

HANNES SNELLMAN

FASHION LAW *Review*

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WELCOME TO HANNES SNELLMAN FASHION LAW REVIEW

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We are excited to publish the first edition of Hannes Snellman Fashion Law Review. The purpose of this publication is to highlight interesting cases and trends within the fashion industry in the Nordic countries and Europe, as well as to give you as a designer, brand owner, or retailer a chance to learn more about what legal aspects to take into account when growing and expanding your business within fashion.

In this edition, we will examine recent EU-level initiatives to strengthen consumer protection especially in the context of e-commerce. We will also discuss the consequences imposed by new emerging trends, such as renting clothes, sustainability awareness and tech innovations and its effect on the fashion industry. We have a piece on data protection, addressing recent case law development within the EU regarding e-commerce platforms, plugins and the responsibility that in some cases is triggered for website owners. Finally, we will discuss new possibilities and challenges that influencer marketing may entail for advertisers.

Hannes Snellman's retail and fashion lawyers provide innovation and flexibility in an increasingly complex legal and regulatory environment. Our legal experts will guide you proactively with thoughtful business planning and creative strategies to address emerging legal issues facing the retail and fashion industries.

We hope you enjoy the first edition of Hannes Snellman Fashion Law Review!



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THE NEW DEAL FOR CONSUMERS

By Anna Rätty, Sarita Schröder, Jessica Tressfeldt & Liisa Vaaraniemi

On 8 November 2019, the European Parliament and the Council adopted a directive on the better enforcement and modernisation of EU consumer protection rules. The directive is a part of the so-called “New Deal for Consumers” legislative package, which aims to enforce consumer protection across the union.

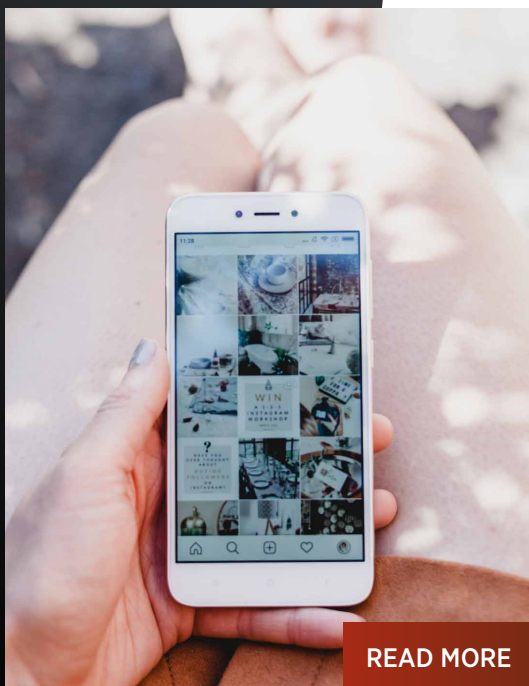


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GO SUSTAINABLE OR GO HOME

By Linn Alfredsson & Elisabeth Vestin

With a higher demand from today’s consumers of purpose and value-driven investments, the fashion industry is transforming. From in-store solutions to omnichannel, on-demand service, and instant payments, the pressure on retailers to perform is high, while simultaneously facing new challenges. This article addresses some of these issues and explains how to navigate in the new fashion landscape that is being created.

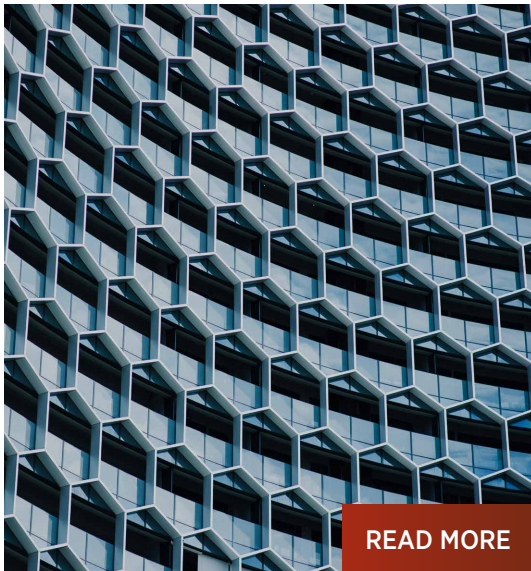


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INFLUENCER MARKETING – NEW POSSIBILITIES COME WITH NEW CHALLENGES

By Linn Alfredsson & Sarita Schröder

Influencer marketing is a dynamic and creative alternative to targeted advertising. However, companies that use influencer marketing as part of their marketing strategies should keep in mind that they are primarily responsible for ensuring that the influencers they collaborate with post in accordance with the law. While the assessment of marketing is always conducted on a case-by-case basis, and there are no universally applicable rules for how influencer marketing should be labelled, the recent self-regulatory praxis and the case law discussed in this article have shown that it is better to be safe than sorry.

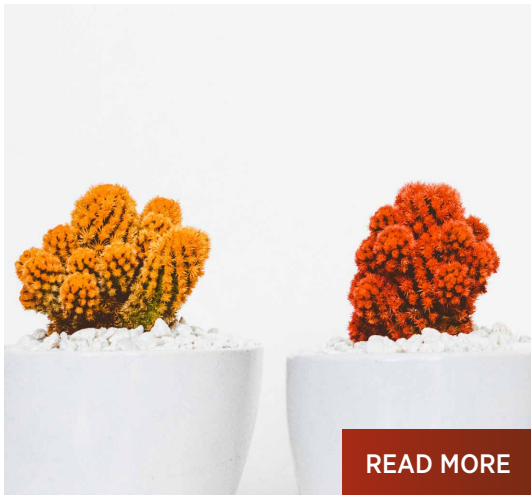


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BLOCKCHAIN: A NEW TREND IN THE FASHION INDUSTRY?

By Itai Coleman, Jesper Nevalainen, Anton Pirinen & Caroline Sundberg

The traditionally slow-evolving fashion industry is turning into an early-adopting industry. Blockchain technology shows extensive potential and constitutes an important part of the fashion industry's shift. In this article, we address the basics of the technology, the ways in which the technology can be applied by fashion companies, and certain legal aspects that should be considered.

