result becomes subject to consumer protection law enforced by the Competition and Markets Authority and the ASA.

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COSMETIC BLUNDER – ALL UK INSTAGRAM CONTENT MUST MAKE CLEAR ON THE FACE OF IT THAT IT IS AN AD, INCLUDING REELS AND STORIES

By Arthur Artinian and Georgina Rigg

The UK Advertising Standards Agency (ASA) has found that an influencer's Instagram reel and story breached the advertising regulations. All advertising made by influencers must make it clear that it is an advertisement; otherwise, brands, even if they have no control, will be held jointly responsible.

The Content – Instagram Reels and Stories

For those unfamiliar with Instagram reels and stories, a reel is a video up to 30 seconds (which can be made up of many videos), and a story is a vertical photo or video of up to 15 seconds, which disappears 24 hours after posting.

Eliza Batten, a social media influencer, posted a reel and story on Instagram promoting the use of a large cosmetics company's (the Cosmetic Brand) products. The story had a "swipe-up" function that took users to the relevant product page on the Cosmetic Brand's website. The reel stated:

> "Nowhere to go to in my go-to makeup @ [CosmeticBrandhandle] [camcorder emoji] […] #collab #makeup."

A complaint was made that neither the reel nor the story was obviously identifiable as an advertisement.

The Case

Ms. Batten received a small commission via a third-party influencer network for all sales made through the story's link to the Cosmetic Brand's website. Ms. Batten was also gifted the Cosmetic Brand's products.

The ASA found that as "the direct beneficiaries of the marketing material through an affiliate programme," the Cosmetic Brand and Ms. Batten were jointly responsible for such ads and their compliance with the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing.

The complaint was upheld despite the following facts:

- The Cosmetic Brand had no form of control over Ms. Batten's Instagram posts;
- The Cosmetic Brand also did not request any posts in exchange for the gifted items;
- The network required influencers to comply with all applicable advertising rules and disclosure obligations;
- After the complaint was known, the network reminded Ms. Batten of the ASA requirements;

- Ms. Batten apologised and added the necessary "#ad" to her posts; and
- The inclusion of the hashtag "#collab" in the caption of the reel (which the ASA considered insufficiently clear that there was a commercial relationship).

The ASA therefore found that the reel and the story were not obviously identifiable as marketing communications and did not make their commercial intent clear, and the complaint was upheld.

Key Takeaways

Key learning points from this case:

- **Train your influencers**: Provide up-to-date training to influencers before the influencers are given free products or can monetised links;
- **Audit your influencers**: Ensure ongoing compliance by conducting randomised audits of influencer posts;
- **Introduce approval mechanisms**: Consider introducing some sort of approval mechanism, as the brand is likely to be held responsible regardless of control; and
- **Remember that duration does not matter**: Remind your influencers that it does not matter how short the video is or the duration of the posts; the advertisement must identify all posts as advertisements—using "#ad" and "#collab" is not sufficient.

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INFLUENCERS AND DIGITAL ADVERTISING

By Claude-Étienne Armingaud

Over the past decade, influence marketing has changed the way advertising is handled by companies. Influencers have entered the marketing world by leveraging massive followings on social media platforms, and brands have recognised the value of the new category of advertising professionals.

Even though the use of influencers has become a mainstay of advertising, French legislation has yet to meet this evolution, resulting in an often opaque legal framework.

The broad, spread-out provisions applicable to influencers also generate difficulties in understanding their legal status, in particular when they are underage. This notably raises the question whether influencers are employees of the brands they advertise for—and therefore subject to labor law—or if they should be considered independent contractors, with their relationship with brands subject to commercial legislation.

Such opaque legal framework raises questions about the applicable regime, as well as the legal status of influencers. Even though there is no specific regime for influencers, recent legislation was adopted in order to protect children influencers (see our post **here**).

Applicable Regimes

Influencer marketing is not specifically regulated under French law. Therefore, it remains governed by a combination of the frameworks applicable to both advertising and consumer protection. As a result, it may be difficult for influencers to fully-grasp the rules to which their professional activity should abide without proper legal advice.

With regard to consumer protection, the French Digital Economy Act 2004 (**Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique**) mandates that any advertising be distinctively identified as such. Considering that they effectively provide advertisement services, influencers are required to clearly mention that a product promotion or any paid-for content included in their social communications is an advertisement. Failure to properly disclose a commercial relationship between an influencer and a brand could be considered a deceptive commercial practice (**Article L.121-3 of the French Consumer Code**). Non-compliant influencing campaigns could therefore expose influencers to up to two years of imprisonment, a €300,000 fine, or even up to 10% of the average annual turnover or 50% of the expenses incurred by carrying out the advertising.

Status

Influencers perform works (services of influence) in return for remuneration, which can be either monetary or a benefit in kind.

French labor law requires the existence of a subordinate relationship to qualify an employer and employee relationship, which would result from the employer exercising direction, control, and sanction powers over the employee.

However, influencers usually are greatly independent regarding the modalities of the services they provide, and there is no control over their working hours. It can therefore be delicate to characterize such subordinate relationships and qualify influencers as "employees." Nonetheless, the brand ultimately reserves the possibility to control the content created by the influencer before publication.

Such key elements demonstrate that qualifying the nature of the contractual relationship between an influencer and a brand requires a case-by-case analysis of both the nature of the services provided and the contractual relationship between the brand and the influencer.

Notwithstanding the qualification of an employer and employee relationship, French law has recently evolved to protect children influencers' interests.

Protection of Children Influencers

The **Loi n° 2020-1266 du 19 octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne** (the so-called Kidfluencer Act, see our post **here**) regulates the activities of influencers under the age of 16.

Under this legislation, children influencers whose activity is considered "work" are protected under French labor law. Prior to the child performing any work activity on a social media platform, the child's parents or legal representatives are required to petition for an authorization or approval before the French administration.

Children whose activity is not considered work are also protected, as a declaration must be made before the French administration if certain thresholds relating to video duration, number of videos, or revenue associated with published videos are exceeded.

In addition, the commercial exploitation of the images of children aged 16 and under on online platforms has been specifically regulated, e.g., with a portion of the income received by such minors to be deposited in a special state-handled account (Caisse des Dépôts et Consignations) and not available to them until their majority or emancipation. As many influencers are minors, this legal provision ensures the minor influencers' protection, either from their parents or from themselves as legally vulnerable persons.

The General Data Protection Regulation (GDPR) provides additional protection relating to children personal data. Considering that underage influencers are oftentimes addressing a younger audience, such provisions may need to be taken into account, notably as these influencers become brands of their own or organize sweepstakes.

For most online services, Article 8 GDPR requires the consent of the parent or guardian in order to process a child's personal data on the grounds of consent up to a certain age. Each member state determined an age threshold (between 13 and 16 years old) under which children cannot consent to the processing of their personal data on their own, requiring parental consent.

Controllers wishing to process personal data of children under the threshold age should therefore collect two consents: the child's as well as the parent or legal guardian's. In any case, any information addressed specifically to a child should be adapted to be easily accessible, using clear and plain language.

Finally, pursuant to Article 17 GDPR, controllers have the obligation to erase underage influencers' personal data that was collected in relation to the offer of information society services (referred to in Article 8 GDPR) without undue delay.

To remedy the opacity of this fragmented general legal framework, the creation of a specific legislation protecting influencers and regulating further the activities of minor influencers appears essential.

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AUSTRALIAN LAW UPDATE – LEGISLATION CHANGES AND OTHER SIGNIFICANT DEVELOPMENTS

AUSTRALIAN GOVERNMENT ACQUIRES COPYRIGHT IN ABORIGINAL FLAG DESIGN

By Gregory Pieris

The Australian Government has announced the purchase of copyright in the Australian Aboriginal Flag, ending several years of controversy and uncertainty and guaranteeing the ability of First Nations peoples to freely-use the flag to express their identity.

