

Intellectual Property Law

MSc Legal & Tax Management

ACADEMIC YEAR 2011-2012

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Duration 3 hours

Documents allowed: *Paper docs only. Any electronic devices prohibited*

Companies are extremely attentive to the protection of their image and assets. It is well established that they use their intellectual property rights in this goal. The exercise of their exclusive rights may sometimes lead to consumers reaction, though.

In Hong Kong, after Dolce & Gabbana forbade the taking of pictures of its store by people passing by, more than one thousand persons gathered in front of this store to protest against D&G policy (Annex 1 – see also Annex 2 on a demonstration against a Paris museum which prevents photos by visitors).¹

Having intellectual property rights may also prove to have limits when it comes to certain forms of brand tarnishment:

- [1] Unhappy that a participant to a US TV reality show was wearing its clothes, Abercrombie offered to pay him to stop doing it (Annex 3)
- [2] On the same TV program, another participant had “actions that have caused her to be the target of public disdain while having a strange appeal”.² A bag manufacturer gave her a rival’s bag in order to make it *less desirable!* (Annex 4)
- [3] The Norwegian journal Dagbladet reported that Lacoste was appalled to see that a person who killed 77 people in July 2011 only appeared before his judges in a Lacoste polo (see Annex 5)

You are the legal counsel of a clothes firm. Your company increasingly has to face new consumers attitudes towards brands: criticism on social networks, on TV shows, and other media – as in scenario 1. You are aware that your competitors may use ambush marketing against your employer – as in scenario 2. You also know that your company might have, one day, to face a ‘Lacoste scenario’ where your trademark would suddenly be associated with a person whose repugnant acts would be widely covered by the press – as in scenario 3. At the same time, you know how sensitive it can be for a company to sue its own clients...

→ 1. Sketch a policy framework in which you will:

- Take into account the new challenges to your company brand [*you can choose a specific line of products*]
- Explain what you can do, from a legal perspective, to (try to) stop them
- Define situations in which it would necessary to launch legal action and others where you would find more relevant to refrain from reacting

[This policy memo does not have to be long, but each point must be justified. You can use charts, or bullet points if you find it relevant]

[20 points]

→ 2. Read the following article and comment it, knowing that your analysis must take into account legal, economic and strategic dimensions.

It’s a patent war: Yahoo sues Facebook for infringement

By Jessica Guynn, Los Angeles Times, 12 March 2012

“Yahoo Inc., the onetime online advertising juggernaut dethroned by Facebook Inc., is suing the social networking giant over 10 patents that include ways to advertise on the Web.

¹ A 3’50 video covering the protest was posted on YouTube (<http://youtu.be/4HN2REtoIUM>), and attracted 61 comments.

² Wikipedia, Article on *Nicole Polizzi*, http://en.wikipedia.org/wiki/Nicole_Polizzi, last consulted March 21, 2012

The lawsuit filed in San Jose federal court Monday marks the first major patent battle in social networking. It comes as Facebook prepares to go public this spring in one of the most hotly anticipated stock market debuts in years.

In a statement, Yahoo said it is confident it will prevail.

"Yahoo has invested substantial resources in research and development through the years, which has resulted in numerous patented inventions of technology that other companies have licensed," a spokesman said in an emailed statement. "Unfortunately, the matter with Facebook remains unresolved, and we are compelled to seek redress in federal court."

A Facebook spokesman accused Yahoo of turning on a business ally and said it would vigorously defend itself.

"We're disappointed that Yahoo, a longtime business partner of Facebook and a company that has substantially benefited from its association with Facebook, has decided to resort to litigation," the spokesman said in an emailed statement.

Patent fights are heating up all over Silicon Valley, where technology titans are buying companies to fatten up their patent portfolios and brawling in court.

Facebook and other social networking companies have seen an escalation in patent lawsuits in the run-up to IPOs, but mostly from firms that buy up patent portfolios, not from major technology players like Yahoo.

Yahoo, which has struggled to right itself for years, counted its more than 1,000 patents as a strategic asset as it reviewed its options, including selling a stake to outside investors or spinning off assets. The lawsuit is said to be part of a newly aggressive tact to turn around Yahoo under its new chief executive, Scott Thompson.

It's not the first time that Yahoo has pursued this kind of payout, said BGC Partners analyst Colin Gillis. Yahoo forced Google Inc. to hand over 2.7 million shares in a patent settlement before the Internet search giant's 2004 IPO.

Gillis said he didn't put much stock in the lawsuit.