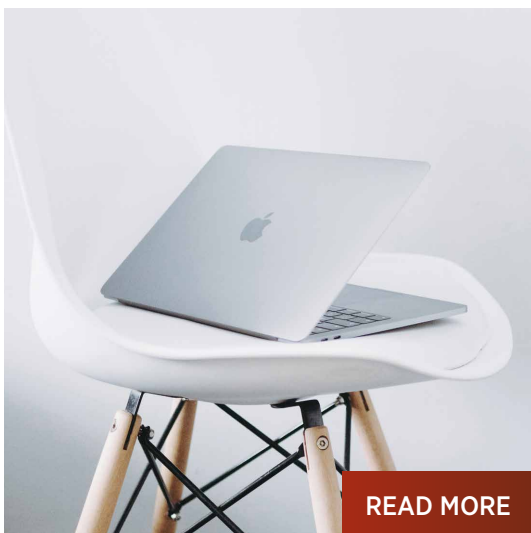


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THE DUAL PROTECTION OF FASHION DESIGNS

By Anna Rätty & Panu Siitonen

The Court of Justice of the European Union has issued a decision in the Cofemel case (C-683/17) to clarify the complex relationship between design and copyright protection and to bring about predictability especially for the fashion industry in the EU, where the practice has been quite scattered on the national level. This article provides a summary of the key takeaways from the case.



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DATA PROTECTION IN RETAIL

By Emma Swahne, Liisa Vaaraniemi & Elisabeth Vestin

Data is the new oil, and it certainly works as a fuel for the retail business. In addition to the maintenance of a mere customer register and processing of payment details, the retail industry has adopted many ways to generate additional value from personal data. One should bear in mind that what is easily available is not always freely usable. This article sums up the key issues for the retail business to think about in order to remain compliant.

THE NEW DEAL FOR CONSUMERS

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On 27 November 2019, the European Parliament and the Council adopted a directive on better enforcement and modernisation of EU consumer protection, which will modernise consumer protection rules. The directive is a part of the so-called “New Deal for Consumers” legislative package proposed by the European Commission in spring 2018. The directive, which the Member States will have 24 months to implement into their national legislation, will bring about many significant changes especially for businesses trading online.

Transparency Requirements for Online Marketplaces

The online market has developed, resulting in an extensive use of online intermediation services (marketplaces), where the identity of the actual seller may not always be clear to the consumer. This has been identified as an issue, because consumer protection rules do not apply to consumer-to-consumer relationships, and a consumer could unknowingly purchase products from another private individual through a marketplace. The new legislation will require transparency with regard to whom the consumer is entering into an agreement with. Furthermore, the marketplace will be obligated to inform the consumer if the marketplace itself is responsible for the delivery and returns and to whom the consumer should turn should any issues arise.

Personalised Pricing

Transparency will be required with respect to personalised pricing, too. The new legislation will mandate that consumers be clearly informed when the price presented to them is based on personalisation on the basis of automated decision-making. It should also be noted that the GDPR restricts the use of automated decision-making, which may also have an effect on the use of personalised pricing.

Criteria for Ranking Offers

Online marketplaces and price comparison sites rank their offers based on criteria that may be unknown to the consumer. The new legislation will require platforms to inform consumers about the main criteria based on which the consumer receives the response to their search query, including whether the search results are based on payments received from traders.

Consumer Protection for “Free” Services

Data is of utmost value for companies. That is why the currency for the use of online services such as social media, cloud services, and email services is often data instead of a monetary payment. To strengthen consumer protection for such “free” services, the new legislation will ensure that the 14-day withdrawal right applicable to digital services will also apply to such “free” services.

Clear Information on Price Reductions

The new legislation will require that any announcement of a price reduction must indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction. This will clarify the current rules on price reductions and may help tackle issues identified with misleading price information.

New Penalties for Violations

In order to make consumer protection more effective,

the new legislation will grant national authorities the right to impose a fine of up to 4% of the trader’s turnover for violations that are widespread and affect consumers in several Member States. This follows the same trend as seen with respect to data protection, where the GDPR introduced similar fines for violations. This has proved successful, as many businesses have made substantial investments to ensure their compliance with data protection legislation. It can be expected that businesses will now need to turn their attention to enhancing their compliance with consumer protection legislation.

The directive on the better enforcement and modernisation of EU consumer protection rules is only one of the two directives making up the New Deal for Consumers legislative package. The second directive on representative actions for the protection of the collective interests of consumers would empower certain qualified entities, such as consumer organisations, to launch representative actions seeking injunctions and collective redress (e.g. compensation, replacement, or repair) on behalf of a group of consumers. This directive is still making its way through the legislative process.

What is Happening in Finland and Sweden?

Due to the evolving EU consumer legislation, the Finnish Government has proposed to strengthen the powers of the consumer authorities (Government Proposal 54/2019). The aim is to expand the authorities’ means of intervention in illegal actions through broader inspection rights, a right to make test purchases, and under certain preconditions, a right to order, among other things, the removal of infringing content from websites. Most significantly, however, the Consumer Ombudsman will be given the ability to seek penalty payments amounting to a maximum of four per cent of a trader’s turnover or a private individual’s taxable income (however, a private individual’s payment obligation may not exceed EUR 40,000).

The abovementioned changes are to be made in order to ensure that the consumer authorities have the powers required under the Consumer Protection Cooperation Regulation ((EU) 2017/2394, the “CPC Regulation”), which enters into force on 17 January 2020. However, in addition to intra-Union infringements, widespread infringements, and widespread infringements with a Union dimension (as defined in the CPC Regulation), the authorities will also be entitled to exercise their new powers in the case of purely national infringements, although the CPC Regulation does not mandate this. Furthermore, as a purely national matter, the procedural rules concerning injunctions issued by the Consumer Ombudsman will

be changed so that such an injunction will become permanent unless the trader opposes it before the Market Court (instead of orally or in writing before the Consumer Ombudsman, as is currently the procedure).

In Sweden, a similar but somewhat more limited strengthening of the consumer authorities’ powers is in progress in order to implement the CPC Regulation (see State Public Report 2019:12). In particular, Sweden appears to be suggesting a more limited approach than Finland to implementing the online enforcement powers specified in the CPC Regulation, opting only to implement the possibility to order a warning text to be displayed in connection with websites including infringing content. No changes have been proposed to the provisions on market disruption fines (in Swedish: *marknadsstörningsavgift*), which have been in force for over two decades and which stipulate that such fines are to be set within the range of SEK 10,000 and SEK 10,000,000, but cannot exceed 10 per cent of the trader’s annual turnover.