Australian Indigenous artist and activist Harold Thomas, a Luritja man residing in the Northern Territory, created the flag design in 1971 for the Aboriginal land rights movement. The design quickly grew to become a symbol for Aboriginal people in Australia. Together with the Torres Strait Islander Flag, another Australian Indigenous flag with which the Australian Aboriginal Flag is often flown, the design was granted status as a "Flag of Australia" by proclamation of the Keating government in 1995 and thereby officially recognised and protected as a national flag under the *Flags Act 1953* (Cth).

National flag-, emblem-, and armorial-bearing designs are generally protected through international treaties, in particular Article 6 of the Paris Convention, which prevents the unauthorised registration and use of such designs as trade marks. However, such designs are generally not protected under copyright, either because original authorship of the design is unknown or because the designer died more than 70 years ago and the term of copyright has therefore expired.

The Australian Aboriginal Flag design stands in a different category, having been created only 50 years ago, and Thomas retained copyright as the original author of the Australian Aboriginal Flag design despite its recognition as a national flag of Australia.

Thomas's copyright in the Australian Aboriginal Flag as an original artistic work was upheld by the Federal Court of Australia in the 1997 decision of *Thomas v Brown* (1997) 37 IPR 207 and several subsequent decisions.

Thomas subsequently licensed the Australian Aboriginal Flag design for the manufacture of official flags, and took action against unauthorised commercial usage. Most famously, Thomas refused to allow Google to use the design incorporated into its logo on the

search engine homepage. However, Thomas allowed free use to non-commercial operations that gave health, educational, legal, and other assistance to Aboriginal people.

In 2018, controversy arose when a non-Indigenous company, WAM Clothing Pty Ltd, was granted an exclusive license for reproduction of the design on clothing and other objects and began issuing infringement notices on various organizations, including Aboriginal not-for-profits, sporting clubs, and community organizations. Demands were also sent to sports governing bodies who had for many years been using the flag on player uniforms and sporting grounds, often as part of rounds dedicated to recognizing the contribution of Indigenous players to the sport or on uniforms worn by Indigenous Australian representative teams.

After several years of negotiations, Thomas has now assigned copyright in the Australian Aboriginal Flag design and terminated all commercial licenses, other than retaining the exclusive license for the manufacture of flags. In return, the flag licensee will not restrict individuals from making their own flags for personal use, and all royalties the Commonwealth receives are to be transferred to the National Aborigines and Islanders Day Observance Committee.

The Commonwealth reportedly made a taxpayer-funded settlement payment of AU$20.05 million. This includes cash payments to Thomas and existing licensees, as well as funding a scholarship in Thomas's name for Indigenous students in relation to Indigenous governance and leadership, and an online education portal on the flag's history.

Under Australian law, moral rights are personal to individual authors and performers, and cannot be assigned or sold. As such, Thomas retains moral rights to his artistic work, including the right to prevent individuals from falsely attributing authorship or subjecting the Australian Aboriginal Flag design to derogatory treatment.

Thomas has expressed hope that:

> "[T]his arrangement provides comfort to all Aboriginal people and Australians to use the Flag, unaltered, proudly and without restriction. I am grateful that my art is appreciated by so many, and that it has come to represent something so powerful to so many. The Flag represents the timeless history of our land and our people's time on it. It is an introspection and appreciation of who we are. It draws from the history of our ancestors, our land, and our identity and will honour these well into the future."

Subject to the commercial license for flag production and Thomas's moral rights, commentators have observed that the settlement means that the Australian Aboriginal Flag has the same status as the Australian National Flag, and other national symbols and may now be used freely in any form and any medium without having to ask permission or pay a fee.

However, this may not necessarily be the case. There are restrictions on registration and misuse of the Australian National Flag as part of trade marks. The Australian Department of the Prime Minister and Cabinet has established protocols for proper use of the Australian National Flag, including on how the flag must be flown, limitations on commercial use of the flag, and restrictions on importation of items bearing an image of the flag without permission. It remains to be seen whether similar protocols will be established in respect to the Australian Aboriginal Flag.

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FULL FEDERAL COURT DECISION REAFFIRMS THAT THERE IS NO INFRINGEMENT BY AUTHORISATION UNDER AUSTRALIAN TRADE MARK LAW

By Gregory Pieris and Avy Lim

The Full Court of the Federal Court of Australia (Full Court) has reaffirmed that a registered trade mark can only be infringed by the primary user of a trade mark, and there is no concept of authorisation of infringement recognised under Australian trade mark law.

Background

PDP Capital (PDP) manufactures and sells a range of chilled dessert products and snacks under registered trade marks containing the words "WICKED SISTER."

Grasshopper Ventures is an intellectual property holding company that licensed other trading entities within its corporate group to apply an unregistered trade mark for the word "WICKED" in stylised font on a range of dipping sauces and other products.

PDP alleged that Grasshopper Ventures infringed PDP's "WICKED SISTER" registered marks by using the "WICKED" stylised mark and engaged in misleading or deceptive conduct and passing off.

Although the appeal concerned numerous issues, the focus of this article is PDP's novel contention that Grasshopper Ventures could be held liable for the actions of its licensees on the basis that it "authorised" the infringing use by its related corporate entities.

Full Federal Court Decision and Significance

The *Trade Marks Act 1995* (Cth) (TMA) recognises that "use of a trade mark" can include authorised use by third parties. For example, the owner of a registered trade mark has the exclusive right to authorise others to use the mark. The owner of a trade mark can rely on authorised use of the relevant trade by third parties in order to defeat a nonuse removal action, to prove prior use, or to prove acquired distinctiveness.

The test for infringement under Section 120 of the TMA refers to a person "using" a trade mark, which PDP argued encompasses authorised use in the same way as other mechanisms dealing with "use of a trade mark" under the trade mark regime.

The Full Court dismissed the appeal and reaffirmed that Grasshopper Venture's mere act of authorising the use of a trade mark to another entity does not constitute trade mark infringement. This is to be contrasted with the *Copyright Act 1968* (Cth) and *Patents Act 1990* (Cth), which specifically provide for infringement by authorisation.

The Full Court found that the language of Section 120 emphasises the personal nature of an act. It is the act of "the person" that attracts a finding of infringement. It does not suggest use by one person will constitute an infringement by another person. Furthermore, unlike other sections of the TMA that incorporate authorised use, infringement under Section 120 of the TMA does not include a specific note that "use" of a trade mark includes "authorised use" of the relevant mark by another person.

However, this does not mean that a party cannot ever be found liable for infringing uses of a trade mark by third parties. The Australian common law has long recognised (and the Full Court affirmed) that a person who has not engaged in the primary act of infringement can be held responsible for the infringing acts of third parties under the doctrine of joint tortfeasorship. However, for unexplored reasons, PDP did not allege joint tortfeasorship in this case.

A full copy of the decision (*PDP Capital Pty Ltd v Grasshopper Ventures Pty Ltd* [2021] FCAFC 128) is available here.

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KEY INTERNATIONAL LEGAL DEVELOPMENTS FOR THE FASHION AND CONSUMER GOODS SECTORS

ETHICAL SUPPLY CHAIN: THE EUROPEAN COMMISSION'S PROPOSAL FOR A DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE

By Mélanie Bruneau, Giovanni Campi, Antoine De Rohan Chabot, Miguel Caramello Alvarez, Matilde Manzi and Joanna Kulewska

On 23 February 2022, the European Commission (the Commission) published a proposal for a directive on corporate sustainability due diligence (the Proposal). This Proposal creates several new obligations for eligible companies in relation to their supply chain, with a view to identifying and, where necessary, preventing, ending, or mitigating adverse impacts of their activities on human rights, such as child labor and exploitation of workers, and on the environment, such as pollution and biodiversity loss.

The first objective of the Proposal is to level the playing field for companies in the European single market, as so far only a few EU countries (notably France and Germany) have enacted legislation regulating supply chains' due diligence.

