

LAW À LA MODE

Edition 4 – Winter 2011

Idiosyncrasies of the Spanish Fashion Market

The Louboutin – YSL Shoe Saga Continues

No Proof Shoes Shaping You Up, Says FTC

Ring in the New Year à la Mode

A Word from the Industry's Mouth
Tom Notte and Bart Vandebosch

New Global Rules for Digital Interactive Marketing

Does Social Media Clash with Luxury Brands?

Are You Ready for the Next Shopping Channel?

Don't Let Genericide Happen to You



Fashion, Retail and Design Group

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Editorial

Law à la Mode Rings in the New Year in the Heart of New York City



Signs of the holiday season abound, from the world's fashionistas navigating snowy sidewalks in their stilettos in search of the perfect New Year's dress to the winter window displays of our favorite department stores that awe children and adults alike. As retailers, designers and consumers reflect on the year that has passed and look forward to the year that is yet to come — the U.S. offices of DLA Piper are thrilled to bring you this issue of *Law à la Mode*, the fashion-style legal magazine distributed to clients and friends of the firm all over the world by DLA Piper's Fashion, Retail and Design ("FRD") Group. Between the buzz and bright lights of the holiday season and the anticipated spring fashion weeks, we have much to celebrate. This issue marks one year since *Law à la Mode's* inaugural issue and we are only getting started — sophomore issues of *Law à la Mode* and FRD global and regional events are already being planned for 2012.

New York is always in vogue for its innovation and holds a beloved place in the hearts of designers, stylists, editors and jet setters alike. This issue highlights that innovation as it applies to the U.S. legal market. We cover the Anti-Counterfeiting Trade Agreement, to which the U.S. is an inaugural signatory. We update you on the U.S. debate over copyrightability of fashion designs. We provide best marketing practices in light of the Federal Trade Commission's recent focus on footwear and apparel products making health and fitness claims. Our coverage of the famous Louboutin – YSL red soles dispute continues; and we give you tips to protect the inherent value of your trademarks from "genericide."

Amidst our focus on U.S. developments, our international perspective is not lost. Milan provides an update on the current status of community trademarks, as determined by the European Court of Justice. We also offer a unique perspective from Madrid on idiosyncratic Spanish fashion consumers, including their dual-love for fast fashion and knock-off

goods. Finally, our *A Word from the Industry's Mouth* column is honored to host an interview with Tom Notte and Bart Vandebosch, the Belgian design duo behind LES HOMMES.

And of course, we cannot ignore the implications the digital cyberscape has on this industry. Stockholm provides the ICC's latest guidelines for digital interactive marketing. Our U.K. real estate experts discuss the intersection of retail leasing with "click and collect" online shopping patterns. The international debate regarding trademarks and Google's AdWords service develops and; last but not least, our social media series focuses on how luxury brands can successfully engage with their consumers.

We complete this issue with our business round-up, tips on how to celebrate the new year *à la mode*, and a calendar of what's on this season, wherever you may be.

The FRD Group loves to hear from you, please contact us at fashion@dlapiper.com. We hope you enjoy this issue and we wish you a happy, healthy and stylish 2012!

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THE DEBATE FOR AdWords OWNERSHIP IN CYBERSPACE CONTINUES

Perspective on cyberspace's latest trademark frontier

“AdWords,” the paid, subscription-based Google referencing service which allows users to advertise their companies alongside Google search results, has recently been the subject of much legal scrutiny. In late September, the European Court of Justice (ECJ) gave a preliminary ruling on questions referred to it by the English High Court in the case between Interflora and Marks & Spencer (“M&S”), regarding the purchase by M&S of the Google AdWord “Interflora” and other similar AdWords.

In answering the questions referred to it, the ECJ repeated much of the recent jurisprudence in this area, in particular from the Google France case. Previous cases established that purchasing a third parties’ trademark as an AdWord would only amount to trademark infringement if such use would have an adverse effect on one of the functions of the trademark.

The ECJ gave the following guidance on how national courts should assess whether the use by a third party of a sign identical with a trademark in relation to identical goods or services has an adverse affect on one of the functions of the trademark:

- The origin function is adversely affected if the advertisement does not permit reasonably well-informed and reasonably observant Internet users to recognize the source of the goods or services referred to by the advertisement as the owner of the trademark. Alternatively, the adverse effect can be established if the Internet user encounters great difficulty in making such a determination, or the Internet user believes the advertisement originates from a third party.
- With regard to the advertising function, the mere fact that the use obliges the owner of that trademark to intensify its advertising in order to maintain or enhance its profile with consumers is not a sufficient basis, in every case, for concluding that the trademark’s advertising function is adversely affected.

- When the use substantially interferes with the owners’ use of its trademark to acquire or preserve a reputation capable of attracting customers and retaining their loyalty, the third party’s use must be regarded as adversely affecting the trademark’s investment function. This is the most significant aspect of the ECJ decision, as any “substantial interference” with the “investment function” of a trademark constitutes infringement.

Interflora operates through a large commercial network, so while the ECJ recognised that consumers could be led to believe that M&S is part of this network, the final determination will be made by the English High Court. It will be interesting to see how the High Court applies this guidance and, in particular, whether the guidance in relation to the investment function will open up new lines of argument for brand owners.

Similarly, under U.S. law, purchasing a third party’s trademark, even a famous trademark, which is accorded heightened protection under the Lanham Act, as an AdWord does not necessarily constitute *per se* trademark infringement. Some U.S. courts have, however, found that such use could be considered trademark infringement if an owner has a valid protectable trademark for commercial use and there is a likelihood that a third party’s use of the trademark will cause confusion in the marketplace.

The Ninth Circuit recently determined in *Network Automation, Inc. v. Advanced Systems Concepts, Inc.* that there was an insufficient likelihood of confusion resulting from a third party’s use of the owner’s trademark as an AdWord to support a preliminary injunction against such use. However, courts may be more likely to find trademark infringement by the purchase of AdWords for use by a third party to trigger a sponsored link through Google’s AdWords service, which implies an association with the trademark to advertise a third party’s competing products.

For example, in *Rosetta Stone Ltd. v. Google Inc.*, the Eastern District of Virginia court found no trademark infringement where Rosetta Stone sued Google for allowing use of its trademarks. However, in *Hearts on Fire Company, LLC v. Blue Nile, Inc.*, the District of Massachusetts court found, on a motion to dismiss, that the use of a competitor’s trademark as a keyword to trigger sponsored links could create a likelihood of confusion under the facts of the case.