Furthermore, following the European Commission’s review of the Swedish implementation of the Consumer Rights Directive (2011/83/EU), certain updates are to be made with the objective to clarify the national rules on consumer protection, including the Distance and Off-Premises Contracts Act (in Swedish: *lag om distansavtal och avtal utanför affärslokaler*). The updates relate to the rules on the right to withdrawal and information requirements.

GO SUSTAINABLE OR GO HOME

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The global market of fashion is at an annual worth of approximately USD 406 billion. Currently, the entire fashion industry is transforming from in-store to omnichannel, and most importantly, it is rapidly increasing its e-commerce revenue. Due to endless mobility, fast deliveries, and on-demand services as well as increasing sustainability awareness among consumers, the fashion industry, like many other industries, is facing new challenges.

In fact, as consumers today are more or less wearing their values on their sleeve, fashion retailers have over the last years tried to change their behaviour to become more sustainability-focused throughout the entire value chain thereby gaining consumer trust. Trends such as real fur becoming a fashion faux pas on the runway, to the new era of the luxury rental, recycling in-store solutions, and the resale market, we are entering 2020 with a marketplace eager to shape a more sustainable fashion landscape and to design with an awareness of the circular economy.

To stay relevant and to access the new generation of impact-driven consumers, fashion brands will need to approach this market segment. At this stage, the circular economy, recycling initiatives, and new technology solutions to support these processes have never been more important for earning consumers' trust. As a result, innovative business models are evolving, including pre-owned, repaired, and rental clothing, providing consumers with more alternatives on prolonging the lifespan of each clothing item.



Sustainable Fashion

Google searches for the term “sustainable fashion brands” have increased by 61 per cent since 2016, increasing by 25 per cent from 2017 to 2018. Furthermore, the Business of Fashion’s report “[the State of Fashion](#)”, published in 2019, discusses the difficulties that the fashion industry is facing and highlights sustainability as one of the main challenges for retailers in achieving consumer trust.

Swedish retailers, such as Åhléns and H&M, have already come a long way in terms of their digital and sustainable journey. H&M launched its new renting service in autumn 2019. Through the service, H&M customers can rent the Conscious Exclusive collections, and the service offers the possibility for customers to repair and update their clothes on site in Stockholm and Gothenburg. According to H&M, the rental of clothes and the possibility to repair them in the retailer’s own sewing studio is an important step in the change towards a “circular fashion future”.

Similarly, the clothing brand Patagonia has started to encourage its customers to repair their old outdoor garments rather than buying new ones. For this purpose, Patagonia is offering free clothing repairs in order to extend the life of its garments. In the view of the CEO of Patagonia, doing so is the single most important thing they can do to lower their impact on the planet.

New technology also allows retailers to work towards sustainability in new creative ways. For instance, the brand Filippa K is using new technology to trace its products through the entire supply chain in order to meet the customers’ request for transparency regarding the origins of their products. Furthermore, the “etailer” giant Zalando is putting a lot of work into becoming more sustainable. For instance, they will offer clothing made from sustainable material and they are using AI solutions in order to decrease the amount of returns from customers.

As all these retailers are changing their business strategies for the good of the environment, we can see that there has been a significant shift from owning to renting, from fast fashion to reusing, repairing and recycling, and lastly, from the exclusive to the sustainable.

Is “Rental” the New “Black”?

Clothing rental services are an economical and environmentally friendly way to stay on trend, while still enjoying the convenience of getting the latest looks delivered right to your doorstep. Statistics already show that next-generation shoppers are changing their consumer behaviour due to environmental effects. To keep up with the growing awareness, retailers need to follow this trend in order to reach a broader demographic.


When it comes to the practice of renting, this trend has not only the potential to reduce the waste and increase the life span of garments. Renting could also be seen as a part of a larger cultural move towards a sharing economy in which ownership could potentially become an out-dated phenomenon. This systematic change in business practice and consumer behaviour is of course to a large part driven by the pressing need for a more sustainable fashion industry.

This systematic change from selling to renting also raises a series of questions from a legal perspective. For instance, the development of the terms of agreement for renting clothes. Swedish retailers have so far developed a concept where you can “rent” certain clothing items on similar terms as buying them (in Swedish: *utökad rätt till öppet köp*), however when returned used and washed, the customer still receives a refund. Questions concerning the duties of the renting consumers and the obligations of the retailers may arise. One may also consider if there will be a future need for legislation protecting the consumers when renting products with a short life cycle, such as clothing.

Key takeaways

Here are a few ways brands can navigate the new fashion landscape and attract the new generation of customers:

- > By offering sustainable options, such as buying clothing made of sustainable materials or renting clothes, retailers can get a competitive advantage as consumers are demanding more environmental friendly alternatives.
- > Building consumer trust might require transparency when it comes to the origin of products. As an example, blockchain technology is being used to track the entire supply chain of products and its authenticity as well as origin. These new and improved tracking tools and techniques allows consumers to buy products that align with their personal values.
- > Exploring new ways to lessen the environmental impact of their businesses and by adapting their business to the circular economy, for instance, by ensuring that products can be resold, reused, and recycled.



“Clothing rental services are an economical and environmentally friendly way to stay on trend, while still enjoying the convenience of getting the latest looks delivered right to your doorstep.”

