

A close-up photograph of a woman's face, wearing dark sunglasses and bright red lipstick. She is holding a large bouquet of blue hydrangea flowers. The background is a soft, light blue gradient. Two teal-colored rectangular boxes are overlaid on the image, containing text.

**K&L GATES**

**FASHION LAW**

“Fashions fade, style is eternal.” — Yves Saint Laurent

**MARCH 2017**

# WELCOME

Welcome to our latest edition of Fashion Law.

The fashion industry is undoubtedly fast paced and the retail conditions are challenging. Businesses in all industries are looking at new ways of connecting with consumers and new ways to do business. In this edition of Fashion Law, our article on e-greements outlines the tips and traps of online contracts which are now part of the normal retail landscape. Deals between designers/influencers and collaborators have also become prevalent in the fashion industry, and our article discusses the importance of clear terms for such arrangements to make sure both parties get the best out of the arrangement.

It is not just the way of doing business that has changed, it is also the way of starting a business in the first place. Our fintech article explains the various financial options available to raise capital as well as different financial products for customer payments.

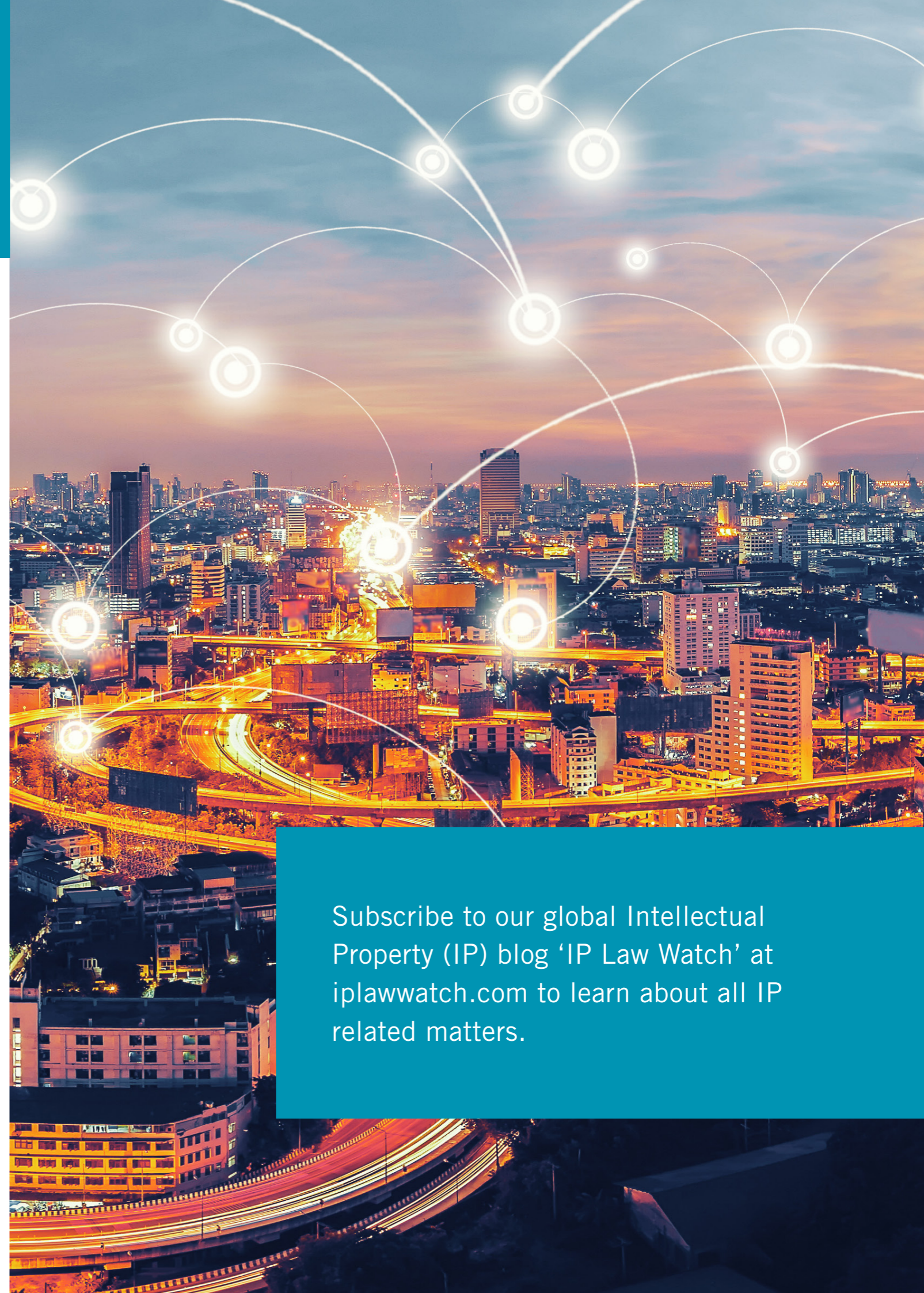
Even when your own business is flourishing, what do you do when one of your customers suffers a financial collapse and how may it impact your business? We look at how to put yourself in the best possible position to ensure that money paid to you by a customer that then faces financial collapse is not clawed back by the administrators.