"There's not going to be an easy money here for Yahoo," Gillis said. "The play worked when they went after Google, but it doesn't look like it's working with Facebook."

[20 points]

ANNEX 1

Get the picture?

Phila Siu and Diana Lee, The Standard, Hong-Kong

Monday, January 09, 2012

Long queues massed along the luxury brand mecca of Canton Road yesterday - but the last thing on their mind was shopping.

More than 1,000 people protested outside Dolce & Gabbana's elite Tsim Sha Tsui flagship, demanding an apology for alleged discrimination against locals banned from taking pictures of its storefront display.



The Italian luxury fashion brand shut its doors before 3pm as the crowds gathered, and other shops nearby were also forced to shut. About 20 police stood on guard outside.

The company issued a short, unsigned statement last night - without an apology - saying: "We wish to underline that our company has not taken part in any action aiming at offending the Hong Kong public."

This came after camera-laden protesters descended on the store taking pictures and carrying placards denouncing the store's actions.

Angry protesters chanted "Shame on you, D&G" and "Snapping pictures is our right. Banning is not your right" as passing motorists sounded horns.

"Open the door. I have money and I want to do some shopping," said one protester, holding a fistful of hell banknotes.

The protest was organized on Facebook, with the site drawing more than 15,000 "likes" since Thursday. Fury started to build last week after people, claiming they were told to leave while snapping pictures of the store from the roadside outside Harbour City, went online to vent their wrath.



A security guard reportedly said only mainland tourists were allowed to take photos outside the store, and a D&G guard allegedly threatened to break journalists' cameras if they continued to take photos.

A well-known mainland, possibly a government official, was reportedly shopping in the store last month when he noticed people outside taking photographs. A complaint was made to D&G because the customer feared netizens would link the shopping spree to corruption. Then D&G instigated the ban. D&G's statement strongly denied making any racist or derogatory comments. "Controversial statements reported in the Hong Kong press have not been made by Dolce & Gabbana nor its staff.

"It is regrettable that Dolce & Gabbana has been brought into this matter."

Harbour City apologized on its Facebook page on Friday. D&G's store did not return calls yesterday and no one came forward to meet the protesters.

Chief executive candidate Henry Tang Ying-yen said D&G should see taking photographs outside the store as a compliment. "People take photos because they like the products. The store should welcome this instead of turning people away."

Tourism sector lawmaker Paul Tse Wai-chun said D&G should apologize for discriminating against locals and he will raise the issue in the Legislative Council.

Arts Policy: Shutterbugs Invade Musée d'Orsay to Protest No-Photo Policy — By Taking Photographs



Camera-toting protesters entered Paris's **Musée d'Orsay** last week and began snapping pictures to draw attention to the museum's no-photo policy. Guards approached the group and asked them to stop, but when the protesters explained their position and politely refused to still their shutters, security backed off and let the photography continue. The protest then had a viral effect, as ordinary museum visitors began to take out their cameras and snap pictures as well.

The group, **Orsay Commons**, started their protests in December and has made the excursions a monthly event — scheduling them on the first Sunday of every month, when admission is free. One of the protesters, blogger **Bernard Hasquenoph**, told **ARTINFO France** that this time there were fewer guards and that they reacted more passively. He also noticed a change in the number of signs forbidding photography: “until now there were a lot; we indicated that it was very ugly. We noticed that they put a lot of them away — there were not nearly as many as last month.”

Hasquenoph takes this as a portent of the group's impending victory. “We think we have them over a barrel,” he said. “We will come every month. For their image, as they try to be modern and ‘with it’ in the Internet age, it's completely contradictory and counterproductive. They will revisit it. It can't go on, it's ridiculous.”

With attention drawn to the no-photo rule, the museum's comments book began to overflow with visitors' aggrieved remarks, calling the policy “scandalous,” “harmful,” “backwards and counter-productive,” and “from another era.” One museum-goer, **Serge Chaumier** of Paris, wrote that the policy “creates an appalling atmosphere and encourages visitor passivity.”

With reduced funding and staff cuts, French museums are on the defensive, and many suspect a financial motive behind the policy, which was put into place last June. As one protester, **Gaëlle Kermen**, wrote [on her blog](#), “if this is to put reproductions of paintings on fridge magnets or mugs sold in the gift shop, then, really, I say no.”

But the Musée d'Orsay denied this, stating that “this policy has no commercial intent.” In a statement, the museum said that the rule was “linked to the increasing number of ‘arm's-length’ photos with camera-phones,” adding that “reproductions of most of the works in the collection can be downloaded from the Web site.”