As the international debate for trademark ownership in cyberspace continues, trademark owners should be vigilant and continue to be cognizant and knowledgeable of new media and advertising platforms, so that they can adequately protect the value of their trademarks and brands.



Don't let Genericide happen to you

Aspirin. Thermos. Escalator. Cellophane. What do all of these items have in common? If your answer is “objects that MacGyver needs to get out of a sticky situation,” you may be correct, but that is not what we were looking for.

Each of these commonplace, generic terms for the objects that they define were once valuable intellectual property before they lost protection through “genericide,” the process by which trademark rights are diminished or lost as a result of overuse in the marketplace. Genericide can happen in a variety of ways. A trademark owner’s failure to police its mark, for example, can result in widespread use of the term by other sellers, thereby reducing the trademark’s ability to identify source. In other instances, a term intended by the seller to be a trademark for its novel product is understood by the public to be a generic name because there is no other word in the vernacular to describe the product. Both of these fates can be avoided by thoughtful branding strategies.

A recent example of an apparel trademark that some may argue has gone the way of zipper (a trademark once owned by B.F. Goodrich Company) is the onesie – or, as Gerber Childrenswear (“Gerber”) writes it, the Onesie®. The term is pervasively used on the Internet to define one-piece, snap-bottom infant apparel, and the early Wikipedia entry for the moniker simply states, “A onesie or onesize is a kind of T-shirt designed to conceal a diaper when worn.”

Yet a different picture has begun to emerge, thanks to Gerber’s apparent newfound interest in fighting for the registered trademark. Wikipedia’s “onesie” page now redirects to “infant bodysuit” and contains a “Onesies Brand” section discussing the tension between Gerber and those in the marketplace that believe the mark has already become genericized. This Fall, Gerber filed a lawsuit against sellers of children’s apparel using the brand name “oneZ,” and Internet blogs and comment boards are abuzz with various baby apparel retailers complaining about the cease and desist letters received for use of “onesie” on their sites.

While it remains to be seen if Gerber can avoid the genericizing trend and strengthen its arguably weakened trademark rights – much like the textbook examples of Xerox® and Kleenex® – trademark owners should bear in mind that fighting genericide is an expensive, time-consuming process that can be avoided. Branding techniques like resisting the urge to use your trademark as a verb, distinguishing your written mark from other copy, and early policing will go a long way in maintaining your valuable, unique brand.





Are you ready for the next

Are Your Leasing Arrangements Flexible Enough To Adapt to a Change in Retail Strategy?

According to a recent study by CB Richard Ellis, two in five people now shop online. This shift is not surprising to the many people leading busy lives who already enjoy the convenience of ordering from their home or office, and either arranging for home delivery or choosing to collect from a store at a time that suits them. Some of the most successful beneficiaries of this development have been the high street department stores and grocery retailers who have pioneered a multi-channel strategy, which balances Internet shopping capability with a high street presence, to ensure a winning business model. House of Fraser's new store in Aberdeen, UK is just one recent example of a shift towards "click and collect" services.

With both landlords and retail tenants increasingly aware of the need to reduce overhead expenses, and with rent and service charge costs being two of the most significant of those overhead costs, what does the shift to "click and collect" mean in practical terms for retail tenants and their landlords?

What Does This Change Mean for Retail Tenants?

The most obvious consequence is that retail tenants may need to increase their storage capacity to accommodate orders awaiting collection in a brick and mortar retail location that is convenient for the customer. Retail tenants should ensure that their lease accommodates the needed flexibility, such as permitting new storage areas if required. Landlords may wish to consider leasing lots which have prime access to common external areas to retail tenants with a "bricks and clicks" business model, to ensure that bulky goods may easily be transported from the retail store to waiting vehicles without hassle.

Less Space, Less Cost?

Some retailers have suggested that increased focus on Internet shopping will result in a decreased demand for floor area. Whilst many customers still prefer to visit the store to view merchandise before they buy, other customers prefer to simply collect their purchase and examine them at home. If the lease provides that rent is calculated on a square-foot

basis, the resulting drop in rent costs would be appealing to retail tenants. However, this may be unattractive to landlords, particularly where such patterns result in a greater number of smaller lots for rent, thereby increasing administration costs.

Landlords and retail tenants should further consider whether they should switch to a “turnover rent” calculation, which is essentially a commission-based model to calculate rent for a retail lot. Such a strategy would require the retailer to track sales in a detailed manner and a clear understanding between the parties of how different types of sales are to be treated. Should the turnover rent include orders placed at the store, but dispatched from another location? How about orders placed online, but dispatched from the store? Further complexity is added by consideration of orders placed online but returned at the brick and mortar store. Thought should be given to whether orders placed as a result of a customer viewing an item in store, but then placing an order online, can be tracked and included in the retail store turnover rent.

Whilst adoption of a “click and collect” strategy could result in a decrease in demand for floor square footage, demand for use of common external areas (such as service yards for collection of bulky goods) may increase. Landlords and retail tenants should be mindful of the “service charge” provisions in their leases and determine whether such charges are already or are due to be fixed or proportional to the retail tenant’s use of these common spaces. A tenant who does not utilise these common spaces may be unhappy with subsidising its

neighbour’s use, who may be a potential competitor. Landlords should also be wary of how various lease provisions interact with each other. For example, the existence of a “service charge” cap may limit recovery from a retail tenant, even where the retail lease provides that the retail tenant should be responsible for a greater share of service charges because of their proportional use of common spaces.

Third Party Interference?

Landlords and property developers should also be increasingly aware of any rights or restrictions concerning common areas which may inadvertently prevent or restrict their retail tenant’s ability to use the common areas to further their “bricks and clicks” retail model. Particularly, landlords should be wary of retail tenants’ attempts to secure exclusive use of certain common areas, which may interfere with other tenants’ rights.

Future Strategy

The future of retail strategy will inevitably support a multi-channelled retail approach. The practical implications for landlords and retail tenants today require that both parties shift their negotiating strategy at an early stage to ensure that they can accommodate future demands. Developers should also consider these needs as they plan new retail developments or undertake major renovations to existing retail developments. Embracing and considering these strategic changes can result in a rare win-win situation.

Shopping Channel?





Idiosyncrasies of the Spanish Fashion Market

Some decades ago, the Spanish Tourism Authority's advertisements across Europe proudly touted that "Spain is different." In reality, this may indeed be true. Spain is an idiosyncratic country where universality and localism are good friends, crisis and luxury seem to have a passionate relationship, and customs from the past walk hand in hand with the latest trends. This self-contradicting spirit, cultural individuality and inherent diversity are without a doubt reflected in the Spanish fashion market.