Another objective of the Proposal is to promote sustainable and responsible corporate behaviour in all global value chains. Companies are to be required to identify and, where necessary, prevent, remedy, or mitigate any negative impacts of their activities on human rights (e.g., child labor and exploitation of workers; inadequate occupational health and safety) and on the environment (such as greenhouse gas emissions, environmental pollution or the loss of biodiversity, and the destruction of ecosystems). These obligations will apply to companies active in the European Union, irrespective of whether their headquarters are located in the European Union or in third countries, based on specific employee and turnover criteria.

Current Status in France and Germany

In France, the Duty of Vigilance Act was enacted on 27 March 2017 and applies to companies and groups of companies located in France that employ for two consecutive years, either (i) more than 5,000 employees in France, or (ii) more than 10,000 in France and abroad. The Duty of Vigilance Act imposes on these companies an obligation to establish, publish, implement, and monitor a "vigilance plan" to identify and prevent risks of severe violations of human rights and fundamental freedoms, health and safety of people, and to the environment in their entire sphere of influence, including subsidiaries and subcontractors when "an established commercial relationship" exists.

In Germany, the German Supply Chain Due Diligence Act (GSCDDA) was promulgated in the *Federal Law Gazette* on 22 July 2021, and will enter into force

on 1 January 2023. It applies to all companies, irrespective of their legal form, which have their head office, principal place of business, administrative headquarters, or registered office in Germany, and employ at least 3,000 employees in Germany (1,000 as from 1 January 2024), including employees posted abroad. Foreign companies that (i) have a branch office in Germany, and (ii) employ at least 3,000 employees in Germany (1,000 as from 1 January 2024) are also included in the scope of the GSCDDA. The GSCDDA obliges companies to comply with a number of human rights and environmental due diligence obligations set out in the GSCDDA, with the aim of preventing or minimizing human rights or environmental risks or ending the violation of human rights or environmental obligations.

Scope of the Proposal

According to Commission estimates, approximately 13,000 companies in the European Union and 4,000 non-EU companies will ultimately be within the scope of the Proposal as presented by the Commission. It should be noted that the Proposal sets lower thresholds regarding the number of employees than the French and German legislations.

The new due diligence obligations contained in the Proposal will apply:

- Upon entry into force, to companies with (i) at least 500 employees and (ii) net sales of at least €150 million worldwide.
- Two years after entry into force, to other companies that do not meet the above thresholds but (i) operate in defined high impact sectors (e.g., textile manufacturing, agriculture, food, forestry, extraction of mineral raw materials) and (ii) have at least 250 employees and a net turnover of at least €40 million worldwide.

The due diligence obligations contained in the Proposal will also apply to non-EU companies active in the European Union that meet the criteria above.

Small and medium enterprises (SMEs) are not within the scope of the Proposal, although they might be indirectly affected by the new rules because of the effect of large companies' actions across their value chains. In order to address this, the Proposal contains measures to protect SMEs from excessive requirements from large companies.

The New Due Diligence Obligations Introduced by the Proposal

Obligations Imposed on Companies

Companies within the scope of the Proposal will be required, in regard to their own operations, their subsidiaries, and their value chains (i.e., direct and indirect established business relationships) to:

- Integrate due diligence into policies;
- Identify actual or potential adverse human rights and environmental impacts;
- Prevent or mitigate potential impacts;
- Bring to an end or minimize actual impacts;
- Establish and maintain a complaints procedure;
- Monitor the effectiveness of the due diligence policy and measures; and
- Publicly communicate on due diligence.

This means that companies must take appropriate measures to prevent, end, or mitigate impacts on the rights and prohibitions included in international human rights agreements, for example, regarding workers' access to adequate food, clothing, water, and sanitation in the workplace.

Companies are also required to take measures to prevent, end, or mitigate negative environmental impacts that run contrary to a number of multilateral environmental conventions.

In addition, the Proposal requires companies to adopt a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement.

Obligations Imposed on Company Directors

The Proposal also introduces duties for the directors of EU companies within its scope. These duties include setting up and overseeing the implementation of the due diligence processes and integrating due diligence into the corporate strategy.

In addition, when directors act in the interest of the company, they must take into account the human rights, climate, and environmental consequences of their decisions and the likely consequences of any decision in the long term.

Finally, when setting any variable remuneration linked to the contribution of a director to the company's business strategy and long-term interests and sustainability, companies have to duly take into account the fulfilment of the obligations regarding the company's corporate climate change plan.

Enforcement and Sanctions

A body designated by each member state (known as a "supervisory authority") is to supervise the companies` adherence to the above-mentioned obligations. If it detects an infringement, it should first give the company a reasonable period of time to take remedial action.

Companies shall also set up a complaints mechanism so that those affected, as well as trade unions and other organizations on their behalf, have the opportunity to take legal action in the event of damage suffered.

The Proposal largely leaves the design of sanctions to EU member states and only contains the following provisions:

- EU member states should be able to impose proportionate sanctions. Monetary sanctions are to be based on the company's turnover, although here too EU member states are to regulate the amount of the monetary sanctions themselves.
- The Proposal contains relatively detailed provisions regarding the obligation to compensate victims and the liability of companies. Thus, there is to be an obligation to pay damages if companies fail to comply with their due diligence obligations. Liability cases can also arise in indirect business relationships.

The Proposal also requires EU member states to adapt their rules on civil liability to cover cases where damage results from failure by a company to comply with due diligence obligations, building on their existing regimes on civil liability. Furthermore, EU member states shall ensure that their national civil liability regimes for companies have an overriding mandatory application, so that civil liability cannot be denied on the sole ground that the law applicable to such claims is not the law of an EU member state.

At the EU level, the Commission intends to set up a European Network of Supervisory Authorities that will bring together representatives of the national bodies in order to ensure a coordinated approach and enable knowledge and experience sharing.

Next Steps

The Proposal will now be examined by the European Parliament and the Council of the European Union. There is no precise timeline yet regarding its adoption.

Once the Proposal is adopted as a directive (as amended by the European Parliament and the Council of the European Union), EU member states will have two years to transpose the new rules into their national laws.

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"EXTRA, EXTRA, READ ALL ABOUT IT" – FINAL EUROPEAN AND UK BRAND DISTRIBUTION RULES PUBLISHED

By Gabriela da Costa, Jennifer Marsh, Dr. Annette Mutschler-Siebert, Francesco Carloni, and Mélanie Bruneau

The new European Vertical Block Exemption Regulation (VBER) and guidelines (Vertical Guidelines) came into effect on 1 June 2022, and will govern how brands can design their European go-to-market strategies and control the sale of their products for the next decade. The United Kingdom's new rules, contained in the Vertical Agreements Block Exemption Order, are now also in effect.

Below we provide quick-fire responses to the top five questions that have been on everyone's lips.

1. "Let's get straight to the point—I want to ask you about prices. I saw something online about MAP possibly being allowed in Europe—is that right?"

- The short answer is "no"—as a general rule, it remains illegal and very high risk in the European Union and United Kingdom to agree to a minimum or fixed resale price with customers, and this also includes prescribing a minimum advertised price. All of these are treated as unlawful "resale price maintenance" (RPM).
- While recommended or maximum resale prices are acceptable, sales teams should also be trained that putting any direct or indirect pressure on customers to "adhere to RRP/MSRP" counts as unlawful RPM. This includes using price-monitoring tools to flag and enforce "price deviations" by retailers, so make sure you are using software in a legally compliant way.
- That being said, the European Commission (the Commission) has expressed clear willingness to countenance RPM in exceptional circumstances where its effect would be overall pro-competitive, such as:
    - As part of a temporary pricing campaign to support a new product launch where there are no realistic and less restrictive alternative means of incentivizing the resellers to promote the product.
    - As part of a coordinated short-term, low-price campaign, in particular, where the supplier applies a uniform distribution format across its retailer network.
    - To protect retailers that make investments in additional presales services (e.g., for complex products) from free-riding by others.
    - Very interestingly, to prevent a particular distributor from using a brand's product as a loss leader, specifically when it resells below the wholesale price. The Commission correctly concedes that "this can damage the brand image of the product and, over time, reduce overall demand for the product and undermine the supplier's incentives to invest in quality and brand image."