The government may get involved, if representative **Patrick Beaudouin** has his way. Back in June, he contacted culture minister **Frédéric Mitterrand**, questioning “the legitimacy of forbidding the reproduction of works that are part of our public heritage by visitors who purchased their tickets.” He also asked whether this policy “could run counter to the goal of cultural democratization.” He is still awaiting the minister's reply.

How have other museums handled the photography issue? After trying a similar no-photo policy in 2005, the **Louvre** abandoned it because it was too difficult for the guards to keep up with the frequent infractions. In a statement, the Louvre also said that “it was restrictive for the public and was confusing.” Photography is still not allowed in the Louvre’s temporary exhibition galleries for copyright reasons. Most of the works in the Musée d’Orsay are in the public domain.

Most European museums allow visitors to take photos as long as they do not use a flash, which could harm the artworks. Some are stricter, like Madrid’s **Prado**, which has forbidden all photography after having found that it was hard to prevent visitors from using the flash and that this sometimes led to arguments between museum-goers and security staff.

Other institutions encourage photography and have harnessed the power of the Internet to disseminate crowd-sourced images of their collections. London’s **Victoria and Albert Museum** has a **Flickr** page to allow visitors to share their pictures, and the **British Museum** has a partnership with **Wikipedia** to make images of its collections widely available. In France, the **Château de Versailles** organized a photo contest in connection with a show called “Versailles in Photographs, 1850-2010.” Exhibition organizers said that they were very impressed by the quality and originality of the photos they received.

ANNEX 3

Abercrombie asks 'The Situation' to shop elsewhere

AP Associated Press

By MAE ANDERSON - AP Retail Writer | AP - Wed, Aug 17, 2011



In a March 9, 2011 photo Mike "[The Situation](#)" Sorrentino ...

NEW YORK (AP) — The Situation doesn't usually require a lot of motivation to lose the shirt. But Abercrombie & Fitch wants him to go one further — the company has offered to pay "Jersey Shore" cast members to stop wearing clothes carrying their brand.

The preppy teen retailer said Tuesday it would pay a "substantial payment" to Mike "The Situation" Sorrentino or any cast member who stops wearing its clothing on the popular MTV reality show because the series is "contrary to the aspirational nature of the brand."

"We are deeply concerned that Mr. Sorrentino's association with our brand could cause significant damage to our image," the retailer said in a press release.

It may seem strange that a brand that employs half-naked models to stand outside its flagship stores and courted controversy with racy catalogs has come out with such an aggressive campaign against the hard partying cast of "Jersey Shore." But the audacious approach is getting the teen retailer tons of publicity during the crucial back-to-school season, the second biggest shopping period of the year. The CEO says it's having fun with the ploy, and marketing experts say the company may wind up laughing all the way to the bank.

"It gets their name further out into the marketplace with one of the hottest brands on TV right now at the peak of the back-to-school season," said Wall Street Strategies analyst Brian Sozzi. "It's free marketing. Because the approach is so ridiculous, everybody's talking about it."

Brands usually embrace celebrities or performers who adopt their products in an unsolicited, organic way because of all the attention it can drum up. But sometimes they can have an uneasy relationship.

When hip hop stars unofficially adopted luxury champagne Cristal as their drink of choice several years ago, for example, the relationship seemed cozy at first. But after a company executive made derogatory comments about hip hop culture, high profile rappers like Jay-Z boycotted it.

Still, unexpected adaptation can be beneficial. When an urban audience adopted ultra-preppy Tommy Hilfiger clothes, the brand ended up expanding massively. And now Tommy Hilfiger's son even is a rapper.

The cast of "Jersey Shore" don't exactly consist of the kind of role models most brands covet. Now filming its fifth season, the show has won millions of viewers who tune in to watch a group of hard-partying, foul-mouthed 20- and 30-somethings hanging out, hooking up and behaving raucously. Mike

"The Situation" Sorrentino is one of the most popular, and outrageous, cast members, boasting of a "gym-tan-laundry" routine and lifting his shirt to show off his abs at every opportunity.

CEO Mike Jeffries said the offer to pay cast members came about when someone alerted him Sorrentino was wearing Abercrombie & Fitch on the show. In an Aug. 11 episode, Sorrentino wears neon green AF-label sweat pants.

Abercrombie has not disclosed the offering price. But Jeffries struck a light tone about the offer.

"We are having a lot of fun with it," he said in a conference call with analysts Wednesday.