Finally, standing out from the crowd has always been important for fashionistas. Our two articles on trade mark protection outline the difficulties of using your own name as your brand – a business ‘divorce’ can be messy and leave you unable to use your own name if this has not been thought about at the outset. And while brand names are important, so too are other aspects of design that can become your signature – like Levi’s pocket stitching.

We hope you enjoy reading this edition’s articles and welcome your feedback.



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## GOODWILL AND THE NAMES OF DESIGNERS

For a purchaser of a business, the goodwill and name associated with it are key assets of the business. For example, the value of a major luxury brand business being sold with its established name would be markedly different to that of the business without the name. Where that name is also the name of the designer who founded the brand, the purchaser will often seek to ensure that the designer cannot, after selling their business (along with the name and goodwill), start a new potentially competing label under their own name. This is because this would effectively divert the goodwill in their name away from the business that was sold.

## THE KAREN MILLEN DISPUTE

In 2004, Karen Millen, the individual behind the Karen Millen brand, sold her business to an Icelandic consortium. Unsurprisingly, the purchase documentation contained a number of restrictions relating to Ms. Millen's use of her own name, or any other confusingly similar name in connection with any similar or competing business, following the sale.

Ten years later, Ms. Millen applied to the UK High Court for a declaration that using her name, 'Karen Millen', in respect of homewares, and 'Karen' in respect of any goods or services would not be a breach of the 2004 purchase contract.

Predictably, the party who purchased the Karen Millen business in 2004 sought an injunction to prevent her from using these names.

The Court did not make the declarations sought by Ms. Millen and held that, as a result of the 2004 contract, she was not entitled to use her own name in a new sector. Nor was she permitted to use the name 'Karen' in potentially competing sectors. The Court found that Ms. Millen's name had become linked to the goodwill of the business which was sold in 2004, such that when consumers saw the brand 'Karen Millen' they associated it with the Karen Millen business rather than the individual. The Court found that the objective purpose of the contractual restrictions was to prevent Ms. Millen from setting up a competing business using her name which could cause confusion and detriment to the goodwill of the Karen Millen name vis-à-vis the Karen Millen business (that was sold in 2004).

## LESSONS

For designers and creatives, careful thought should be given to how you use your name and if you're setting up your own business, you may want to consider choosing a brand name that is different to your own name. This will ensure that the goodwill associated with your business accrues in this brand name, rather than in your personal name. For designers and business owners considering a sale of their business



which features their name, it is important to consider the scope and enforceability of any restrictions placed on you and the use of your name going forward after the sale, particularly in light of any future plans that you might have.

Also, if you join the creative department of an established brand, you should be mindful of letting your name be used as a trade mark for your designs created for your employer as, unless you protect your position contractually, there is a risk that this could present issues if you later want to go out on your own and set up your own fashion brand under your own name. Many creative directors of established brands have gone on to build their own brands and the more control you retain over your name, the easier this transition will be.

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# A GOOD E-GREEMENT

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With AUD10 billion spent online in Australia in 2015, the demand for online shopping is increasing. When customers buy products, either online or in-store, they enter into a contract with the retailer which is formed when the purchaser accepts the terms. Like any written agreement, online agreements are subject to general principles of contract law. It is therefore important that e-tailers get the terms and conditions on their websites right.

