



Fashion & Law Journal

MAY 2023

FASHIONLAWJOURNAL.COM

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DEATH OF STREETWEAR 2.0

ARE YOU BUYING THE PRODUCT OR THE BRAND?

Selective Distribution System and protection from “misappropriation” of others’ Customer Experience

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It is known how a well-designed Selective Distribution System is becoming increasingly crucial for Luxury Fashion Brands.

As the European Court of Justice has been noticing for quite a while *“the quality of [luxury] goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury, that that aura is essential in that it enables consumers to distinguish them from similar goods and, therefore, that an impairment to that aura of luxury is likely to affect the actual quality of those goods”* (Judgment of the Court (First Chamber) of 6

December 2017 - Coty Germany GmbH v Parfümerie Akzente GmbH).

Not to mention that consumers of luxury goods not only are usually very attentive to details, as well as to the quality of the product and its design, but they are also more and more looking for personalized services and high-end shopping experiences, also engaged by the story of the brand and the lifestyle it represents (so called “Customer Experience” or “CX”).

Therefore, fashion houses in the sector continuously invest in new concepts, intent in conveying their brand values through

memorable storytelling, playing on the mechanisms of identification and emotionality. Customers are not meant only as mere recipients of the brand's products, but they are involved in the brand's history itself, of which they take part with their personal journey. Their affection and fidelity is encouraged through a system of sophisticated and dedicated initiatives (so-called "Customer Experience Management" or "CXM" or "CEM"), aimed in creating a deep sense of belonging.

In that context, the ECG continues, *"the establishment of a selective distribution system, which seeks to ensure that the goods are displayed in sales outlets in a manner that enhances their value, contributes to the reputation of the goods at issue and therefore contributes to sustaining the aura of luxury surrounding them"*.

So not only a lawfully designed SDS -, primarily aimed to preserve the luxury image of those goods - is compatible with antitrust law (although it is indisputable that vertical agreements can affect competition in the market), but it is increasingly essential and protected by law and case law, so encouraging significant investments in the fashion industry, particularly in terms of manufacturing capabilities, innovation, design, building and maintaining of the brand image and of a reputation linked to quality and customer satisfaction.

On this regard the Court of Rome, in Italy, called to examine the case of a parallel distribution of products covered by Polo Ralph Lauren (PRL) trademarks, recently issued a very interesting decision (Judgement of the Court of Rome, n. 18090/2022, issued on December 7, 2022)

The parent fashion company Polo Lauren LP, based in USA, together with its Italian affiliate, RL Fashion of Europe s.r.l., claimed before the Court of Rome the unlawful import into the European Economic Area (EEA), specifically Italy, of clothing exclusively intended for the American market, in violation of PRL's trademarks exclusive rights.

The Polo/Ralph Lauren Group has been in fact operating in Italy for many decades, with increasing success, gradually extended to sectors other than the "core business" of clothing.

Claimants had emphasized the efforts of PRL brand in providing a very rich assortment of its products, in the advertising, in the quality standard of the goods offered, in organizing events to which the PRL name and signs could be associated, in other words in conceiving, creating and offering a high level Customer Experience (and, not last, in the protection of such efforts themselves before all the competent offices, when required). A constant commitment that allowed the brand to reach a significant market position over the years in Italy, that threatened to be frustrated by any attempts at speculation aimed at selling products at prices lower than those usually practiced on the Italian market and also threatened to be deeply damaged by the creation of an unlawful, parallel distribution, stranger to the legitimate selective distribution system ideated, prepared and implemented by PRL.

In the case at issue clothing destined to the North American market had been in fact purchased by American entities, domiciled and/or based in the United States and then shipped to Italy and there commercialized by unauthorized Italian distributors, without any consent, not even an implied one, by PRL to exports of products outside the normal selective distribution channels (despite the counterparties claimed otherwise).

The Italian Court decision is certainly really interesting under many profiles.

The Judge, in fact, preliminarily faced the issue of the exhaustion of PRL's trade-mark rights opposed by the defendants, stating that the same principle couldn't be argued in the case at issue.

Given as a peaceful circumstance, acquired in the proceedings, the existence of a lawful selective distribution circuit by the parent company, known to all operators in the sector, there was in fact no tangible evidence of a PRL's effective and legitimate consent to export its products into the EEA and (this entailing the violation of PRL's exclusive trademark rights).

But the Court of Rome also stressed another interesting aspect.

The parallel import of products outside the selective network set up by PRL had in fact undoubtedly led to an unfair competition

situation, since those who were involved in the parallel import activity had engaged in commercial conduct potentially confusing and harmful to competition (and in particular of authorized distributors) but, above all, to consumers themselves, who were in contact with subjects who accredited as authorized dealers – as such in possession of specific requirements and capacity – but which, in reality, were not and were therefore not able to provide a service sales and after-sales similar to that of the European selective sales network (think of changes of goods, defective products etc.).

SDS, through original initiatives, with all the connected benefits mentioned above. A real “*distribution system’s cloning*”, says the Court, classifiable as “*parasitic competition*”, a particular case of unfair competition, governed by art. 2598, n. 3, of the Italian Civil Code, which consists of “*a continuous and systematic operation in the footsteps of a competing entrepreneur, through the imitation not so much of the products, but rather of relevant entrepreneurial initiatives of the latter, in a temporal context close to the conception of the work*”.



The parallel network, then, had been created by the defendants, directly hooking up to the distribution of PRL, not by chance using for further distribution subjects that also appeared in the “official” network of RL, in an integral, continuous, systematic and lasting way, so as to start and make effective what assumed the characteristics of “*a real cloning on an industrial scale, rather than a - already serious - mere parallel import operation*”.

The Court in fact also expressly stated that the defendants had managed to use the imported products in association with advertising activities attributable to PRL’s stores, with consequent confusion on the part of consumers and damage to the selective network of authorized dealers, parasitically and intentionally taking advantage of the investment costs incurred by PRL for the creation and maintenance of its sophisticated

It is always interesting to observe how case law, step by step, is a faithful mirror of reality that changes. Just as fashion luxury brands have faced an evolution from the status of “producers of goods”, whose strategy implies the centrality of the luxury product, to the new role of “producers of experiences”, for which the priority is the luxury experience, so we can see how the jurisprudence is structuring in parallel to offer protection to the said new dimension, which requires a deep awareness of this paradigm shift and of the new challenges it brings.

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