The thresholds for these potential exemptions are high, and it still carries significant uncertainty and potentially high risk if an authority or court disagrees that the RPM is necessary in the circumstances. However, the Commission's more pragmatic stance is encouraging, and as the scope of these potential exemptions (and national competition authorities' attitudes towards them) become clearer, we can expect to see more companies pursuing these options.

Another concession: The new rules also now state that where a supplier concludes a supply agreement with a specific customer, and then enters into an agreement with a reseller that it has chosen for the purpose of executing (or "fulfilling") that supply agreement, imposing on the reseller the resale price agreed with the customer will not constitute RPM.

2. "That's interesting—a lot more to think about in that area now.

The real trouble is simply that our brick and mortar partners just cannot compete with the prices of their online competitors because of their higher overheads. This has been worsened by the lockdowns, and we have a lot of partners planning to shut their offline stores. This is terrible for our brand."

This is one area where the new rules introduce a major change and a clear recognition that the high street does need some protection, which is:

- It will no longer be a hardcore restriction of competition to charge a hybrid seller different wholesale prices for the products it sells in brick-and-mortar stores compared with those it sells online.
- We see many brands taking advantage of this to introduce meaningful performance pricing policies, which reward or incentivize partners for their investments in the brand and consumer experience.
- The key is to make sure a price difference is not arbitrary, and is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel. A price difference that has the object of preventing the effective use of the Internet to sell to particular territories or customers will still be regarded as a very serious competition law violation.
- We also suggest "watching this space" for Germany and France—their attitude to dual pricing has historically been more conservative, so particular care needs to be taken on pricing policies affecting these territories.
- Another positive development in the new rules is that selective distribution criteria for brick-and-mortar partners no longer have to be 100% equivalent to the online retailer criteria. This relaxation of the rules will allow brands to apply standards for partners that are more relevant and appropriate to the channel in which they operate, which could help to ease the burden on offline network partners.

3. “You mentioned selective distribution. Remind me what that is again, please? I seem to recall we thought about it, but not every country was ready for that—or we could not protect selective distribution territories—so we abandoned the idea.”

Selective distribution is a system where (i) distributors and sellers are authorized based on their compliance with certain qualitative criteria, and (ii) they agree not to sell outside the authorized network.

A properly designed selective distribution system is a necessary precondition for a brand to be able to stop someone from purchasing and reselling their product (often called “grey market selling”)—without a legally valid system in place, grey market enforcement carries serious antitrust risk.

In this area, the new rules are mostly helpful in clarifying or confirming some important points:

- They now explicitly recognize that selective distribution may be appropriate for many high-quality products (not just technical or luxury goods).
- It also confirms when and what types of restrictions on online marketplaces are likely to be accepted.
- The new rules expressly allow brands to combine different distribution systems within the European Union. For instance, exclusive or free distribution in one territory and selective distribution in another (where the local conditions might support this model better). More importantly, they clarify that it is legally permissible to prevent customers and indirect customers in a nonselective distribution territory from selling a brand’s products to unauthorized dealers in a territory where selective distribution has been implemented. This means your business team has more flexibility to decide where selective distribution might work and the comfort that the system can be protected from outside leakage.

4. “We have always gone for exclusive relationships. Anything we should be aware of there?”

Yes. Two really interesting developments are the following:

- Brands will be able to grant “shared” exclusivity over particular territories or customers to up to five distributors (rather than only one distributor, as before). This presents some novel potential options for brands as they relook at their system designs, for instance, where selective distribution is not appropriate but a single distributor is not enough.
- It is also now possible to protect a distributor’s exclusive territory or customer group from active sales both from the brand’s other direct distributors, as is currently possible, as well as from indirect customers to whom the active sales restriction can be passed down. This enhances the possibilities for protecting the exclusivity granted to partners. However, remember that passive sales (i.e., sales following unsolicited orders from customers, for instance, where the customer is browsing a foreign website but has not been targeted in any way) can never be restricted in the European Union.

One very puzzling area of the new EU rules to note is how they treat the situation where the brand has an exclusive distributor at the wholesale level (A) but applies selective distribution at the retail level (i.e., applies quality criteria for the selection of authorized retailers). This is a common model in the market given the very different roles played by wholesalers (trade-facing) and retailers (consumer-facing). Sometimes brands restrict their wholesalers in other territories from making active sales to authorized retailers in distributor A’s exclusive territory.

Unfortunately, the new EU rules treat an active sales restriction in this scenario as a hardcore restriction of competition—which could void an agreement and expose the parties to large fines. However, they do allow for a possible individual exemption on a case-by-case basis—for instance, where the wholesale distributor would not be prepared to make the investments needed to support the implementation and maintenance of a retail selective distribution system in its territory unless it received some protection from active selling by other wholesalers. Alternatively, companies can still choose to only appoint one wholesale distributor per territory (there are different options for how this can be structured) but without restricting active selling by others into that distributor's territory.

Note that in the United Kingdom an active sales restriction in this scenario is not a problem.

"That sounds… confusing."

It will be interesting to watch how this one plays out.

In the meantime, we suggest digging out your distributor contracts and having this aspect reviewed to make sure your terms are compliant.

5. "Like many others, our brand has been growing its direct-to-consumer (or D2C) business, and this was accelerated by COVID-19. It is very exciting and great for customer engagement with the brand, but we are finding it quite tricky to know what we can and cannot say to our network partners who are now also our competitors. Any tips?"

Yes, this situation—called "dual distribution"—is an important feature of the new rules.

We are pleased to report the Commission has not adopted the very conservative approach as proposed in its July 2021 draft of the rules, and that the VBER will continue to exempt certain information exchanges between brands with market shares of under 30%

and their competing customers. The Commission has also helpfully clarified that the exemption for dual distribution will apply to more levels of the supply chain, such as importers and wholesalers, and not just retailers.

However, brands should note that the scope of the old legal exemption has been narrowed in some respects—the information must now be “directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services” to be automatically exempted. The Vertical Guidelines provide examples of what is or is not (usually) likely to meet this test, but as a rule of thumb, competitively sensitive exchanges (e.g., a brand’s or customer’s competitive strategy or future prices, where these are not part of a network-wide maximum price promotion) are likely to raise concerns. Certainly, sales teams should be appropriately trained and technical or administrative precautions considered to minimize the competition risk, especially as this area looks ripe for investigation.

Another thing to be aware of is that the legal exemption for dual distribution will not apply to an agreement between a brand and a provider of online intermediation services (e.g., e-commerce platform) where the platform also sells the product in competition with the brand. In these scenarios, the relationship needs to be individually assessed to ensure competition law compliance.

“That is a lot to take in.”

It is, and there is more where that came from. However, do not worry—if you are interested in being kept up to date on developments in this space, including other key areas to watch, contact our team listed below.

Our team is available to connect if you would like to discuss how the new laws will affect your company, to ensure it is not exposed to material new risk and, conversely, is aware of opportunities that may have opened up.

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DO CONSUMERS REALLY NEED MORE FINANCIAL PROTECTIONS? THE UK GOVERNMENT SAYS "YES"

By Judith Rinearson and Kai Zhang

In May 2021, the United Kingdom's Financial Conduct Authority (FCA) published a **consultation paper** proposing there would be a "new consumer duty" (Consumer Duty).[1] The central proposition is that a firm must deliver "good outcomes" for consumers, which is then supplemented by additional requirements.

In particular, the FCA noted in its May consultation:

> "We want to see a higher level of consumer protection in retail financial markets, where firms compete vigorously in the interests of consumers. We are proposing to introduce a new "Consumer Duty" that would set higher expectations for the standard of care that firms provide to consumers. For many firms this would require a significant shift in culture and behavior, where they consistently focus on consumer outcomes, and put customers in a position where they can act and make decisions in their interests."