The structure of the Spanish fashion manufacturing and distribution market presents a good example. At first sight, this market appears fragile, with a fragmented industry: Eighty percent of Spanish manufacturers and distributors have less than ten employees. However, the strength of the few key players, such as Inditex, the largest manufacturer-distributor in the world and architect of the *fast fashion* concept, make Spain an extremely competitive and aggressive fashion market. Buying *fast fashion* is not just a need or desire in Spain; it is part of the essence of the Spanish lifestyle.

The Spanish retail market is similarly situated. Louis Vuitton's Fashion Director recently referred to Zara, Spain's world renowned fast fashion retailer, as "possibly the most innovative and devastating retailer in the world." Zara's success is a reflection of the Spanish consumer. Spanish consumers have constantly evolving preferences; yet the fashion market is not without its difficulties. Product moves slowly (attributed to today's hard economic times), product lifecycles are short and there is constant pressure to follow the latest fashion trends. This makes the Spanish retail business (and, by comparison, the European market in general) a serious strategic and logistical challenge where only the fittest can survive.

Spanish consumers themselves exhibit conflicting behavior and are the source of many of these idiosyncrasies. Consumers are fashion conscious and strive to follow the trends, but at the same time, are hardly inclined to pay a premium for the inherent value of such creativeness. This leads to the lavish availability of fake products in the streets of Madrid and Barcelona, and likewise across the country, particularly rampant are knock-off accessories, including handbags, belts, wallets, etc. These products are welcomed by the masses, whose pockets have been fiercely punished by today's economy, but not enough to warrant renunciation of their consumptive habits. The market will likely continue to evolve, particularly due to the E.U.'s prospective consideration of joining in the Anti-Counterfeiting Trade Agreement (Turn to page 13 of this issue for an analysis of this Agreement by our colleagues in Chicago).

Similar issues emerge when you consider the applicable legal framework. Despite best efforts by E.U. authorities to offer a harmonized environment to European players, Spain's regional configuration, formed by a bouquet of seventeen autonomous regions and two autonomous cities, results in a multiplicity of overlapping legal regimes that affect and influence commerce, consumer protection, environmental and many other related matters. Leading political figures have admitted the need for an improved structure that favors business endeavors, but to date these plans are merely well intentioned blueprints or openly wishful thinking.

Notwithstanding these troubles, the Spanish fashion market remains intimate and charming for many of the players, who manage to rise above these challenges and have lived to tell their story of immense commercial success in Spain.

U.S. FASHION COPYRIGHT PROTECTION

Still in a State of Limbo

Job Seese (New York)

Our Spring 2011 issue discussed a pending U.S. legislative bill that would expand copyright protection to fashion designs – something that generally is not available under existing U.S. law. Known as the Innovative Design Protection and Piracy Prevention Act (IDPPPA), the bill was first introduced in the Senate in August 2010. However, the bill was never taken up by the full Senate and effectively died at the end of that Congressional session. Currently, a legislative bill of the same name is pending before the U.S. House of Representatives Subcommittee on Intellectual Property, Competition and the Internet.

The bill is the latest in a long series of legislative efforts to address the lack of a clear legal framework in the U.S. for protecting fashion designs against infringement, beyond patent and trade dress protections. The bill also represents what can be viewed as a compromise position between the Council of Fashion Designers of America and the American Apparel and Footwear Association, wherein the interests of the creative designers have been balanced against those more focused on high volume manufacturing and distributing.

The IDPPPA would reverse decades of American case law and amend U.S. Copyright Office policy – by adding “apparel” and “fashion design” to the categories of creative work eligible for copyright protection. Under the IDPPPA, copyright protection would attach automatically (that is, without any need for the designer to register the design with the U.S. Copyright Office) at the time of first public appearance and would protect designs from “substantially identical” copies for three years.

Jovani Fashion, Ltd. v. Cinderella Divine, Inc., a recent federal district court decision in New York, illustrates the vacuum that the IDPPPA is intended to address. The case involved a copyright infringement action brought by a manufacturer of prom dresses, Jovani Fashion, Ltd. against several competitor manufacturers and retailers that Jovani alleged were manufacturing or selling infringing designs. The court held that Jovani failed to demonstrate that the dress design at issue was entitled to copyright protection.

In reaching its decision, the court noted that, under existing U.S. law, clothing designs are classified as “useful articles” and thus “are largely unprotected by the Copyright Act.” The court observed that design components of useful articles are eligible for copyright protection only to the extent that they “incorporate[] pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” The court concluded that none of the elements of the dress design at issue were “physically or conceptually separable from the dress as a whole.”

The *Jovani* decision illustrates the need for greater legal clarity for the fashion and retail industry. In determining whether the dress’s artistic features were separable from its utilitarian features – the so-called “separability test” – the court noted that the test “has proven difficult to apply, and courts ‘have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article’s utilitarian function.’” By contrast, under the IDPPPA, the relevant test would simply be whether the dress contained original elements, or an original arrangement of elements, that provides a “unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.” If so, the dress would automatically qualify for protection under the Copyright Act as a creative work.

According to proponents, the IDPPPA would provide designers with a more effective weapon against the cheap knockoffs that plague the industry, and industry trade groups have lined up in support of the bill. Opponents, on the other hand, argue that the proposed law would encourage frivolous litigation and would drive up the prices of high-end apparel and accessories. For now, however, the biggest impediment to passage appears to be not opposition to the bill, but Congress’s preoccupation with other priorities.



For the Love of RED ... SOLES

THE LOUBOUTIN – YSL SHOE SAGA CONTINUES



Red-soled stilettos for only \$39.99? French luxury shoe designer Christian Louboutin continues the fight to protect its iconic “Chinese red” soles. This past August, a U.S. federal district court denied a preliminary injunction against Yves Saint Laurent (YSL) and issued a decision that questioned the validity of Louboutin’s red-sole trademark. On October 17, 2011, Louboutin’s lawyers appealed that decision to the U.S. Court of Appeals for the Second Circuit. Shortly thereafter, premier jeweler Tiffany & Co. filed an *amicus* brief in support of Louboutin, furthering the fight to protect color as a trademark. The International Trademark Association (INTA) also filed an *amicus* brief on November 14, 2011 taking the position that the District Court erred in rejecting the U.S. presumption of validity attendant to Louboutin’s federal trademark registration. Further, INTA argues that the District Court incorrectly construed the Louboutin’s registration as a broad claim to the color red instead of the narrower claim to “lacquered red sole on footwear,” which is what the registration actually covers. The Court of Appeals is left with the daunting task of determining whether and when color may function as merely a design element versus a source-identifying trademark.