INFLUENCER MARKETING

– New Possibilities Come with New Challenges

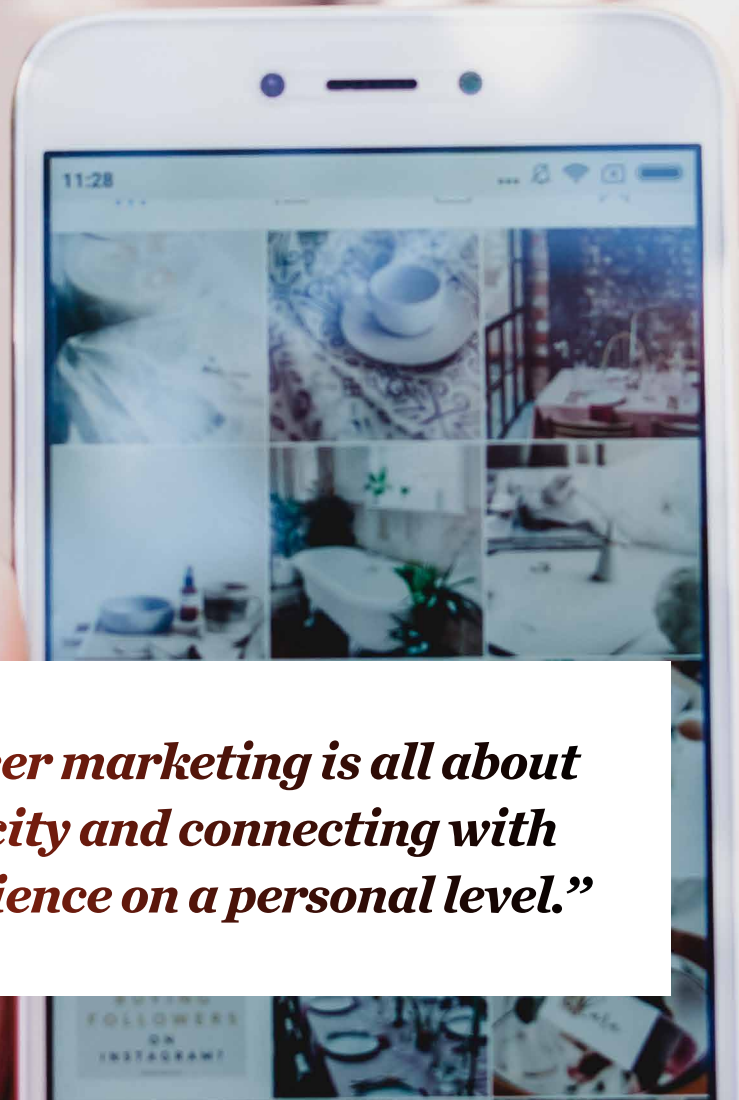
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“Influencer marketing is all about authenticity and connecting with your audience on a personal level.”

Influencer marketing is a dynamic and creative alternative to targeted advertising. However, companies that use influencer marketing as part of their marketing strategies should keep in mind that they are primarily responsible for ensuring that the influencers they collaborate with post in accordance with the law. While the assessment of marketing is always conducted on a case-by-case basis and there are no universally applicable rules for how influencer marketing should be labelled, recent self-regulatory praxis and case law have shown that it is better to be safe than sorry.

The Booming Industry of Influencer Marketing

Companies have always relied on advertising and endorsements to boost sales. Traditionally, celebrities have played a major role in promoting products. However, the growth of the social media platforms and the rise of influencers outside of the traditional celebrity sphere have revolutionised the concepts of marketing and consumer trust.

Influencers provide a unique marketing opportunity, as they connect with their audiences on a personal level. Long-time followers value an influencer's opinion, meaning that an endorsement from an influencer may carry more weight with a consumer in contrast to more conventional endorsement marketing models, hence making the consumer more likely to purchase the promoted product.

In fact, a [recent study](#) has shown that for children and youngsters between 6 and 16 years old, influencers are the second-biggest driver to buy products (25%), only outdone by their friends (28%). This means that for the younger generations, influencers have become more effective than traditional celebrities (6%) and their own families (21%) at driving purchase decisions. Consequently, for today's youth, entertainment and shopping are so intertwined that influencer marketing may be a necessity for companies aiming to reach this group of consumers.

Requirements for Identifying Commercial Content

As influencer marketing is in many ways more dynamic than traditional forms of advertising, it has proven more challenging to regulate. A key point of issue is the more discreet nature of influencer-created commercial content, which can lead to difficulties in discerning such content from non-commercial content.

The fundamental rule in many jurisdictions worldwide, including Sweden and Finland, is that the recipient of marketing must be able to, generally and even at a quick glance, easily identify the commercial nature of such content. It must also be clear who is responsible for the advertisement, i.e. to whose benefit the product is being advertised. For instance, if an advertiser collaborates with an influencer, the influencer should label the content they publish or otherwise disclose the collaboration so that it is immediately apparent that they have created the content as part of a collaboration with a specific advertiser.

The difficulty is that influencers often create commercial content using the same look and tone as they would in regular personal posts, which, while being part of the charm of influencer marketing in the first place, also raises legal concerns. In this year only, the Swedish Marketing Ombudsman and the Finnish Council of Ethics in Advertising have found dozens of instances of influencer marketing on social media to be non-compliant with the requirement that commercial content must be easily identifiable as such regardless of the form and the medium used.

There are no universally applicable rules for the format influencers have to use when identifying posts as commercial in nature. However, the Swedish and Finnish consumer authorities, among others, have published guidelines on how influencer marketing should be labelled in different social media channels. Despite the close ties between the two jurisdictions, however, there are differences between the authorities' guidelines.

The Swedish guidelines instruct influencers to label a blog post with the text "advertisement" (in Swedish: "annonser" or "reklam") at the beginning of a post and at the end of a post. In addition, the commercial nature of the post should be disclosed in the heading and at

the beginning of the actual content. Furthermore, the Swedish guidelines advise influencers to use a different font and colour for the advertisement label and to use the hashtags #advertisement (in Swedish: “#annonser” or “#reklam”) and #companyname. However, in view of the recent case law, it is unclear if solely the hashtag #collaboration (in Swedish: “#samarbete”) or #incollaborationwith is sufficient as it does not disclose that there is an advertisement or paid collaboration behind the post in question.

The Finnish guidelines also recommend the use of the term “advertisement” (in Finnish: “mainos”), but they state that it is also acceptable to use the term “commercial partnership” (in Finnish: “kaupallinen yhteistyö”), which is perhaps more popular in practice. In the context of blog posts, this label should be placed at the beginning of the post and optionally also at the beginning of the title (e.g. “ADVERTISEMENT: [title]”), and it should be in the same language as the content of the post. In addition, the advertiser’s name or trademark should be displayed in the same context. The use of a different font and colour for this information is also advised. Separate detailed recommendations are provided for Instagram, Instagram Stories, YouTube, and podcasts.

Case Law Starting to Emerge

Although there has been a recent deluge of self-regulatory praxis from the Swedish Marketing Ombudsman and the Finnish Council of Ethics in Advertising, case law in the field of influencer marketing is still mostly lacking in these jurisdictions.