After receiving input from 235 stakeholders, the FCA issued a **second consultation paper** in December 2021, which confirmed the original high-level proposals and set out the draft detailed rules. The deadline for providing feedback on the second consultation was 15 February 2022.

The key reason for having the new rules, as argued by the FCA, is that firms "are not consistently and sufficiently prioritising good consumer outcomes," which leads to consumer harm.

The new Consumer Duty has three elements:

- A "Consumer Principle" that "a firm must act to deliver good outcomes for retail customers."
- "Cross cutting rules" (essentially the "content" of the Consumer Principle, i.e., how firms should act) that require firms to:
  - o Act in good faith toward consumers;
  - o Avoid foreseeable harm to consumers; and
  - o Enable and support consumers to pursue their financial objectives.
- Four outcomes regarding:
  - o The products and services (i.e., designed to meet consumers' needs);
  - o The price and value (i.e., giving fair value to consumers);
  - o The consumer understanding (i.e., helping consumers making informed decisions); and
  - o The consumer support (i.e., ongoing support throughout customer relationship).

These new requirements would apply to regulated firms, including banks, electronic money institutions, broker dealers, asset managers, and payment service providers. In addition, these would also apply proportionally to firms throughout the distribution "chain" (i.e., intermediaries not directly facing consumers).

As this new Consumer Duty would be "outcome-based regulation," this would appear to require that firms go further than complying with the letter of the law by ensuring the customers get the outcome they seek. These are definitely broad and aggressive goals that will impact considerably on the provision of retail financial services and products to consumers, and they would place yet another significant obligation on financial service providers.

While the FCA insists that the Consumer Duty "does not remove consumers' responsibility for their choices and decisions," there is still concern that consumers will place the blame for poor outcomes (such as their poor investment results or credit losses) on their

1 Note: in the United Kingdom and European Union, a consultation paper is similar to an advance notice of proposed rulemaking in the United States. It is the way regulators set forth goals and seek input from the industry, academics, consumer groups, and other stakeholders. The consultation paper is an early indication of the government's intention to institute new laws or regulations.

financial institutions. Certainly, the new Consumer Duty will increase the costs of providing consumer financial services, and may at the same time raise the risk of consumer fraud. Those of us who work with retail financial services in the United States strongly hope that this aspirational but perhaps impractical new duty does not make its way across the pond and into U.S. laws and regulations. However, note that UK firms distributing U.S. (and other non-UK) products and services would still need to comply with certain requirements, and therefore, U.S. firms may be indirectly impacted.

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COPYRIGHT DISPUTE OVER ANDY WARHOL'S PORTRAITS OF PRINCE HEADING TO U.S. SUPREME COURT

By Susan Kayser and Eric Lee

The U.S. Supreme Court will review the standard for a "transformative" work as "fair use" under the Copyright Act of 1976. Specifically, whether a second work of art *is* "transformative" when it conveys a different meaning or message from its source material, or *not* "transformative" where it recognizably derives from and retains the essential elements of its source material.

The Supreme Court agreed to review the Second Circuit's decision that Andy Warhol's Prince series portraits of the musician Prince (Prince Series) did not make fair use of celebrity photographer Lynn Goldsmith's photograph of Prince. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, No. 21-869 (petition granted 28 March 2022).

The Andy Warhol Foundation's (AWF) petition argues that the Second Circuit's decision contradicts Supreme Court precedent that a new work is "transformative" if it has a new "meaning or message," citing *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–03 (2021) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). AWF also argued that the Second Circuit's decision creates a circuit split where the Ninth Circuit has held that even with few physical changes a work can be transformative if new expressive content or a new message is apparent. As a result, AWF argues, this decision "threatens" massive restrictions on First Amendment expression" that would create a "sea-change in the law of copyright."

Goldsmith's opposition brief asserts that AWF mischaracterizes Supreme Court precedent and that the Second Circuit "faithfully applied" the proper test for transformativeness in determining Warhol's series of silkscreen prints were not fair use. Goldsmith also argues petitioner has manufactured a circuit split that does not exist.

This dispute stems from a declaratory judgment action filed in 2017 by AWF in the Southern District of New York seeking that Warhol's portraits of Prince did not infringe photographer Lynn Goldsmith's photograph. In 2019, the district court granted summary judgment to AWF, holding that the Prince Series was "transformative" because it incorporated a new meaning and message different from Goldsmith's photograph.

In 2021, the Second Circuit reversed, holding that Warhol's portraits were not fair use as a matter of law. The Second Circuit held that Warhol's use was not "transformative," even though Warhol's use included some visual differences from Goldsmith's photograph, because Warhol's use "retains the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements."

Multiple amicus briefs supporting AWF were filed, including by a group of 12 copyright law professors, a group of 13 art law professors, artists and art professors Barbara Kruger and Robert Storr, and the Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, and Brooklyn Museum. The visual arts community and content creators in every industry will heavily watch this case.

The Supreme Court will hear the Warhol case in its new term, which begins in October 2022.

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EVEN IN THE DIGITAL AGE, ONLY HUMAN-MADE WORKS ARE COPYRIGHTABLE IN THE UNITED STATES

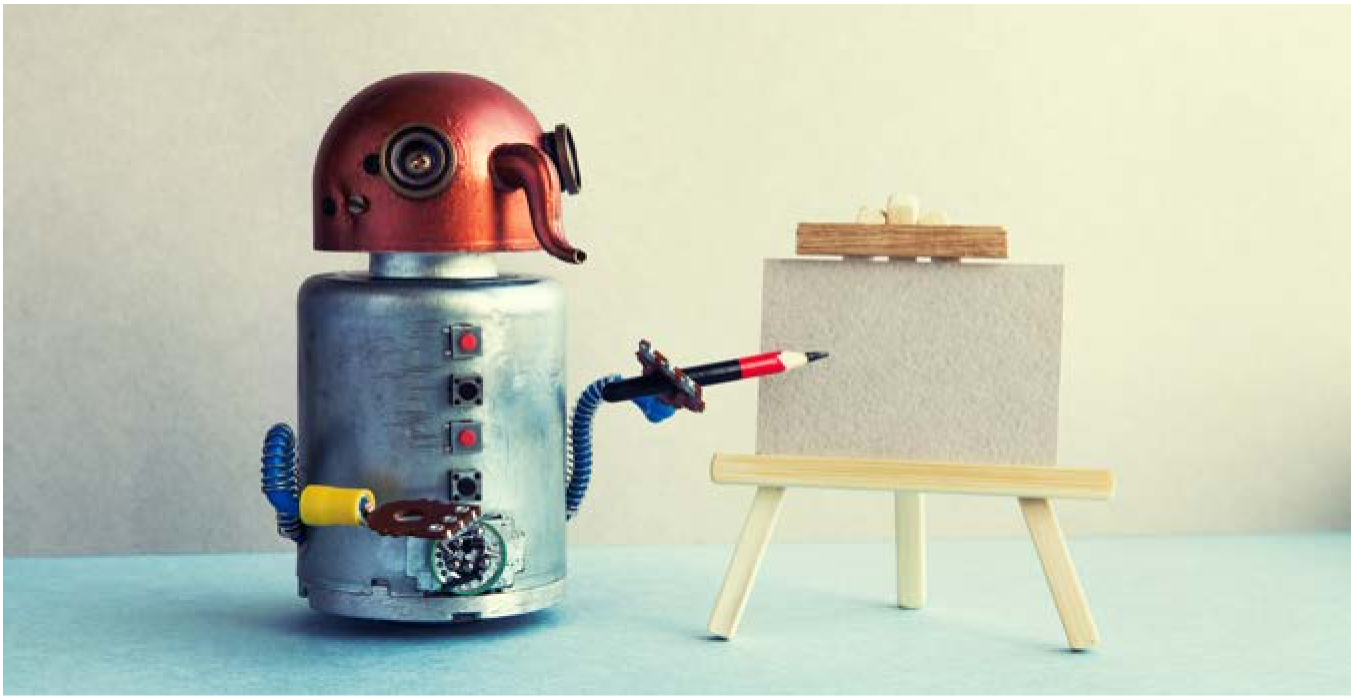
By Susan Kayser and Kristin Wells

The U.S. Copyright Office Review Board (the Review Board) refused copyright protection of a two-dimensional artwork created by artificial intelligence (AI), stating that "[c]urrently, 'the Office will refuse to register a claim if it determines that a human being did not create the work.'" See **recent letter**. The Compendium of U.S. Copyright Office Practices does not explicitly address AI, but precedent, policy, and practice makes human authorship currently a prerequisite.