Some would argue that over the course of twenty years, Louboutin’s red-sole trademark has become one of the world’s most renowned and internationally recognized brands. According to Louboutin’s brief, “Louboutin’s 2011 U.S. retail sales projections for its footwear are \$135 million.” The Louboutin mega-million dollar power house has much at stake should YSL’s legal position continue to gain footing. Others would argue that the nature of color in the fashion industry serves a special function and cannot be relegated to simply designating the source of a product. Given the

arguments on both sides of this issue and the potential for the appellate court decision to have an impact on the industry overall, this will be among the most closely watched U.S. cases in the fashion industry in the coming year.

For starters, this pending decision could change legal precedent regarding the protectability of color as a trademark in the United States. Under American trademark law, color on a fashion item can serve as a trademark brand so long as it has acquired secondary meaning and is not essential to the use or purpose of the item or affect its cost or quality. Fashion consumers arguably regularly associate colors with reputable brands, including Hermes’ orange, Burberry’s classic beige plaid and Tiffany’s robin’s egg blue.

Even so, an unfavorable ruling for Louboutin could severely circumscribe color protection for fashion designers. Designers already have limited recourse in protecting their valuable apparel and shoe designs, especially in the United States. Lack of protection of a color scheme itself will become yet another unavailable protective mechanism.

Despite the availability of countless shades of red and other colors for high fashion and as equally not-so-high fashion shoe designers to use on the bottoms of their soles, an affirming decision by the Court of Appeals could, to Louboutin’s dismay, essentially grant opportunists a “license to copy.” Overzealous competitors would have a license to freely use the color red or another similarly situated color on their shoe bottoms without any sort of ramifications. In turn, third-party use of the red soles, particularly in the lower end markets, could devalue Louboutin’s brand and the precious notoriety that it has developed over years of marketing and quality production. The question then is whether Louboutin’s



Under American trademark law, color on a fashion item can serve as a trademark brand so long as it has acquired secondary meaning and is not essential to the use or purpose of the item or affect its cost or quality.

Radiance A. Walters
(Washington D.C.)

signature red soles still have the same desirable “whip appeal” to celebrities and fashionistas worldwide.

Regardless of the specific outcome of the Louboutin – YSL shoe saga, this case will have significant implications on competition in the fashion industry. On the one hand, the district court opined that, “awarding one participant in the designer shoe market on the color red would impermissibly hinder competition among other participants.” On the other hand, however, Louboutin’s lawyers rebutted in their brief to the Court of Appeals that, “competition has remained vigorous in the designer shoe market throughout nearly twenty years that Louboutin has made substantially exclusive use of the red outsole as a brand identifier.”

If necessary, Louboutin is prepared to fight all the way up to the U.S. Supreme Court. Win or lose, Louboutin has undoubtedly influenced how the world perceives and reveres the soles of a sleek pair of stiletto heels. But will the Court of Appeals render another no-go for Louboutin’s red-sole trademark? Stay tuned . . . as the story continues to develop.



EDWIN CO. v. ELIO FIORUCCI

A Designer and Company Sharing a Name? Be Careful of the Pitfalls!

In 1967, the well-known Italian fashion designer Elio Fiorucci founded the fashion brand Fiorucci S.p.A. After more than two decades of success in Italy and around the world, Mr. Fiorucci sold the company and all of its creative assets to the Tokyo Company Edwin Co. Ltd in 1990. The sale encompassed all the Fiorucci trademarks, including numerous marks containing the element “FIORUCCI.”

In 1999, Edwin Co. registered the mark “ELIO FIORUCCI,” by filing an application with the Office for Harmonization for the Internal Market (OHIM), which is a body of the European Commission, for a broad category of goods, including cosmetics, apparel, footwear and leather products.

Mr. Fiorucci Fights to Protect his Name

In 2003, Mr. Fiorucci filed an application for revocation and declaration of invalidity of the

mark “ELIO FIORUCCI” with the Cancellation Division of OHIM pursuant to Italian law, in an attempt to protect his personal ownership of his name. The OHIM Cancellation Division dismissed the application for revocation but granted the application for declaration of invalidity relying on Section 8(3) of the Italian Industrial Property Code (IIPC) which states: “*If they are well known, the following may be registered as a trade mark by the proprietor or with the consent of the latter: personal names, signs used in the artistic, literary, scientific, political or sporting field . . .*” The Cancellation Division stated that, in order to register Mr. Fiorucci’s name as a Community trademark, Edwin Co. should have obtained the prior consent of the name’s holder.

Edwin Co. Appeals the Decision and Mr. Fiorucci Continues the Battle

In response to Edwin Co.’s appeal, OHIM’s First Board of Appeal annulled the decision arguing that “*this situation did not fall within the scope of Article 8(3) of IIPC whose purpose is to prevent third parties from exploiting for commercial purposes the name of a person who had become famous in a non-commercial sector and is not applicable to this hypothesis.*”

In 2006, Mr. Fiorucci challenged the Board of Appeal’s ruling with the Registry of the General Court. The Court rejected the Board of Appeal’s findings. It confirmed that OHIM may declare a Community trademark to be invalid, on application by the interested party, if its use can be prohibited pursuant to the right to a name, as it is protected by national law (which in this case, was Italian law).

The CJEU Decision and Its Implications

In July of this year, the Court of Justice of the European Union (CJEU) upheld the General Court’s decision, stating that the holder of a well-known personal name is entitled to prevent its use as a Community trademark where there are national laws in place supporting this level of protection.

This decision is significant because it underscores the importance of national intellectual property law, even when international use is implicated. Moreover, the twelve year legal battle that ensued serves as a cautionary tale for fashion designers operating businesses where their own personal name has become synonymous with the inherent commercial value of a brand or its products—and perhaps should become a central inquiry at the time of a successful business’ sale. A fashion designer’s right to his or her name creates an interesting series of legal issues, and trademark lawyers should continue to watch international developments regarding Community trademarks.





GLOBAL DEVELOPMENTS REGARDING THE ANTI-COUNTERFEITING TRADE AGREEMENT

Those involved in the fashion and retail industries are well aware of the challenges associated with combating the global proliferation of commercial-scale counterfeiting and piracy. With legal rights and remedies often varying on a country-by-country basis, enforcement of intellectual property rights on an international scale can often be fraught with unexpected hurdles and inconsistent outcomes. The Anti-Counterfeiting Trade Agreement (“ACTA”) aims to change that.