The only court ruling to date was handed down by the Swedish Patent and Market Court in January 2018, and it was upheld, for the most part, on appeal in December 2019. The ruling concerned the identifiability of a popular Swedish influencer’s commercial blog and Instagram posts. In this case, the Swedish Consumer Ombudsman filed a claim against the influencer’s company and the media agency that arranged the collaboration, but for some unknown reason not against the company whose service the influencer had advertised. In their rulings, the courts stressed that for influencer marketing to be fair and in compliance with the Swedish Marketing Act, a consumer must be able to identify a commercial post as marketing, generally even at a cursory glance, so that they can then choose whether they want to read or view the entire post.

In the first of the two blog posts at issue in the case, the influencer had added the indication “in collaboration with” (Swedish: “i samarbete med”) at the end of the post in a small font that did not differ from the font used for the rest of the post and without indicating who the collaboration was with. In the second blog post, the influencer had placed a pink banner with the text “sponsored post” (in English) in a small font below the title and subtitle of the post, as well as the text “in

collaboration with” (in Swedish) and the name of the advertiser at the very end of the post. In the Instagram post, the influencer had used the hashtag “#collaboration” (in Swedish: “#samarbete”) at the end of the text field.

The Patent and Market Court of Appeal found that all three posts were contrary to the requirements concerning the identifiability of marketing, whereas the lower instance considered the second blog post compliant with the requirements. According to the Court of Appeal, due to the formulation and placement of the abovementioned labels, it was not possible for the average consumer to tell, at a cursory glance, whether any of the three posts were commercial in nature. As this was likely to impact the average consumer’s ability to make a well-informed commercial decision, this was found sufficient grounds to prohibit all three posts.

In addition, the Court of Appeal agreed with the lower instance on the fact that the advertiser had not been identified in a sufficiently clear way in any of the posts. However, as this in itself was unlikely to impact the average consumer’s ability to make a well-informed commercial decision, the Court of Appeal found, contrary to the lower instance, that this did not constitute additional grounds for an injunction regarding the posts.

As regards liability, the Court of Appeal upheld the finding that, of the defendants, only the influencer’s company could be held liable for the posts. According to the Court of Appeal, even if the media agency had arranged the collaboration and had an active role in the formulation of the posts (for example by suggesting copy), the influencer’s company had been able to make the final decisions on the formulation and publication of the posts. There was insufficient evidence to support the finding that the media agency would have been in such a position to “substantially contribute to the marketing practice” and thus, they could not be held liable. The Court of Appeal prohibited the influencer’s company, under penalty of a fine of SEK 100,000 (approximately EUR 10,000), from publishing similar, insufficiently labelled commercial posts in the future. The ruling is final.

Final Remarks

Influencer marketing is all about authenticity and connecting with your audience on a personal level. Influencers cultivate followers by being relatable, while presenting an image that others look up to at the same time. Followers want to do the things that influencers do and have the things that influencers have. This dynamic creates an excellent marketing opportunity. However, influencer marketing has recently been subject to a greater legal scrutiny. Thus, in order to structure a successful business plan for influencer marketing, it is critical to understand consumer legislation and advertising and marketing regulation in the jurisdictions in which you aim to carry out such marketing.

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Practical tips

- > **Keep in mind** that in the context of influencer marketing, the advertiser always has the primary responsibility to ensure that the audience is able to, generally even at a quick glance, easily identify the commercial nature of the content and know to whose benefit the marketing is being carried out. However, at least a professional influencer may also be held liable for the fulfilment of these requirements.
- > **To help** fulfil their obligations, advertisers should obligate the influencers with whom they collaborate to label their posts correctly and further instruct them on how to do so. It is always advisable to enter into a written agreement concerning any commercial partnership and to include the relevant obligations and instructions in such an agreement.
- > **In general**, in Sweden and Finland, commercial posts should be marked with “advertisement” at least at the beginning of the post, in the same language as the content of the post (in Swedish: “*reklam*” or “*annons*”, in Finnish: “*mainos*” or “*kaupallinen yhteistyö*”). Where technically possible, the font and colour of this label should be such that the audience can clearly distinguish it from the content of the post, and the advertiser’s name or trademark should always be displayed in the same context.
- > **Note that** requirements other than those mentioned in the previous point may also apply depending, for instance, on the jurisdiction and media, so always check the relevant local guidelines, case law, and market practice. The Nordic consumer authorities have issued a [joint position](#) (2016) on covert marketing in digital media. In addition, the Swedish and Finnish authorities have each published their own guidelines. The [Swedish guidelines](#) (2015) are only available in Swedish, whereas the [Finnish guidelines](#) (2019) are also available in English.
- > **Other issues** to consider in the context of influencer advertising include the question of whether the advertised product and the content of the advertising are appropriate for the audience that the influencer generally reaches (e.g., cosmetic surgery services should not be advertised to those aged under 18, and this age group should not be directly encouraged to buy anything), how to avoid the relationship between the advertiser and the influencer being seen as an employment relationship (if that is not the parties’ intention), and how to ensure that all applicable taxes are also paid when the influencer receives payment in kind (e.g. free goods or services) instead of a monetary compensation.

BLOCKCHAIN

A New Trend in the Fashion Industry?

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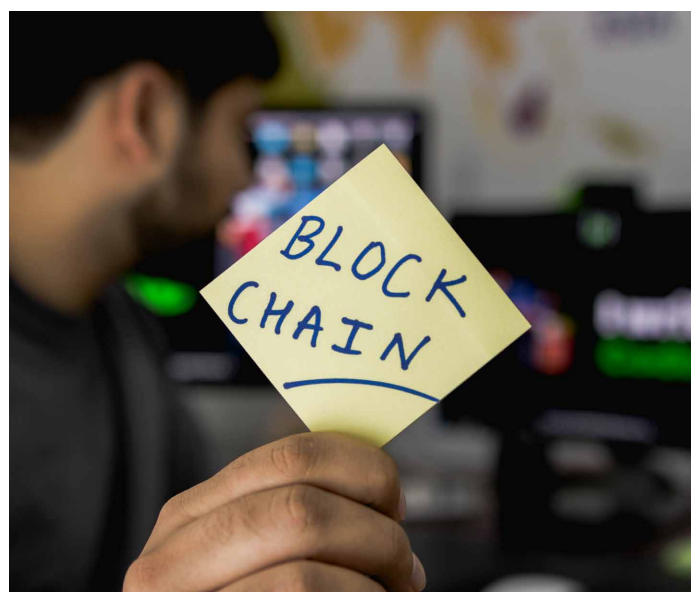
The use of blockchain technology is an integral part of the fashion industry's shift from being rooted and slow-evolving to becoming an early-adopting industry using disruptive technologies to meet the demands of the 21st century.