To form a contract, parties must be aware of, and accept, the terms. Customers will be aware of terms if given actual or 'reasonable notice'. This notice will be given where the e-tailer has done all that was reasonably necessary to bring those terms to the attention of customers, even if the contract wasn't actually read.

Most e-tailers use 'click-wrap contracts'. Here, customers are required to click an 'I agree' button or otherwise deliberately indicate their agreement in order to accept the terms. A valid contract is formed where the terms and option to accept are clearly and unambiguously displayed and purchasers are given an opportunity to review the terms before accepting.

The more conspicuous the terms, the harder it will be for customers to say that they were unaware of them.

Some online stores use 'browse-wrap contracts'. These aim to bind users simply by displaying or linking to the terms on

the website. No positive step is required to show agreement. These contracts have been mostly litigated in the US, where the courts have regarded them as valid if customers were aware of the terms before using the website. They have been rejected where the terms are inconspicuous or require customers to take many steps to gain access to the terms.

We set out our top tips for e-tailers below.

- 1. Use click-wrap contracts to make customers positively state that they have read and agree to the terms.** It is much harder for a customer to claim that they were unaware of the terms if they have been required to positively state that they have read and agreed to the terms.
- 2. Make terms noticeable and easy to find by:**
  - placing hyperlinks in prominent positions where they can be viewed without having to scroll down or click through multiple pages; and
  - using different fonts, larger text and bright colours.
  - The more conspicuous the terms, the harder it will be for customers to say that they were unaware of them.



- 3. Use banners or pop-up screens to tell customers they are entering into a contract.** For click-wrap contracts, the text accompanying the acceptance method should notify the user that, by accepting, they are entering into a legal agreement. For browse-wrap contracts, make it clear that use of the website is governed by the terms and that users should stop use if they do not agree to them.
- 4. Force customers to accept terms.** For click-wrap contracts, make customers scroll to the bottom of the terms before being able to click 'Accept'. Acceptance 'checkboxes' should be left blank as a default. For browse-wrap contracts, place a prominent link on every page of your website to ensure that customers are exposed to your terms regardless of how they enter the site.
- 5. Make your terms accessible.** Allow customers the ability to print, download or email the terms.
- 6. Notify customers when terms change by labelling hyperlinks** with text such as 'Website terms and conditions – Updated on [insert date]'. In the terms, state that customers are bound by updated terms and include the date of the last update.
- 7. Use concise and clear language for terms.** Avoid 'legalese' or volumes of pages, especially in tiny font.
- 8. Give special notice of onerous or unusual terms.** Use pop-ups, larger fonts, capital letters or colours to draw the customer's attention to unusual or onerous terms.
- 9. Be aware of the law. Exclude 'unfair contract terms' or terms that contravene legislation.** Don't mislead or hide costs and ensure you give consumer guarantees with the right to repair, replacement, refund, cancellation or compensation.
- 10. Privacy.** Ensure privacy policies are up to date with any changes to the law and that you comply with them at all times.

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# A TRADE MARK STITCH UP AND ALL THINGS VOGUE

Christine Danos and Zara Lim

Trade marks are more than just your brand name. In this article we look at two decisions that demonstrate the importance of registering your brand for all relevant goods and the benefits of protecting unique design features as trade marks.

## VOGUE

A European Union case regarding the VOGUE trade mark emphasises two important matters when it comes to trade marks:

1. choosing a unique brand name to differentiate your products
2. thinking about how your product line may expand in the future and registering your mark for those products, as a registration for clothing will not protect your brand for other goods like cosmetics and sunglasses.

In the VOGUE case, Trinity Haircare AG (**Trinity**) filed an application with the EU Intellectual Property Office (**EUIPO**) to have an EU trade mark for VOGUE, which was registered for various goods including cosmetics, perfumes and beauty products, declared invalid.

Trinity argued that VOGUE was descriptive of these goods, as it was used as a synonym for 'fashion' or as a shortened form of the expression 'en vogue'. The EUIPO dismissed Trinity's application and found that VOGUE was not descriptive of the goods for which it was registered.

Trinity appealed the decision and the Board of Appeal confirmed that while

VOGUE has a meaning related to 'popularity' and expressions such as 'en vogue' mean 'fashionable, tendency', Trinity had not demonstrated that VOGUE was used as a synonym for these expressions. Therefore, VOGUE was not descriptive of the goods at issue.