On October 1, 2011, eight countries signed ACTA, namely Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the U.S. A signing ceremony was held in Tokyo by the Government of Japan. Representatives of the E.U., Mexico, and Switzerland attended the ceremony and confirmed their continuing support for ACTA. Those three sovereignties are in the process of finalizing domestic procedures in preparation to sign, and their signatures are expected by May 1, 2013. Collectively, these eleven countries represent more than half of the world’s trade.

ACTA signifies an important step forward in the international fight against trademark counterfeiting and copyright piracy. It establishes a legal framework on an international scale that includes criminal enforcement, border measures and civil and administrative actions. Specifically, ACTA gives border enforcement authorities the ability to act on their own initiative to suspend the release of, or to detain, both imports and exports of counterfeit and pirated goods. It authorizes criminal authorities to initiate investigations or legal actions with respect to piracy and counterfeiting cases rather than having to wait for a complaint to be filed. ACTA further provides for criminal procedures and penalties where willful piracy or counterfeiting is carried out for commercial advantage. Criminal remedies are also made available for willful importation or domestic use of labels and packaging for counterfeit goods. In addition, ACTA contains

enhanced civil enforcement provisions concerning damages, including the ability to recover costs and attorneys fees and to destroy infringing goods. Further, ACTA clarifies existing international requirements to protect against circumventing digital security measures and promotes best practices to aid in enforcement.

In theory, under ACTA, brand owners and copyright holders will have better access to a consistent legal system to crack down on counterfeiters and pirates; will be able to obtain court orders to stop illegal activity; and will be able to secure meaningful damages remedies when their rights are violated. While ACTA may make enforcement easier in many countries, some of the largest markets for pirated and counterfeit goods are not included and the world-wide fight against counterfeiting is far from over. Brazil, China, India, Russia and South Africa all contribute to the world’s counterfeiting and piracy problems, and none are parties to ACTA.

Some countries are concerned that while ACTA significantly enhances protections for intellectual property rights- holders, it simultaneously threatens the critical balance of intellectual property law and challenges due process rights of citizens. For example, the Brazilian parliament is debating recently proposed “Anti-ACTA” legislation. The proposed legislation contains provisions that protect Internet neutrality and individuals’ privacy and personal data. Brazil’s proposed legislation attempts to guarantee protections for Internet users and prohibits the strong enforcement measures that ACTA provides.

While counterfeiting and pirated goods continue to affect world trade, ACTA seeks to offer some consistency in the application of the variety of methods for brand owners and copyright holders to combat counterfeiting and piracy. It remains to be seen, however, how these rights and remedies will operate in practice, especially for the fashion and apparel industries.



Michelle Schaefer
and
Alexandra Marzelli
(Washington, D.C.)

NO PROOF SHOES SHAPING YOU UP, SAYS FTC

In September, the U.S. Federal Trade Commission (“FTC”) – the consumer protection agency tasked with regulating U.S. advertising practices for consumer goods – warned companies selling apparel and footwear in the U.S. that all health and fitness claims must be substantiated by competent and reliable scientific evidence. This warning came from the FTC’s lawsuit against Reebok International Lmtd. (“Reebok”), for alleged deceptive practices related to certain footwear including running sneakers, walking sneakers and flip-flops. Reebok was charged with making “unsubstantiated claims” that the footwear provides extra tone and strength to key muscle groups (including the buttocks, hamstrings and calves) and strengthens various muscle groups by a certain percentage. Under the settlement, Reebok agreed to pay \$25 million in refunds to consumers. Reebok has stated that the settlement does not indicate agreement with the FTC’s allegations and it will continue to sell the products at issue, but will market them differently.

Class Action Lawsuits Pre-date the FTC’s Enforcement Action

Through this action, the FTC cautioned the industry that it will pursue companies that make health and fitness claims without an adequate basis, and impose substantial penalties on them, including restitution to consumers. As is often the case with U.S. regulatory action, FTC’s enforcement activity comes on the heels of class action lawsuits filed across the U.S. against several footwear companies. Generally, these lawsuits allege that the companies falsely represented the physical benefits of their “toning” shoes by promising consumers tighter and stronger bodies. Notably, the FTC’s lawsuit against Reebok appears to have prompted further class action lawsuits, with plaintiffs relying on the FTC’s action against Reebok as a basis for their complaints.

As the FTC continues to focus on health and fitness claims, footwear and apparel companies should have policies in place to ensure that their product claims are substantiated by the proper level of science before marketing their products.



Best practices for marketing products with health and fitness claims

Implications for Footwear and Apparel Industry

Toning shoes are not going anywhere. These shoes have proven to be one of the footwear industry's smash hits generating more than \$1 billion in revenue in 2010.

Companies will surely continue to introduce new shoes and apparel with toning or strengthening attributes. The FTC's pursuit of Reebok signals its focus on the burgeoning market and its intent to require companies to have an adequate level of proof if they make such claims.

Who's Next?

Shapewear is another fashion category with a growing market that FTC may start focusing its attention on. Shapewear is reportedly \$812.5 billion business. "Shapers" are being worn every day by women and men of all ages and sizes who are hoping they will help smooth the silhouette and make clothes fit better. The category includes undergarments that come in all sorts of shapes and forms, from tank tops and body suits with layers of support lining, to tights and pants with heat-sealed control panels and briefs with engineered stomach control. Many of these products make "calorie burning," "shaping, toning and slimming," "anti-cellulite," and "posture support" claims. FTC's approach to the footwear market makes scrutiny of claims related to Shapewear likely.

Best Practices

As the FTC continues to focus on health and fitness claims, footwear and apparel companies should have policies in place to ensure that their product claims are substantiated by the proper level of science before marketing their products.

The settlement with Reebok identifies the FTC's newly articulated evidence standards and key compliance guidance for companies that wish to make health and fitness related claims. In light of these standards, companies should consider the following strategies:

- Develop marketing strategies focused on compliance by standardizing, streamlining and establishing best practices across all departments.
- For quantifiable health related claims, (e.g. walking in these shoes will lead to x% more strength), possess substantiation in the form of at least one adequate and well-controlled human clinical study that is randomized, blinded, of at least six weeks duration, and that uses an appropriate measurement tool or tools (e.g., a dynamometer if measuring strength).
- For general health or fitness benefit representations about a product, have substantiation in the form of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, and that are generally accepted in the profession to yield accurate and reliable results.
- Review the content of all marketing and promotional materials related to the sale, manufacturing, labeling, advertising, promotion, distribution, packaging and advertising of products to identify all potential claims and to ensure adequate substantiation of those claims exists. Include all marketing outlets, such as print, television, movies, the Internet, social media, endorsements, depictions, illustrations and displays.
- Assess relevant products currently in inventory, on store shelves, or on order and determine whether any of the products are subject to FTC's newly articulated standards.