MTV called the move a "clever PR stunt" by Abercrombie. "We'd love to work with them on other ways they can leverage 'Jersey Shore' to reach the largest youth audience on television," the network said Wednesday in a statement.

Analysts say while Abercrombie's provocative move suggests a publicity ploy, the teen retailer does have an image to protect. Laura Ries, president of the Atlanta marketing consultancy Ries & Ries said the image is "classic, sexy, preppy teenagers."

"Jersey Shore' shows 20-something guys and girls getting drunk every night and going out to party," she says, "so it clearly does not go with the image they have worked for over a decade to show to the world."

The news came as Abercrombie, based in New Albany, Ohio, reported strong second-quarter results, fueled by international growth. Abercrombie lost market share during the recession to cheaper competitors, but has rebounded since and is focused on growing internationally. In fact, preserving its image overseas might be part of the impetus behind the move, said Nomura analyst Paul Lejuez

"It shows their European customer, especially, he is not what the brand represents," he said. "They have a strong, aggressive European growth strategy. You don't want Europeans thinking that's what the brand is all about."

Ries, the Atlanta branding expert, said the title of Abercrombie's description of the offer as "a 'Win-Win' situation" in the press release is appropriate.

"Abercrombie and 'The Situation' are both getting enormous PR and really everyone is in on the joke," she said.

Sorrentino did not return requests for comment and there was no word at press time whether anyone in the cast accepted the offer.

AP TV writer Frazier Moore contributed to this report.

Snooki hit with 'pest' rap

By Perry Chiaramonte, New-York Post, August 19, 2010

Snooki is annoying -- and now it's official.

Nicole "Snooki" Polizzi of MTV's "Jersey Shore" was charged yesterday with "annoying others on the beach," in addition to two previous criminal complaints stemming from her July 30 drinking binge in Seaside Heights.

Snooki was a court no-show yesterday, but didn't have to attend. Defense lawyer Raymond Reya pleaded not guilty for her to charges of disorderly conduct, public nuisance and the new annoyance charge.

PHOTOS: NICOLE "SNOOKI" POLIZZI

"We added the additional charge after looking at all the information," said municipal prosecutor Kim Pascarella. "It seemed a little more appropriate." Polizzi, 22, faces fines of up to \$500 for disorderly conduct and \$2,000 each for the other charges. Her trial is set for Sept. 8.



DANIEL MAUCERI/INFPHOTO.COM

Nicole Polizzi aka Snooki

Meanwhile, in a twisted anti-branding campaign, Snooki has a closet full of designer bags, like the one in this picture -- and the gifts are not from the actual purse makers, but their competitors, according to a report.

Bag makers are allegedly giving their competition's products to Snooki so she brings a bad rep to that label.

Norway massacre: the real Anders Behring Breivik

Former friends and neighbors in Oslo talk about growing up with the boy who became a mass murderer.



Anders Behring Breivik leaving court in Oslo Photo: JEFF GILBERT

By Robert Mendick

7:00AM BST 31 Jul 2011

Even as he languishes in solitary confinement in a prison that fittingly was once a Nazi concentration camp, Anders Behring Breivik continues to wage his demented war against Islam.

Having murdered 77 innocent victims, he is now entering the propaganda phase of his 21st-century crusade. Confined to his cell, The Sunday Telegraph has learnt that he spends his waking hours writing speeches or making bizarre requests to the authorities.

A narcissist and a fantasist, Breivik, 32, refuses to have his prison “mugshot” taken to ensure that the carefully stage-managed photographs he took of himself – in full Masonic regalia or clutching his rifle – are not replaced by more humbling images.

Having been refused permission to wear a combat uniform, he has demanded to wear a red Lacoste sweater for his public outings to court or to the police station. He will not wear anything else.

Eight days after the attacks, clothes and looks remain as important as ever to Breivik, principles of dress code laid down in the 1,516-page manifesto emailed to alleged followers in the hours before he struck. “Nothing over the years I knew him, or what I have since read in his so-called manifesto, suggests that he is crazy or disturbed,” says Peter Svaar, a former schoolfriend, journalist and one-time press officer for the Eurovision song contest. “Everything that happened after the bomb went off at 3.26 on Friday afternoon has followed his plan. My biggest fear now is that he is still playing us – the media, public opinion – like a piano.

Another former schoolfriend told The Sunday Telegraph that Breivik’s attention-seeking was evident a decade ago. “I remember we were at a party,” recalls the former friend, “and he told me he had had his nose and chin operated on by a plastic surgeon in America. It was a bit weird, but he was hanging around at that time with a group of people obsessed by their bodies.”

(...)