The General Court upheld these conclusions after a further appeal by Trinity. The General Court found that VOGUE is not descriptive of beauty and care products, which are different to fashion products. Consumers buy beauty products for their 'result' (ie because a perfume produces a pleasant scent) whereas fashion is concerned with a change linked to every season and every year.

This case shows that by choosing a unique brand name you can distinguish your brand from your competitors and ensure that you obtain and maintain trade mark protection for your brand and products.

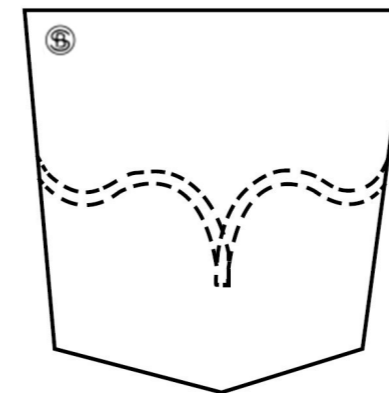
The case also highlights that fashion designers cannot rely on an existing trade mark registered for clothing to stop a competitor from using the same trade mark for cosmetics. For fashion designers considering expanding their product range in the future, it is important to register your trade mark for those new products to ensure protection for your brand.



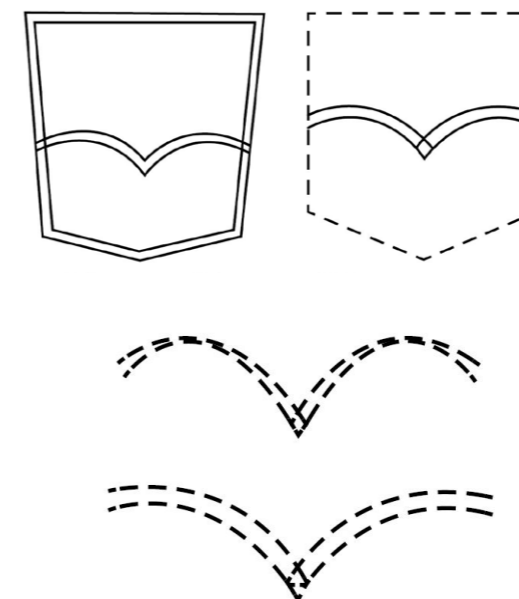
## LEVI'S

Levi's has successfully opposed an Australian trade mark application filed by Yugen Kaisha Shimura (**Yugen**), for pocket stitching.

Yugen filed an application to register the below trade mark for clothing:



Levi's is the registered owner of four Australian trade marks for its iconic pocket stitching (depicted below), the earliest of which dates back to 1976.



Levi's argued that the Yugen application was deceptively similar to the Levi's registrations.

The Trade Marks Office found that the Yugen's trade mark was deceptively similar to the Levi's trade marks. Even though Yugen's trade mark also featured a monogram (the letters 'BS' or 'SB' in a circle depicted in the top left hand corner of the mark), the monogram was considered a minor element in the trade mark and its visual significance was not immediately evident. There was a real, tangible danger of confusion between the trade marks.

The decision highlights the importance of considering protecting elements of your brand beyond your name. Trade mark applications can be filed for designs which have already been released to the market. Designers should also consider filing design applications to register the unique shape of their garments for designs that have not yet been released to the market. Registered trade marks and designs are valuable assets that allow designers to prevent competitors from copying their original designs.

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# AVOID UNFAIR PREFERENCE CLAIMS AFTER THE FINANCIAL FAILURE OF A CUSTOMER

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It has been a difficult time for the retail fashion industry as evidenced by the recent collapse of international brands American Apparel and Valleygirl. The Australian industry is no exception with reputable fashion brands Laura Ashley, Josh Goot and Seduce all falling into some form of external management in recent years.

These circumstances impact on a wide range of participants in the fashion retail sector. In particular, creditors of the failed enterprise (usually suppliers or designers) are often left with substantial unpaid accounts. Even if a creditor is fortunate enough to be paid by the indebted company before a liquidator is appointed, these amounts may later be clawed back as 'unfair preference' payments.