Though the required protocol for particular products may vary, consideration of and attention to these standards will assist in ensuring that footwear and apparel companies are headed in the right direction and will not run afoul of the FTC's latest articulated guidelines.



DLA Piper's
**Fashion, Retail, and
Design Group**

wishes you a Happy Holiday Season



NEW GLOBAL RULES FOR DIGITAL INTERACTIVE MARKETING

The new digital landscape and its embrace by the corporate world create new challenges for all marketing professionals at a pace that has never before been encountered. In fact, organisational procedures and legal standards are struggling to keep up. Few jurisdictions have marketing regulations in place that are up-to-date with the latest digital possibilities. Social media can be an effective tool for marketing and brand awareness, but it also poses great challenges for marketing professionals navigating new issues. (Turn to pages 20 – 21 for the latest edition of our social media series, where our U.S. colleagues discuss these branding issues as they relate to luxury brands).

On September 15th, the International Chamber of Commerce (ICC) presented its new 2011 Consolidated ICC Code of Advertising and Marketing Communication Practice (the “Code”). The Code raises the standards for consumer protection globally and also includes new online rules. It is recognised as the gold standard for self-regulation and now offers best practice guidance across all sectors, technologies and platforms and guides marketing professionals as they deal with many of the most challenging topics, such as Online Behavioural Advertising (OBA), marketing in digital interactive media, privacy protection, environmental claims and marketing to children.

The Code sets detailed conditions and limits for OBA, providing for explicit consent by the consumer and regulating both marketers and website operators participating in OBA. This requirement also concurs with the amended E.U. ePrivacy directive that requires the user to consent to the use of cookies, which should have been implemented by all E.U. member states by May 2011. For digital marketing

communications, the Code provides clear rules for engagement. It provides that the commercial nature of an online communication may not be concealed and marketers who control content for a social network site should take appropriate steps to ensure this. There are also specific criteria dictating when marketers are permitted to send individually addressed, unsolicited marketing communication via digital interactive media. Consumers should also be given the right to opt-out. The Code also includes a provision regarding respect for the potential sensitivities of a global audience, given the reach of electronic networks and sets limits to marketing communications via public groups and at meeting places. Moreover, communications directed to children in a particular age group should comply with specific requirements and parents should be encouraged to supervise their children’s interactive activities.

The Code adds another layer of protection for consumers’ personal data by providing clear guidance on consumers’ rights, including the right to know what information is acquired by a marketer and the standards for the collection, use and security of personal data when it is collected. There are also specific restrictions on disclosure of a child’s personal data to third parties.

Responsible marketing and advertising is becoming increasingly difficult and even more important in this viral era. Internal communication tools and legal consideration of new market initiatives on a regular basis are important factors in creating successful and compliant campaigns. The new ICC Code is an important step in order to streamline international marketing and meet its new challenges.

A WORD FROM THE INDUSTRY'S MOUTH

TOM NOTTE AND BART VANDEBOSCH

Insight directly from the design duo behind LES HOMMES

I met Tom Notte and Bart Vandebosch, the two charismatic Belgian fashion designers behind the label LES HOMMES, which is distributed by over 100 high-end fashion shops all over the world. Both graduated with honours from the renowned Fashion Academy in Antwerp, Belgium, where they first met.

What moved you both at that time to enroll at the Fashion Academy of Antwerp?

Bart: For me it was more than evident to choose a fashion education because I have always been fascinated by fashion and visual arts in general. I grew up in an artistic environment, my father draws and paints, and my two brothers all obtained arts degrees. Of course, I chose specifically the Fashion Academy in Antwerp because it is one of the best fashion schools in the world.

Tom: My passion lay also in fashion and design. However, as I came from a more classical and entrepreneurial family, it was not really an option for me to pursue an artistic education after high school. I first went to university to study Economic Science. However, this was not my cup of tea and so after a year I started Graphic Design at the Academy, where I learned to draw. It was a great experience and the perfect preparation for a fashion education. After two years of Graphic Design I finally registered at the Fashion Academy in Antwerp, also thanks to the encouragement of my professors.

Your label LES HOMMES has now existed for seven years. Could you briefly explain how it all started?

Bart: Already during our third year at the Academy the idea grew to make our own collection. Soon after we met we became close friends, and later also a couple. We worked together intensively on our collections for the Academy. In those days we sensed quite quickly that we shared the ambition and the enthusiasm to create one day our own label.

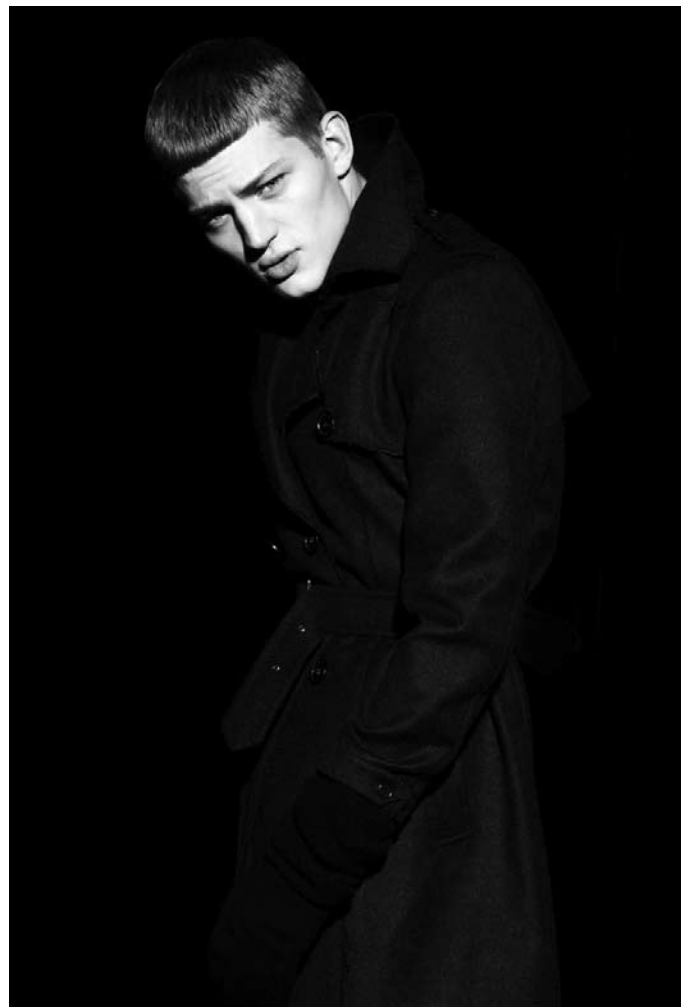


Photo courtesy of Tom Notte and Bart Vandebosch – From LES HOMMES' current look book

Tom: Our ambition got also stronger through the encouragement of our professors. The ultimate goal of the Antwerp Fashion Academy is really to prepare the students to become eventually independent fashion designers, who are capable to create their own collections. Already in our third year at the Academy we were embittered by this idea and even the name LES HOMMES was already decided back then.