Background

Blockchain technology constitutes a peer-to-peer network in which records of events such as transactions and contracts are stored in blocks. Once an event is verified by every node in the network, the event is added as a new block in a chain of earlier events. Every block contains a unique identifier that is connected to earlier blocks in the chain. Since all nodes in a blockchain are a part of the verification process and have access to the records related to all events, changing information on a blockchain is difficult and expensive, and where it is done it is likely visible to all those having access to the ledger. Thus, blockchains may be used to verify the nature of events and the order in which the events have occurred.

Blockchain technology initially provided the necessary means to enable payments with no intermediaries in cryptocurrencies (such as Bitcoin and Litecoin). Although the technology is still in its infancy, it is now recognised that the potential uses of the technology are fundamental and extensive in a wide array of industries, including the fashion industry. It has even been suggested that blockchain may be one of the most important inventions since the internet.

“It has even been suggested that blockchain may be one of the most important inventions since the internet.”





Uses of Blockchain in Fashion Industry

With the recent increase in demand of transparency from consumers, several fashion companies are implementing procedures to enable efficient monitoring of supply and distribution chains. By combining blockchain technology with physical RFID chips or QR codes, companies can track the multiple steps involved between sourcing the necessary raw materials for a garment to distributing the garment to the end consumer. In addition, blockchains can be used to ensure that the process is consistently performed in an ethical, sustainable, and secure manner by monitoring the intermediaries.

Blockchain technology can also be used to protect intellectual property owned by fashion companies from misuse and to increase consumer trust by reducing the risks of fraud and counterfeit products. In order to secure the availability of the information necessary to protect their designs, companies can demonstrate their ownership and creation by recording their creation processes on a blockchain. Furthermore, through the use of distributed ledgers, goods can be tracked and verified by retailers and consumers from the production phase all the way to the second hand sale of goods.

Earlier this year, the luxury goods conglomerate LVMH launched a blockchain platform to facilitate consumers' authentication of luxury products. The ledger provides consumers with transparent information about the product's history, including events in the design, production, distribution, and transaction processes. Several Swedish brands, such as Filippa K and Asket, have also initiated the implementation of blockchain technology in order to achieve full transparency towards consumers.

In addition, smart contracts placed on blockchain platforms, such as Ethereum, can be used to automate the actions related to contractual obligations, provided that the set criteria are met. Thus, a smart contract can be described as a software-implementation of an

underlying contract that can make the enforcement and performance of the contract more effective.

Outlook

Despite the fact that there are several legal uncertainties related to blockchain technologies, only limited guidance has been provided to date by the authorities and courts. Blockchain technology as such is largely unregulated, but it is subject to existing legislation. Although it is yet to be tried, blockchains could assist in generating compelling evidence in civil proceedings in the fashion industry, considering that the information stored on a blockchain could be argued to be secure and immutable. In addition, it is still unclear how existing contract law will apply to self-performing smart contracts. The non-performance of automated actions under a smart contract may, for instance, due to technical issues, lead to unforeseen challenges. Provided that the performance of such an action is outside the debtor's control, can the debtor be held liable for the failure to act?

Despite the uncertainties, most companies in the fashion industry are likely to benefit from the implementation of blockchain technology either by meeting customer demands regarding transparency or by protecting intellectual property and counteracting counterfeits, or both, while simultaneously decreasing the administrative costs related to tracking, auditing, and compliance. However, significant upfront investments and uprooting largely functioning administrative processes can compose initial hurdles in implementing new blockchain technologies. To make these investments a long-term success, particular attention should be paid to ensuring that the contracts under which the technology is sourced facilitate change in the company's business, that adequate rights to the information stored on the blockchain are secured, and that the information stored on blockchains is available and accurate, and, where appropriate, unmodifiable. and accurate, and, where appropriate, unmodifiable.

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The Court of Justice of the European Union has issued a decision in the Cofemel case (C-683/17) to clarify the complex relationship between design and copyright protection and to bring about predictability especially for the fashion industry in the EU, where the practice has been quite scattered on the national level.



The CJEU's Cofemel Judgment

Unlike much of the other intellectual property rights legislation, copyright legislation is still largely unharmonised within the European Union. However, certain EU legislation does exist, and the case law of the Court of Justice of the European Union (the “CJEU”) has played a central role in the founding and steering of the European Union copyright regime. A recent judgment clarifying the relationship between copyright and design protection was rendered by the CJEU on 12 September 2019 in the Cofemel case (C-683/17).

The parties involved in the case are both active in the field of design, production, and sale of clothing. In the dispute, the plaintiff, G-Star, claimed that certain clothes designed and sold by Cofemel were in fact copies of G-Star’s designs, which, it maintained, constituted original intellectual creations that qualified as copyright-protected works. Cofemel, on the other hand, considered that such designs could not constitute “works” that qualify for copyright protection.

The Portuguese Supreme Court referred the case to the CJEU to clarify whether the applicable Information Society Directive prevents Member States from granting copyright protection to designs on grounds other than originality. An example of such other grounds can be found in the Portuguese Copyright Law, which requires designs to produce an “aesthetic effect” in addition to originality in order to qualify for copyright protection. Such additional requirements have also been implemented in some other Member States’ copyright legislation, and, for instance, Italian copyright legislation has an additional requirement of “artistic value”.

Criteria for Qualifying as a “Work”

To answer the question, the CJEU analysed the matter by focusing on the concept of copyright-protected “work”, which, according to the CJEU, must be considered an autonomous concept under EU law, wherefore it must be interpreted uniformly across the Member States. The CJEU ruled that in order to qualify as a work, it must have a combination of the following two cumulative elements:

1. The object of protection must be original, which means that it must derive from the intellectual creation of its author.
2. Only elements that can be regarded as expressions of such intellectual creation can be classified as works.

Hence, if there has been no room for the author’s freedom of creation, and the object is determined by technical considerations or constraints, the object cannot be regarded as original enough to constitute a work eligible for copyright protection.