## WHAT IS AN UNFAIR PREFERENCE?

By law, a failed company's liquidator can seek to clawback certain payments made within a six month period preceding the company's administration or liquidation. These payments are known as 'unfair preferences' and are said to occur where a creditor has 'jumped the queue' by receiving payment of their debt (or part of their debt) at the expense of other creditors of the company. A payment will be an unfair preference if it is shown that the creditor received more money from the indebted company than it would receive in liquidation.

This can seem extremely unfair to a creditor who has done no more than been diligent in its cash flow management by chasing up and putting pressure on its

customers to pay debts properly due and payable. Unfair preference claims, once commenced, can be difficult and costly for creditors to defend.

## DEFENCES

Creditor suppliers or designers may be able to defend an unfair preference claim in the following ways:

### Good Faith

Creditors can defend an unfair preference claim by proving that it did not suspect that the company was insolvent at the time that it received the alleged unfair preference payment and that any other reasonable person in their position would not have held that suspicion. This is known as the 'good faith' defence.

### Running Account

Where parties have an ongoing commercial relationship pursuant to which the creditor continues to supply goods or services over a period of time and the company makes payments throughout that period a 'running account' will be established. In these circumstances, instead of assessing each transaction separately to determine whether they are unfair preferences, the net value of all of



the relevant transactions is assessed as if it were one transaction. Essentially, if the creditor has supplied goods or services to the company during the previous six months then the payments it received and the services supplied are essentially 'netted off' so that only the balance is recoverable from the creditor as a preference payment.

## PROTECTING YOURSELF

While defences are available, the best course of action is to avoid becoming the subject of an unfair preference claim in the first place. Taking the following actions may help to protect your business:

- **Cash in advance or cash on delivery.** If you require payment at the time you supply your goods or services, your business will never be a creditor of its customers. This means that the payments your business receives cannot be considered unfair preferences.
- **Taking security.** A liquidator can't pursue a secured creditor for unfair preferences. So, if it's not realistic for you to demand cash in advance or on delivery, it's best to position yourself as a secured creditor. If you are a supplier, consider incorporating a retention of title clause into your credit terms and ensure that it is properly registered on the Personal Property Securities Register. Recent cases suggest this

form of security will provide a defence to an unfair preference claim up to the value of the security.

- **Cash flow management.** Where possible, do not allow your creditors to operate outside payment terms, regularly follow up creditors for payment rather than waiting until the company is approaching financial difficulty.

## WHAT TO DO IF YOU RECEIVED AN UNFAIR PREFERENCE DEMAND?

If you receive a demand for the repayment of a preference, seek legal advice immediately. Often the claim can be defended by relying on one of the matters mentioned above or a commercial resolution can be reached, avoiding the need for your business to repay all or some of amount demanded.

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# CONTRACTUAL ‘MUST HAVES’ FOR DESIGNER/INFLUENCER COLLABORATIONS

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## SPONSORED POSTS

It is important that brands do not mislead consumers when engaging influencers to promote their brand. To protect themselves, fashion brands should ensure that contracts contain clauses that require any relevant commercial relationship between the brand and the influencer to be appropriately disclosed in every online post. The contract should also set out how this disclosure is to happen, which could be via a simple #ad or #sponsored.

## PREVIEWS AND SHOWS

Brands should ensure that contracts clearly set out any confidentiality requirements surrounding previews of collections and runway shows that bloggers and influencers are invited to attend.

Be clear as to whether or not photos and video footage of the collections and events can be posted online, particularly if the event is a confidential preview of a collection. The contract should also set out any specific requirements or conditions

that the brand wants met when the usage of photos and images are permitted. For example, the brand may want to ensure that the posts are in line with the brand’s identity or values, and that any images or footage posted are of a reasonable quality. If so, these requirements should be clearly spelled out.

## PRODUCT TESTS AND REVIEWS

Similarly, some fashion and accessory brands provide sample products to influencers to test and review on their blogs, social media accounts or platforms such as YouTube. These products are often provided to these people to try out before they are finalised or released to the public, sometimes on the understanding that the product will not be posted about until it is finalised or released.

For brands planning to register their designs (to protect against copying), this kind of situation raises some red flags. Design applications must be filed before a design is publicly disclosed. Any public disclosure or non-confidential use of a



product prior to a design application being filed will invalidate the design. This risk can be dealt with by imposing contractual obligations on the influencer that requires the design be kept confidential, until the design application is filed. These types of contractual terms can be complex and are best drafted by a lawyer.