How did you come up with the name LES HOMMES?

Bart: It was important to have an appealing name with an international and institutional flavour. LES HOMMES seemed the perfect choice to us, since it represents Tom and Bart.

I have read in the media that Tom Notte and Bart Vandebosch have quite opposite personalities. Could you explain how this reflects in your collections?

Bart: The strength of the creations of LES HOMMES is that we draw the collections together, each of us with its own vision and input. The fine-tuning of each design constitutes a pure synergistic process. If we do not agree regarding a certain silhouette we will not go through with it.

Tom: The difference in our personalities makes that there exists a perfect balance in the development of our collections. I have a more commercial approach, while Bart is more artistic and dares to create extreme silhouettes. For example, he would design an oversized coat, but I will then ask: "Is this something that people will wear?" This ensures that our silhouettes fit perfectly in the market. They are fashionable, elegant and creative, but still wearable and saleable.

LES HOMMES' main activities are located in Milan. Why Milan?

Tom: Milan is the number one in terms of men's fashion. The main fashion houses and factories are based in Milan, which makes the advantages on a operational level enormous. Also the sun shines there more often than in Belgium.

Bart: In Antwerp you only have two major fashion companies, Dries Van Noten and Ann Demeulemeester, which makes it more difficult to scout good talent. In Milan, you have a constant flow of really competent and experienced people.



Photo courtesy of Tom Notte and Bart Vandebosch – LES HOMMES' flagship store in Antwerp

To conclude, what are your ambitions for LES HOMMES for the future?

Bart: We will certainly develop further our retail network. One year ago, we opened our first flagship store in Antwerp, which is a success. We plan to open more of them in Belgium and abroad.

Tom: The aim is also to expand worldwide the wholesale of our collections and to strengthen our image. We would like to continue our philosophy of delivering high quality and creative designs and eventually to become the number one brand internationally.

DOES SOCIAL MEDIA CLASH WITH LUXURY BRANDS?

Fashion is an integral part of how consumers construct their personal identities and choose to portray themselves in their everyday lives. From a societal perspective, we correlate luxury fashion brands with success and exclusiveness. We notice individuals with red-soled stilettos or LV patterned brown leather purses because we know that while these individuals could have chosen from a variety of options, they chose to identify themselves with expensive emblems of status. This aura of exclusiveness is the value that luxury brands provide to their consumers: few can have it; the others merely aspire to it.

Social media stands in stark contrast to this image. Social media platforms are inherently noisy, crowded and easily accessible from a variety of platforms. This dichotomy begs the question: will using social media tarnish the value of luxury brands by making them too accessible by the masses?

Why Risk It

The reasons for fashion brands to have a social media presence are compelling. In the U.S. alone, eighty percent of people with an income over \$250,000 are social media users according to Unity Marketing research. Another study by L.E.K. Consulting showed that individuals earning more than \$150,000 is the only segment increasing spending during the current recession. These statistics are evidence enough for luxury brands to open their marketing doors to new media platforms. The challenge, however, remains engaging without jeopardizing or “degrading” the brand.

Using Social Media to Connect with Existing Customers

The luxury brands that are using social media effectively have found the right “voice” for their brand. First, translating a luxury brand into a social media space requires not

just implementing an isolated social media strategy. Rather, luxury fashion brands must remain cognizant of the marketing strategy that has worked to create this exclusiveness, and subsequently integrate social media platforms, as appropriate, into their overall communications and marketing strategy.

For luxury fashion brands that pride themselves on elitism and inaccessibility, carefully translating this character to social media is key. While communication on Facebook, Google+ and Twitter is inherently casual, these platforms can also be used effectively to make personal connections with consumers and expand the in-store experience. For example, one luxury clothing brand encourages fans to submit photos and videos of themselves on Facebook modeling their products. Another well-known luxury wedding dress designer has her own iPhone wedding planning application for brides. A high-end shoe designer has a “treasure hunt” on Foursquare, a popular geo-location social media platform in the U.S.

What distinguishes brands that are successful with social media from those who merely set up an unmoderated Facebook fan page and attempt to acquire as many “likes” as possible is that the successful companies encourage their customers to engage with the brand in meaningful ways. This interaction, combined with effective conversations between consumers and the brand, reinforce brand loyalty and engage the consumer post-purchase.

How luxury brands have dealt with the changing social media landscape



However, luxury brands' investment in social media is not just about the customer; it also provides an unprecedented feedback loop of research back to the company. Social media allows communications and marketing departments to evaluate perceptions of the brand instantaneously as it is expressed in social media in order to fine tune the brand's message and product development. Social media reveals what consumers really think about the brand— whether it is good, bad or indifferent. The goal is to do more than simply track website traffic, but to develop true insight by listening to the spontaneous conversations expressed throughout social media and using that information to determine how it impacts the brand. This can reveal current and potential groups of customers, popular online retailers, product preferences, online influencers and lead users.

Using Social Media to Create with Future Customers

Every brand is faced with the difficult balancing act of maintaining their well-cultivated image, dialoguing with existing consumers, and grooming a connection with the newest generation of customers. For luxury brands, this is particularly difficult since the next generation, on average, lacks the financial capital necessary to consume. The challenge has been making the brand accessible at affordable prices in order to engender early loyalty while not tarnishing the brand's aspirational status. Social media platforms provide unprecedented communications vehicles to achieve this bimodal goal: not only does evidence suggest that their existing customers are using social media, but it goes without saying that their future customers are the digitally entrenched millennial generation.

Social media, and in particular, the growing concept of social buying, has given luxury brands a unique opportunity to make their products accessible to a younger generation. Websites like gilt.com and renttherunway.com have made luxury goods accessible to a younger generation with moderate price points on limited products. Sites like Australia's Fashionising.com and Canada's FashionMash.com have become online hubs communities sharing fashion trends and styles. This media platform allows "aspirational" consumers to begin to develop their loyalties with luxury products that were previously unavailable. By offering a limited selection on an off-site location, luxury brands are introducing new customers to their products without diluting the exclusiveness associated with the main brand.