Moreover, the CJEU held that the existence of an object of protection must be identifiable with sufficient precision and objectivity, and all subjective elements that might be harmful to legal certainty must be excluded from the process. Thus, the requirement of precision and objectivity cannot be met when such identification is based on the subjective experience of a person. This is because the “aesthetic effect” of an item may differ for each person considering the aesthetic characters of the item.

The fundamentally different objectives of copyright and design protection were also considered in the judgment. Design protection aims to protect objects that are novel and that have individual character and that are suitable for practical use and mass production. This also justifies the more limited duration of protection when compared to copyright protection, which is reserved for “works” and which confers protection for a longer period of time period. Thus, granting copyright protection to a design should not result in compromising the objectives and effectiveness of these fundamentally different forms of protection. Thus, dual protection should only be possible in certain limited circumstances.

After careful consideration of these aspects, the court held that if a design meets the abovementioned two-step criteria, it may also be considered a copyright-protected work.

Impacts of the Judgment

The judgment brings about predictability especially for the fashion industry in the EU, as the practice has been quite scattered on the national level. In the context of designs, it is now confirmed that the additional national requirements are not in line with the EU-wide concept of a copyright-protected work. The only acceptable requirement of copyright protection for designs is the originality of the design at hand.

In practice, the judgment may clarify and lower the threshold for fashion and design items’ copyright protection especially in those Member States that have their own additional requirements for copyright protection, including certain key Member States in the field of fashion, such as Italy and Germany. On the other hand, as other requirements for copyright protection are now clearly prohibited, the threshold of originality may now play a more central role in the evaluation of whether an object meets the requirements of the copyright protection.

What will be particularly interesting is the interpretation of the originality of fashion items and other items of utilitarian purpose, where the creation process is often subject to certain technical restrictions.

DATA PROTECTION IN RETAIL

Key Things to Think About to Remain Compliant

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In addition to the maintenance of a mere customer register and processing of payment details, the retail industry has also adopted many other ways to process personal data, most importantly, to generate additional value from it.

Customer loyalty programmes are an effective way to connect with and engage customers, and to receive information about their desires and needs by simultaneously obtaining loads of behavioural data. Such personal data is of utmost importance when creating personalised experiences and marketing.

Personalising customer experiences is a key in today's economy, involving customer encounters both in digital and tangible world. As customers increasingly value communication and service that is tailored to their interests and needs, analysing and profiling have gained importance. A rapid increase in the number of available mediums has not only brought about new possibilities, but also imposed new challenges. Modern marketing makes use of digital tools that manage processes, workflows, content, and customer analytics. Adtech enables programmatic buying and selling of advertisements to make them more effective towards unknown prospects based on certain targeting parameters (location, browser history, behaviour, etc.).

Regardless of the planned processing, the basic rules are pretty much the same. The key piece of legislation in the EU in this regard is the General Data Protection Regulation (EU) 2016/679 (the "GDPR"). Having high standards of privacy and data protection within an organisation is not only important for compliance purposes, but also because they deliver a valuable competitive advantage. High privacy standards have been found to increase customer trust, enhance an organisation's brand image, and give the organisation readiness to better engage with customers.

Here are some key things to consider in planning and performing personal data processing in a compliant way:

Planning Ahead

One should plan the processing prior to the collection of the personal data, i.e. decide in advance why personal data is collected and what the data will be used for, as data may only be collected for a specified and explicit purpose. Once collected, the data can only be used for the initially specified or compatible purpose and for the time necessary.

While evolving technologies and innovative business ideas often allow new ways in which to utilise previously collected personal data, as a rule, the purposes for which the data has initially been gathered cannot be freely extended.

Minding Other Involved Stakeholders

Efficient data processing is usually based on digital tools and services (which often are provided by third parties specialising in such solutions), marketing efforts may utilise data obtained from external databases, and advertising may be based on collaborations. Where processing involves more parties than one, it is important to analyse the roles of the parties concerned, as the identified roles determine the rights and obligations of the parties.

For instance, where a marketing agency sends invites to a retailer's contacts for a marketing event, the marketing agency acts as a processor for and on behalf of the retailer acting as a controller. The marketing agency does not gain rights to the contacts and may not use them for its own purposes. In addition, the parties are required to conduct a data processing agreement providing for minimum content laid down in the GDPR.

“Personalising customer experiences is a key in today's economy, involving customer encounters both in digital and tangible world.”

Where two or more controllers process personal data for the same purposes, they are considered joint controllers, who also must agree on certain issues with regard to their mutual relationship under the GDPR. Joint controllership also affects, for instance, the lawful basis of the processing, the duty to inform, and the facilitation of the data subject's rights. This should be borne in mind especially when operating online. The Court of Justice of the European Union (the "CJEU") considered in its recent judgment in the Fashion ID case ([C-40/17](#)) that an online clothing retailer was a joint controller together with Facebook with regard to the collection of personal data through Facebook "Like" button embedded to the retailer's website. This is because by embedding the Facebook "Like" button on its website, the retailer had made it possible also for Facebook to obtain the personal data of the visitors on its website.



“Customer loyalty programmes are an effective way to connect and engage customers and to receive information about their desires and needs by simultaneously obtaining loads of behavioural data.”

Staying Focused

In addition to planning the data processing in advance, it is also important to regularly review the collected data. The personal data that is processed must be adequate, relevant, and limited to what is necessary for the purpose(s) for which they are processed. When the data is no longer necessary for those purposes, it should no longer be kept in a form permitting identification.

Hence, even though rich data is important in achieving effective results, the data should also be genuinely relevant. Not all customer data about will be of assistance in marketing efforts, and outdated data will certainly not make business flourish. Non-relevant data should not be collected “just in case”, and once the personal data is no longer relevant, it should be anonymised or deleted.

Shifting to Digital

Trade and marketing are increasingly shifting to a digital environment, where valuable customer data is often gained through cookies. The CJEU recently reviewed the rules on cookie collection practices in the *Planet49 case (C-673/17)*. One of the main questions faced by the CJEU was that what is required of a website operator in order to obtain a legally valid consent from its users to the store cookies on their computers. Only consent that is the result of an active behaviour and that has been “freely given, specific, informed and unambiguous” will unquestionably constitute such a valid consent.

The CJEU found that if a pre-ticked box is used to obtain consent, it would appear impossible in practice to ascertain whether a website user actually gave their consent since they have not “actively” confirmed this. For this reason, the CJEU held that a consent given by a pre-ticked box would not constitute a valid consent.