A "Creativity Machine" authored the work titled "A Recent Entrance into Paradise." The applicant, Steven Thaler, an advocate for AI intellectual property rights, named himself as the copyright claimant. Thaler's application included a unique transfer statement: "ownership of the machine," and he further explained that the work "was autonomously created by a computer algorithm running on a machine." Thaler sought to register the work as a work-for-hire because he owns the Creativity Machine.

AI's "kill switch" at the U.S. Copyright Office? AI is not human. The Review Board relied on the U.S. Copyright Office's compendium of practices and U.S. Supreme Court precedent dating back to 1879—long before computers were a concept—to hold that the U.S. Copyright Office will not register a claim if it determines that a human being did not create the work.

The Review Board also denied Thaler's argument that the work-made-for-hire doctrine allows non-human persons, like companies, to be authors of



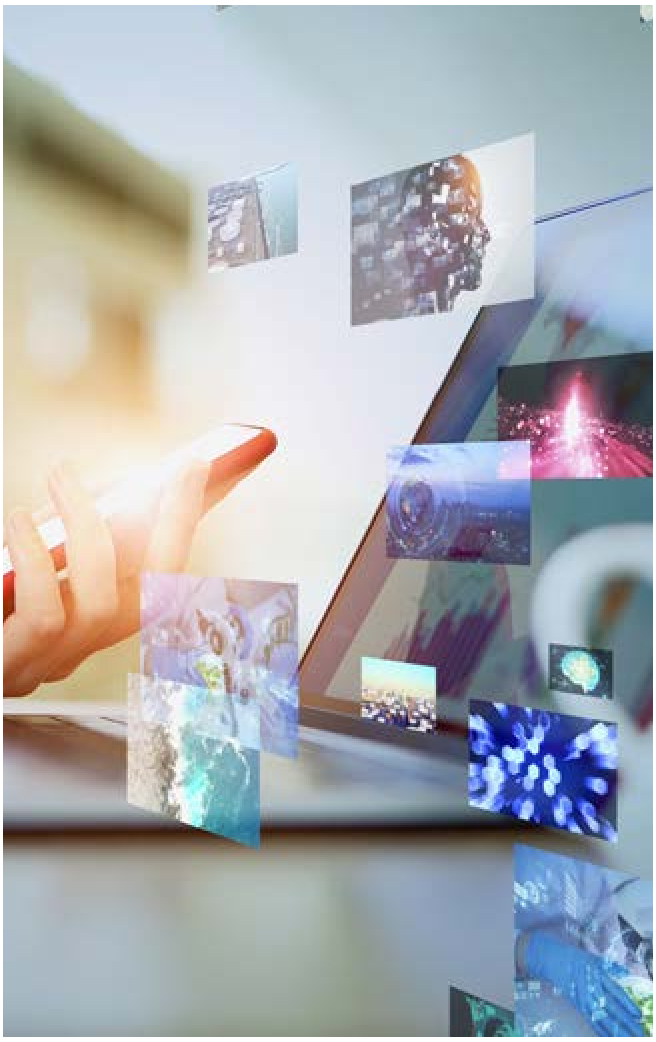
copyrighted material. The Review Board explained that works made for hire must be prepared by "an employee" or by "parties" who "expressly agree in a written instrument" that the work is for hire.

Because Thaler did not claim any human involvement in the work, the Review Board did not address under what circumstances human involvement in machine-created works might meet the statutory requirements for copyright protection. This is an issue that may soon arise.

AI has brought about an important crossroads in copyright law. Humans have always used tools to create copyrightable works; copyrighted works have always been fixed in some tangible medium of expression. But, what happens when the tools are no longer "just" tools and they evolve into larger roles? And when the tools create valuable works, who reaps the benefits of that value? How can the law incentivize the creators of AI to continue to develop creative AI to produce valuable works of art, music, literature, and games?

In October 2018, a portrait created by AI sold for **US$432,500** at Christie's New York. The hefty price tag for the piece, "Edmond de Belamy, from La Famille de Belamy," was more than double the purchase prices of Andy Warhol and Roy Lichtenstein prints available for sale in the same collection. The French collective that created the US$430,500 AI-generated piece used a 19-year-old's code and a preexisting algorithm to create the artwork.

Google's Google News Initiative uses AI to generate local new articles. A company called Deep Mind has created software that makes music. AI's position in the marketplace for music, art, and publications is growing. An enormous amount of valuable works are at risk of plagiarism. While the U.S. Copyright Office just denied copyright protection to AI-*only* works, it may soon have an opportunity to decide the requisite amount of human involvement required to protect AI-contrived works.



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DOES REPUTATION ENSURE DISTINCTIVE CHARACTER OF A TRADE MARK? NOT NECESSARILY

By Serena Totino and Sophie Verstraeten

The General Court of the European Union (the EGC) handed down its decision on the invalidity proceeding brought against the well-known Moon Boot three-dimensional (3D) trade mark registration. The EGC took a close look into the distinctiveness of 3D signs, providing new guidance on the subject.

Background

Tecnica Group S.p.A. owned a trade mark registration for the below 3D sign representing the iconic Moon Boot footwear for goods in classes 18, 20, and 25 (the Mark). Moon Boot's signature footwear, created by Giancarlo Zanatta, was launched in the 1970s and has been popular ever since.

In 2017, Zeitneu GmbH filed an invalidity action against the Mark and the European Union Intellectual Property Office's (EUIPO) Cancellation Division declared the Mark partially invalid in class 25 (e.g., footwear). The appeal filed by Tecnica Group SpA was dismissed by the EUIPO Board of Appeal, which decided that the sign did not depart significantly from the market of after ski boots and, as such, the Mark was devoid of distinctive character. Tecnica Group SpA then turned to the EGC.

The EGC Decision

The EGC held that it is a well-established principle that there should be no distinction between the distinctiveness assessment of conventional and less conventional marks, such as 3D marks. However, the perception of the average consumer is not necessarily the same, as average consumers are not in a habit of making assumptions about the origin of the goods on the basis of their shape alone. Therefore, only 3D marks that differ significantly from the norm of the sector concerned will have a distinctive character.

With regard to the Mark, the various features of the product pointed out by Tecnica Group SpA are merely decorative or technical details and do not contribute to the overall appearance of the product and should simply be considered as variants of after ski boots. Consequently, the Mark does not differ significantly from other shapes on the market.

Takeaways

No doubt, the EGC decision brought some disappointment, especially considering that the Moon Boot footwear previously obtained copyright protection. This case shows that nontraditional marks with reputation are not guaranteed trade mark protection.

In fact, an application may be refused or invalidated, even when similar products available on the market were inspired by the mark itself. Thus, obtaining a trade mark registration for 3D marks is still not an obvious route to protection, and brand owners should take into account that a solid intellectual property (IP) enforcement strategy involves:

- Preventing that a shape becomes generic overtime; and
- Relying on more than one IP right.

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SNAP! MARKS AND SPENCER TIED UP IN A LEGAL DISPUTE WITH LACOSTE OVER ITS ICONIC TRADE MARK CROCODILE LOGO

By Simon Casinader and Kira Green

After suing Aldi over allegations of intellectual property infringement based on its Colin the Caterpillar cake and Christmas glitter gin, Marks & Spencer (M&S) now faces a "litigator" itself, as it has recently been sued by Lacoste for allegedly infringing its crocodile logo (below) and related rights on a number of clothing and household products.