Even if a brand does not intend to register its design but does not want the test product posted about until a certain date for commercial reasons, this should also be set out in the contract.

## PHOTOGRAPHS

It is important to be clear about who owns the copyright in photos produced by influencers and whether the brand is permitted to reproduce such photos.

Fashion bloggers often take their own photos wearing products provided to them by a clothing or accessories brand. The brand may want to use these photos, however in order to avoid any copyright disputes, it is imperative that it has the permission of the copyright owner to do so. It is therefore prudent to clarify in the contract whether the brand has permission to use any photos taken by the influencer that feature its products.

Brands should also be aware that if the influencer has a third party taking the photos, the photographer is likely to be the owner of copyright in the photos and is the party that needs to approve any such use.

## AFTER THE COLLABORATION

Finally, brands may want to consider including a clause that prevents influencers from publishing disparaging comments about the brand, especially after the relationship comes to an end.

If you are unsure how to go about drafting an appropriate contract, we recommend that you talk to a lawyer about preparing a pro forma contract that can be adjusted each time your brand collaborates with a new influencer. This can be a cost effective way to ensure that your brand is protected.

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## CUSTOMER PAYMENTS

Perhaps the most important aspect of any new business is ensuring your customers can pay you. Cash payments are now almost a thing of the past, with most consumers opting to pay by credit, debit or even via apps. New solutions are needed, especially for online sales made to overseas customers. Here's a round-up of some innovative payment options that will ensure you never miss a sale again.

### Micro Merchants

High start-up costs, monthly fees and merchant charges can make accepting credit card payments expensive for small businesses. However, there are now a number of providers which offer you the flexibility of accepting card payments with no lock-in contracts or monthly account fees. Many of these services also offer flat transaction fees and free or inexpensive card readers. The added bonus? They're much sleeker and more stylish than your average clunky EFTPOS machine and can operate portably.

### E-commerce facilitators

Selling your goods to international buyers online creates significant growth potential, however, it can also expose you to increased complexity and risks such as failed payments, currency movement and

transaction fees. There are now a number of platforms that make international trade simple by providing a local customer experience and offering a dynamic range of payment options. Many of them also capture data that provides a valuable insight into what turns a quick browse into a sale.

## RAISING CAPITAL

A common issue faced by start-ups is how to raise the cash to get your business off the planning table and into reality. Traditionally, sourcing funding has involved approaching a bank with your business plan and market research clutched in your hands. This can make it extremely difficult for up-and-coming fashion labels which might struggle to translate vision and potential into statistics.

New funding models, such as equity crowdfunding or marketplace lending, give businesses the opportunity to share their pitch with a much wider range of investors, typically via an online platform. Investors are free to invest as much or as little as they want, subject to any minimum or maximum limits that apply.

### Equity Crowdfunding

Crowdfunding is not new and platforms like Kickstarter have brought many innovative products to market. However, equity crowdfunding is relatively new to Australia.



It is a method of raising capital from a broad group of investors, to fund businesses in return for ownership of a small part of the company in the form of shares. An investor's return is directly linked to the success of the business, as they will share in the profits of the company through dividends or increased value on sale.

Crowdfunding can be a valuable source of funding, particularly for fashion start-ups seeking an initial injection of cash, but there are currently some regulatory barriers. The Government is working on proposals to open up crowdfunding for Australian businesses and investors.

### Marketplace lending

Marketplace lending (also known as peer-to-peer lending) describes an arrangement where individual investors are connected with businesses looking for small to medium loans. Loans can be unsecured or secured over business assets or even over a bundle of invoices.

These arrangements are typically facilitated by an online platform that connects potential borrowers with potential lenders. Because of this, lending decisions are often

substantially automated and borrowers may get access to funds quicker than traditional bank lending channels. Australia already has a developed marketplace lending industry, with a number of platforms already up and running.

Unlike equity crowdfunding, investors do not receive a share in your company and their return is based on an agreed rate of interest paid across the term of the loan, rather than a share of profits.

While it is tempting for designers to focus on the creative aspects of running a fashion label, don't underestimate the importance of having a secure financial framework. It could be the one thing that propels your fashion brand to successfully take off.

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