Gaining Trust Through Transparency

The terms for the data processing must be specific and clearly communicated to the customer through, for instance, privacy policies. Companies must provide sufficient transparency by disclosing all relevant information to the customers, thereby giving them control of their data. When making use of AI solutions, one should bear in mind that automated processing may not happen in a black-box, as the data subjects must be informed of automated decision-making (including profiling) and provided with meaningful information about the logic involved. Transparency plays a crucial part in gaining customer trust.

Particular care should be involved if the automated processing, for instance, by an adtech tool, involves elements such as discounts based on certain personal factors or targeting of vulnerable groups (e.g. children). Nobody wants to feature a news piece on illegal processing of personal data. Furthermore, even “legal” processing may sometimes be considered unethical or suspiciously intrusive by the public.

Do's

- > Plan the processing from the moment the data is obtained until its deletion. Remember that it is always cheaper to analyse and plan than to try to fix things afterwards!
- > Be transparent and fair, this is the best way to avoid complaints from the data subjects to you and the supervisory authority.
- > Document the processing and spread information within the organisation, make everyone involved and liable for their own part.
- > Review the stored data and implemented ways of working from time to time.
- > Analyse your role in the processing and consider the impacts of involving third parties. Be active in contracting; ensure that the mandatory contracts are entered into and that you understand the rights and obligations imposed by the contracts.

In case processors are frequently used, preparing an own data processing template is always a good investment, as it may be also used as a tool to evaluate the terms provided by the other party.

Don't's

- > Don't gather and store information for unknown purposes or “just in case”.
- > Ignorance is not bliss. Don't postpone the handling of the data protection issues to a better moment, usually such time never comes.
- > Don't consider data protection as a one-time exercise; compliance requires daily measures.
- > Don't forget to review the compliance capability of your systems, e.g. duties to comply with a data subject request cannot be neglected by reason of failing to take appropriate technical measures.

TRENDS & HIGHLIGHTS

We hope you enjoyed the first edition of Hannes Snellman Fashion Law Review. As a final note, we would like to give you a look at some fashion and retail law trends for the upcoming year. What runs through all consumer-facing industries is the fact that awareness and trust will be more important than ever going forward. Maintaining consumers' trust in your company and communicating how your company is protecting their integrity will be all the more important in the future when building a strong brand.

The awareness of consumers is rapidly increasing and purposeful values such as sustainability, diversity,

the circular economy, and impact-driven initiatives set a high bar for retailers to deliver a competitive offer. Furthermore, with fast-paced technological development and emerging technologies come both new possibilities, but also new legal issues which have not been considered before. It is therefore important to us that we closely monitor the market and listen to the needs of our clients so that we can best help them figure out the best way to move forward in any situation that may arise and have an impact on their business. With years of experience and a dedicated team within fashion and retail law, we hope to hear from you if you have any questions or concerns.

Consumer Rights & Societal Impact

- > The push for a more sustainable market is starting to shape the way consumers think about the fashion industry, where purpose-driven values are taking much more space than before. Consequently, fashion brands and retailers are turning to new concepts such as clothing rental, and they are increasingly communicating about the action they are taking to be responsible and sustainable.
- > Both consumers and companies are behaving in new ways at an increasingly rapid pace, especially due to the development of the online market. Meanwhile, legislators are working hard to keep up with these changes and to ensure sufficient and modern consumer protection rules adapted for the modern retail market.
- > In order to stay relevant and keep a broad consumer base, fashion brands and retailers need to focus on an agenda consistent with sustainability and responsibility.
- > Privacy and consumer trust are rapidly becoming one of the most important factors to consider within the fashion industry.

Advertising & Influencer Marketing

- > Influencer marketing is all about authenticity and connecting with your audience on a personal level. To connect with Generation Z, influencer marketing may even be a necessity, as for them, influencers have become more effective than traditional celebrities and their own families at driving purchase decisions.
- > Be aware of how you post on social media: commercial content must be clearly identifiable as advertising, generally even at a quick glance. Compliance with this requirement is subject to increasing scrutiny. Recently, there has been a deluge of self-regulatory practice on influencer marketing in both Sweden and Finland, and the Swedish courts have now rendered a final decision in the first case in this field.

Technology & Data Protection

- > Blockchain is a promising technology that can benefit fashion companies in several ways. It will likely become a pivotal tool for fashion companies in protecting their intellectual property from misuse and in meeting contemporary consumer demands by facilitating a transparent and sustainable production chain and the authentication of products.
- > Alongside their potential benefits, there are currently several legal uncertainties related to blockchain technologies. For instance, it is still unclear how existing contract law will apply to self-performing smart contracts. While anticipating additional legal clarity, most fashion companies will probably benefit from exploring how the technology could support their business operations.
- > Customer loyalty programmes are an effective way to connect and engage customers, and the gathered personal data is of utmost importance when creating personalised experiences and marketing. While new digital tools and technologies allow new ways in which to utilise collected data, data protection should always be kept in mind when launching such activities. Ensure compliance by planning the processing ahead of time, reviewing it regularly, and keeping it transparent and fair.

FASHION LAW AT HANNES SNELLMAN

WHAT PEOPLE SAY ABOUT US



- > Our Intellectual Property team is a “efficient and business-minded” team according to Legal 500, 2019 edition.
- > Our partner Elisabeth Vestin is ranked as **one of the world’s leading franchise lawyers** by Who’s Who Legal 2016, 2017, 2018 and 2019.
- > Our partner Panu Siitonen stands out for being “very thorough”, according to Legal 500, 2019 edition. He is also ranked as a **WIPR Leader 2019** by World Intellectual Property Review.



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a top-tier Nordic law firm with 300 outstanding lawyers and other professionals based in Finland and Sweden. Our whole team of about 25 IP & Tech lawyers and other professionals regularly works together across borders.

WE CAN HELP YOU

Hannes Snellman’s fashion lawyers can support you through the entire fashion journey including: Brand Protection | E-commerce | Data Protection | Consumer Protection | New Innovations and Technology Solutions | Commercial Agreements | Social Media and more.



WE ASSIST

retail chains, department stores, e-commerce sites, as well as apparel, cosmetics and design companies across the Nordic region and the rest of the world.



OUR VALUES: *One Firm | Our People | Ownership*

Our values are what unite us, what guide us, and how we look at every challenge.

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