The Allegations

We set out below a representative selection of the alleged infringing products that are the subject of the complaint.

Alleged infringing products

Lacoste, the luxury sportswear brand, wrote to M&S last year demanding that it cease advertising and selling various goods bearing crocodile logos or signs. M&S refused, and now Lacoste is seeking an injunction on M&S and damages (among other things).

The Lacoste brand, which is named after the well-known tennis player René Lacoste, who was nicknamed the "Crocodile," has existed since 1933. As such, it has an extensive reputation worldwide and has ownership of a number of UK trade mark registrations dating back to 1984. Lacoste is arguing that by using similar versions of its crocodile logo, which has built up a considerable reputation by the brand, M&S is not only creating a likelihood of confusion between the brands, but importantly, is taking advantage of the Lacoste mark.

What is interesting about Lacoste's claims is that, although the brand only owns trade mark registrations in the United Kingdom for the word "CROCODILE" and various representations of its logo, it is claiming that M&S's use of different crocodile signs on products and the use of the word "CROCODILE" in relation to those goods constitutes trade mark infringement and passing-off. These allegations are particularly interesting since M&S's products feature varying depictions of crocodiles.

The claim is also in relation to a number of products sold by M&S that feature Roald Dahl's crocodile character from *The Enormous Crocodile*, whose image was licensed to M&S to use (below).

Following the filing of the claim, M&S has now proceeded to file a defense and counterclaim mounting a strong response to the claim, that also seeks to have Lacoste's rights removed on the basis of nonuse or declared invalid in respect to goods depicting, relating to, or referring to a crocodile or crocodiles. As would be expected, M&S also argues that their products merely feature depictions of real-life animals and are not an infringement of Lacoste's rights.

What is to Come?

It will be interesting to monitor this matter going forward as these two big brands go to battle. However, whatever the outcome of this case (if it is not settled in the meantime), the decision could have important lessons for trade mark owners and third parties on the scope of protection granted over not just their trade marks, but similar marks.

Reference: *Lacoste, Lacoste E-Commerce and Lacoste UK Limited v Marks and Spencer P.L.C. (IL-2021-000093)*

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SURGE OF ANTITRUST ENFORCEMENT AGAINST MANUFACTURERS OF BRANDED CONSUMER GOODS

By Michal Kocon, Jennifer Marsh, Gabriela da Costa, Dr. Annette Mutschler-Siebert, Christopher Finnerty, Mélanie Bruneau, and Francesco Carloni

European antitrust regulators have shown a continued focus on scrutinizing manufacturers' engagement with their distributors. The anticompetitive practices that have attracted the highest financial penalties primarily relate to marketplace restrictions, resale price maintenance, and restrictions on cross-border and online selling. This heightened attention by antitrust enforcers on vertical agreements clearly demonstrates the risks that brands are facing when it comes to the design and enforcement of their distribution strategies.

Apple and Beats Case (Italy)

One of the most highly anticipated cases from 2021 was the Italian Competition Authority's (the AGCM) decision[1] imposing fines of €174 million (as revised) in relation to a restrictive agreement that prevented legitimate resellers of "genuine" Apple and Beats products from operating on a number of national marketplaces, including in Italy.

Apple markets its branded products (including Beats) through: (i) direct and open distribution, and (ii) selective distribution. The AGCM did not investigate Apple's distribution policies, but only certain provisions of a 2018 agreement between Apple and an online marketplace. The AGCM found that these provisions:

- Limited the pool of third-party resellers allowed to sell on Italy's top marketplace only to those with the highest sales in the country; and
- Allowed for handpicking of specific third-party resellers authorized to sell the branded goods without proper reliance on a genuine selective distribution system (the AGCM's investigation in fact found that Apple resisted the inclusion of qualitative criteria in the 2018 agreement, potentially in an attempt to have greater freedom in subjectively selecting trading partners).

The Italian antitrust authority concluded that the contractual provisions introduced a mere quantitative restriction and limitation of sales by restricting the number of retailers allowed to sell through the marketplace, which represented the main online platform in Italy. The AGCM found the selection of the retailers to be arbitrary and discriminatory. In addition, the limitation of the number of online retailers determined, according to the AGCM, a highly likely increase in the average price of the products sold by these retailers. This also significantly impacted

cross-border sales within the European Union, as a number of retailers were restricted from selling through the marketplace in Italy.

According to the AGCM, the contractual restrictions could not be justified by EU competition rules and the Court of Justice of the European Union's ruling in *Coty*.[2] The selection was not made on the basis of predefined, objective, qualitative, and nondiscriminatory criteria that were uniformly applied. The AGCM also rejected the parties' argument that the contractual restrictions were needed to tackle the distribution of counterfeit products that posed security concerns.

This case stands as a stark reminder that online distribution strategies need to be carefully crafted. Under EU competition law and the EU courts' decisional practice, there are opportunities that allow brands and manufacturers to effectively defend brand value from online price erosion. This includes the adoption of a properly designed and enforced selective distribution system, which can limit the number of resellers allowed to sell a brand's goods, including on marketplaces. However, gray and hybrid solutions that cannot be fully justified will inevitably attract scrutiny and may result in the imposition of significant fines.

Other Noteworthy Cases

Bose (Germany)[3]

In December 2021, the German competition enforcer (the Bundeskartellamt) sanctioned Bose €7 million for having engaged in resale price maintenance practices in relation to the distribution of their audio products. According to the Bundeskartellamt, "[t]he company tried to make sure that the prices for headphones or speakers […] did not significantly undercut the recommended retail price (RRP)." The German regulator held that such practices adversely affect price competition and, in principle, harm consumers. The Bundeskartellamt's investigation discovered that Bose employees in particular agreed on concerted measures for setting resale prices with resellers. Bose was also said to have intervened on several occasions against sales partners who deviated from the RRP. In some instances, the resellers themselves complained to Bose about low resale prices offered by other authorized resellers, soliciting intervention by Bose.

Numerous Major Eyewear Brands (France)[4]

In mid-2021, following a series of dawn raids, the French Autorité de la concurrence (Autorité) fined several companies active in the sunglasses and glasses frames sector a total of €126 million for limiting the freedom of opticians to set resale prices or to sell the products online. The Autorité in particular found that the anticompetitive conduct included misusing "recommended" prices, such as by (i) encouraging retailers to maintain a certain retail price point, (ii) monitoring compliance with the "recommended" prices and acting on deviations, (iii) requesting the help of other retailers to "combat the abuses observed," (iv) prohibiting discounts and special offers for retail selling, and (v) taking retaliatory measures against noncompliant opticians, such as delaying or suspending deliveries to their stores, withdrawing the authorization required to distribute certain brands, or blocking their accounts to prevent them from placing orders. The Autorité also sanctioned the brands for practices or clauses in license agreements with authorized resellers prohibiting sales of sunglasses and glasses frames online.

Personal Computer (PC) Video Games (European Union)[5]

The European Commission fined a U.S. video game developer that owns the online PC gaming platform "Steam" and the five publishers Bandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax €7.8 million in total for breaching EU antitrust rules. In particular, the European Commission found that the video game developer and the publishers restricted cross-border sales of certain PC video games on the basis of the geographic location of users within the European Economic Area, entering into the so-called "geo-blocking" practices. Under EU competition law, companies are prohibited from contractually restricting cross-border sales except in very limited specific ways because such practices deprive consumers of the benefits of the EU Digital Single Market and of the opportunity to shop around for the most suitable offer in the European Union.