Shift from Risky to Essential

For luxury brands, participating in social media has shifted from being risky to essential. Not only have these channels become part of their existing customers' dialogue, but it has created unprecedented opportunities to foster future consumers. The challenge, however, is that while any brand can have a social media presence, luxury brands must engage in more calculated, thoughtful approaches. They must recreate the brand experience and foster genuine dialogue using these channels. Above all, high-end fashion and luxury brands must have a social media presence that complements and reflects their reputations, or they risk losing their competitive advantage.

Business Round-up

Rachael Histed
(Birmingham)

ASBESTOS RELATED CONVICTIONS BACK IN FASHION

A major high street retailer was fined £1 million and ordered to pay £600,000 in prosecution costs due to asbestos management failings during an in-store refurbishment programme this past September.

The retailer was found guilty of failing to ensure, so far as reasonably practicable, the health and safety of its employees and members of the public, at a UK store in 2006, which was a breach of Sections 2(1) and 3(1) of the United Kingdom Health and Safety at Work etc. Act of 1974.

The judge commented that because the process “was already costing the company too much money,” the retailer had turned “a blind eye” to what was happening. This underscores

a major aggravating feature in health and safety cases where retailers put profit before safety. The size of the fine also reflects the possibly fatal consequences of asbestos exposure and the high volume of customers potentially exposed to asbestos due to the premises’ retail nature.

No doubt the severity of the fine will act as a wake-up call for retailers, whilst confirming that asbestos-related offences remain high on the UK regulatory agenda. Companies must continue to comply with health and safety requirements, diligently managing any store refurbishments, in order to protect their employees, customers and their reputation.

The Latest Salvo in the Fur Apparel Debate: WEST HOLLYWOOD BANS FUR SALES – FOR NOW

West Hollywood is making headlines for something other than star sightings: Its city council has approved an ordinance that bans the sale of all fur apparel. In its defense of a move that affects up to 46% of the city’s apparel retailers, the council continues to confront a groundswell of opposition. Advocates view the ordinance as an important step in the battle against animal cruelty, opponents see an arbitrary law that will do little to prevent fur sales (after all, one merely will need to cross into neighboring Los Angeles or Beverly Hills to purchase fur apparel). As retailers threaten to relocate their businesses, and opponents predict a dire economic domino effect, the council revisited the ordinance at its November 7th meeting and again approved it, but with a delayed implementation date of 2013. In the meantime, the city’s mayor has called for an independent study of the economic impact of the ban. If the study shows significant harm, he promises the law will be revisited and changed in as soon as six months.

Meanwhile, the fur industry argues that the ban is unnecessary because its certified sourcing program, Origin Assured and the associated “OA” label, shows consumers that the fur has been obtained from approved countries (i.e. those with animal welfare regulations governing fur production) and species.

The West Hollywood brouhaha may be symptomatic of a broader movement concerning the fur industry in the U.S. In December 2010, President Obama implemented the Truth in Fur Labeling Act. The Act closed a much-maligned loophole in labeling law that excepted goods valued at less than \$150 from the federal requirement that all fur products be labeled as such. The loophole, it is argued, misled consumers and thwarted their attempts to abstain from purchasing fur products.

However West Hollywood resolves the question, one thing is for sure: Although the memorable days of red paint attacks on fur coats may be over, the fur apparel debate rages on.

Alexandra Marzelli and Michelle Schaefer
(Washington D.C.)




Ring in the New Year à la Mode

Alexandra Marzelli and Michelle Schaefer (Washington D.C.)


With the holidays just around the corner, the eternal (read: annual) question reemerges: *What to wear on New Year's Eve?* Although here in the U.S., the answer is dictated by the current fashion trends, many other countries take a more traditional approach. Meanwhile, many other traditions around the world focus on food, not fashion. Still others require action as part of the celebration.

A few examples for your consideration:

Denmark
Stand on a chair and, at the stroke of midnight, jump off to symbolize jumping into the new year with good luck. Or, throw your unwanted plates saved throughout the year against your friends' front doors—the more broken plates on the doorstep, the better.




Italy
Wear red underwear for luck, love, or both.




China
Give your significant other zodiac-embazoned red underwear to ward off bad luck in the coming year.

The Netherlands
Burn old Christmas trees to discard the old and bring in the new.




Panama
Burn famous people in effigy to drive off the evil spirits of the previous year for a fresh start.


Brazil, Ecuador, Bolivia and Venezuela
Wear yellow underwear for fortune in the coming year and red underwear for love.




Estonia
Eat 7 times on New Year's Day to stave off hunger (and gain the strength of 7 men) in the coming year.



Spain
Eat 12 grapes, one for each month, as quickly as possible at the stroke of midnight for good luck.



Philippines
Wear polka dots, their round shape symbolizes coins, which bring fortune in the coming year.



No matter how you choose to celebrate, DLA Piper's Fashion, Retail and Design Group wishes you a **Happy, Healthy and Stylish 2012!**

Calendar

(December 2011 – February 2012)

Compiled by: **Job Seese** (New York)

DECEMBER

Daphne Guinness Exhibition,
The Museum at the Fashion Institute of
Technology, New York
September 16 – January 7

**The Fashion World of Jean Paul
Gaultier: From the Sidewalk to the
Catwalk,** Dallas Museum of Art
November 13 – February 12

Milan Fashion pre collection Fall
November 15 – December 15

FEBRUARY

Norwegian Fashion Week, Stockholm
February 6 – 12

New York Fashion Week
February 9 – 16

London Fashion Week
February 17 – 22

Berlin Fashion Week
February 18 – 20

Milan Fashion Week (Men's)
February 22 – 28

Ready-Wear, Paris
February 28 – March 7

Paris Fashion Week (Women's)
February 28 – March 7

JANUARY

Pitti Immagine (Men's and Women's), Florence
January 10 – 13

Milan Fashion Week (Men's and Women's)
January 14 – 18

Hong Kong Fashion Week
January 16 – 19

Paris Fashion Week (Men's)
January 18 – 26

I Interfilie Paris, Paris Cross-Sec – R
January 21 – 23

Fame, Paris
January 21 – 24

Haute Couture, Paris
January 23 – 26

Hong Kong Fashion Week
January 16 – 20

Munich Fashion Week
January 26 – 28

Mercedes-Benz Fashion Week, Stockholm
January 29 – February 1

Cibeles Fashion Week, Madrid
January 30 – February 5

080 Barcelona Fashion
January 30 – February 3

Amsterdam International Fashion Week
January 27 – 31

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