UK Cases

Since the United Kingdom's departure from the European Union, European Commission investigations will no longer cover the UK market. In this context, it is interesting to monitor whether the UK cases continue to follow similar priorities to the European Union and whether the level of fines changes. In fact, the focus by the UK antitrust regulator and courts on supply and distribution agreements is continuing, for example:

Belle Lingerie[6]

Belle (an online reseller, in particular of lingerie products) recently brought a stand-alone claim for damages before the UK Competition Appeal Tribunal against a Japanese manufacturer and supplier of luxury-branded lingerie and swimwear. Belle is alleging that the supplier breached competition law by maintaining a fixed and minimum retail price policy, in particular requiring Belle to align its advertised and retail prices with the supplier's RRPs on all eBay sites around the world, failing which Belle would have to de-list products from such eBay sites so that they were not visible in consumer searches. This case is an important reminder that minimum advertised pricing policies, which can be permissible in North America under certain circumstances, pose serious antitrust risks in the United Kingdom, Europe, and elsewhere.

Leicester City Football Club-Branded Products Case[7]

The UK Competition and Markets Authority (CMA) is currently investigating suspected breaches of competition law (thought to be resale price maintenance) by Leicester City Football Club and JD Sports in relation to the sale of Leicester City Football Club-branded products and merchandise in the United Kingdom.

Där Lighting[8]

The CMA fined Där Lighting £1.5 million for having restricted retailers' freedom to set their own prices online, requiring them to sell at—or above—a minimum price and thus preventing them from offering discounts. In this case, Där Lighting was sanctioned for giving retailers the impression that the terms of its selective distribution agreement prevented them from offering online discounts.

Key Takeaways

We see the key themes arising from this surge in enforcement activity as being:

- Antitrust regulators in both the European Union and United Kingdom are very much focused on branded consumer goods;
- Investigations can be extremely disruptive, and they typically lead to very high, multimillion financial penalties being imposed on the manufacturers;
- The spike in enforcement activity into vertical agreements is not limited to a particular region but can be observed throughout the European Union and United Kingdom; and
- The most commonly sanctioned conduct involves direct or indirect resale price maintenance, though restrictions on who can sell products online or on marketplaces that lack a legitimate legal framework and basis are increasingly attracting attention.

It is apparent from these cases, and from the magnitude of the financial penalties they involve, that anticompetitive restrictions in supply and distribution agreements will not be tolerated, and will be pursued resolutely. With the recent updates to the EU rules on vertical agreements (which we have written about in a previous **legal alert**), the expectation is that European antitrust authorities will continue to focus on vertical restrictions used in the distribution of branded consumer goods. It is therefore of paramount importance for consumer goods brands to carefully design, monitor, and enforce their distribution strategies (including selective distribution systems) to limit the risk of antitrust exposure, which can lead to substantial financial penalties and reputational damage.

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1 https://www.agcm.it/dotcmsdoc/allegati-news/I842%20chiusura.pdf; https://en.agcm.it/en/media/press-releases/2021/12/I842

2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0230

3 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/02_12_2021_Bose.html

4 https://www.autoritedelaconcurrence.fr/en/press-release/several-eyewear-brands-and-manufacturers-fined-imposing-selling-prices-and

5 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_170

6 https://www.catribunal.org.uk/sites/default/files/2022-01/20220114_1427_Rule_33%288%29%20Summary%20of%20claim.pdf

7 https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-in-relation-to-the-sale-of-leicester-city-fc-branded-products-and-merchandise

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WINE LABELLING: A NEW EU REGULATION IS COMING INTO FORCE IN 2023

By Judith Rinearson and Serena Totino

The EU reform of Common Agricultural Policy (the CAP), published on 6 December 2021, will enter into force on 1 January 2023. Such reform consists of a number of changes to the existing regulations. These changes may have flow-on effects with other consumer markets.

Specifically, wine labelling will be regulated by EU Regulation 2021/2117, which amended four EU regulations, namely Regulations (EU) Nos. 1308/2013, 1151/2012, 251/2014, and 228/2013. Consultations on modernization of the CAP started in 2017, and the legislative procedure was completed at the end of 2021. While a midterm review will take place in 2025, the CAP is meant to cover the period 2023–2027.

The CAP introduces a number of new provisions to be considered by companies operating in the agricultural and wine sector.

The "Electronic" Label

The EU wine industry, unlike food, has not been previously required to list ingredients other than allergens on wine labels. The CAP now introduces such an obligation, with a twist.

The content of physical labels placed on the wine bottle can be limited to a nutrition declaration of the energy value (roughly similar to a declaration of "calories" in the United States) by using the symbol "E." The full nutrition declaration and ingredient list, however, can be provided by electronic means identified on the label itself, such as with QR codes. There are three limitations to this general rule:

1. A listing of ingredients causing allergies and intolerances must be on the "physical" label;
2. "Electronic" labels cannot contain any other information intended for sales or marketing purposes; and
3. No user data can be collected or tracked through electronic means.

A Socially Responsible Regulation

The CAP has been in existence since 1962, and it is intended (among other things) to provide financial support to farmers in order to ensure a stable supply of affordable food. The newest version of the CAP continues to pay large subsidies to farmers, but it also focuses attention on a number of factors of increasing importance to the European Union:

Workers' Rights

The European Union funds for farmers will not be granted unless laws establishing the rights of workers and adequate employment conditions are followed.

Environment and Green Energy

EU member states will have to ensure that at least 5% of funds received from the European Union are directed toward projects aimed at achieving environmental protection, energy efficiency, sustainability, and reduction of the environmental impact of the wine sector as a whole.

Greater Competitiveness

Interbranch organizations that bring together farmers, processors, and distributors with geographical indications can now adopt agreements to share value, costs, and profits without being subject to EU competition rules.

Transparency

There has been progress on the lower alcohol content front. Wines with low alcohol content were included among wine-growing products; total de-alcoholization (alcoholic strength less than 0.5%) has been authorized for table wines. However, addition of water and other elements not obtained directly from the de-alcoholization process is not allowed under the CAP.

The Geographical Application

The CAP applies to products placed on the EU market whether they are produced in one of the EU member states or are imported from a third country, including wines produced in the European Union and exported outside of the European Union, including the United States.

Wine produced and labelled before 8 December 2023, however, may continue to be placed in the EU market until stocks are exhausted.

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FASHION EVENTS AND EXCITING UPDATES

Brand Distribution Strategies in Europe

On 21 June 2022, our London office hosted a hybrid brand strategy panel and summer drinks event.

The session was led by K&L Gates' specialist competition partners Gabriela da Costa, Jennifer Marsh, and Chris Finnerty, who were joined by Kolja Plegt, Managing Director EMEA at POC Sports, and Carolina Bade, Vice President, Business & Offering, Iittala and Local Nordic Brands at Fiskars Group.

The discussion focused on the European Commission's recently published vertical distribution rules (which came into force on 1 June 2022), key questions on everyone's minds, and the new opportunities—and risks—the new rules present for consumer brands.

Luxury Law Summit and Awards, London, 22 June 2022

Congratulations to our Policy and Regulatory partner **Francesco Carloni** for being named a finalist in the Luxury Law Partner of the Year awards for 2022.

K&L Gates was also shortlisted for the Luxury Law Firm of the Year – International Law Firm award.

Congratulations to **Gordon Richie, Managing Director, Crombie** (Scottish fashion label), on winning the K&L Gates-sponsored prize for Business Leader of the Year at this year's awards ceremony (presented by our partner Gabriela da Costa).

Luxury Law Awards 2022 Event Photos

K&L Gates Policy and Regulatory partner, Gabriela da Costa with Gordon Richie, managing director, Crombie.

Credit: Luxury Law Summit and Awards (Global City Media | The Global Legal Post) (2022)

K&L Gates Policy and Regulatory partner, Gabriela da Costa with chief legal officer, Line Køhler Ljungdahl (right) and assistant general counsel, Heidi Winkler, in-house legal team of Bang & Olufsen, which won 'Legal Team of the Year' at this year's Awards.

Credit: Luxury Law Summit and Awards (Global City Media | The Global Legal Post) (2022)

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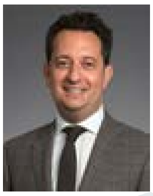

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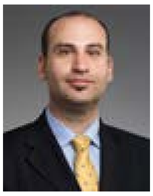

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