

GARRIGUES

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URBAN MARKETS
AND FAKES:
TOMMY HILFGER V
DELTA CENTER

CAN I USE THE
IMAGE OF A FAMOUS
PERSON
WHO IS NO
LONGER LIVING
FOR ADVERTISING
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INVESTIGATES
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#SURREPTITIOUS
ADVERTISING
#FAKEREVIEWS



URBAN MARKETS
AND FAKES

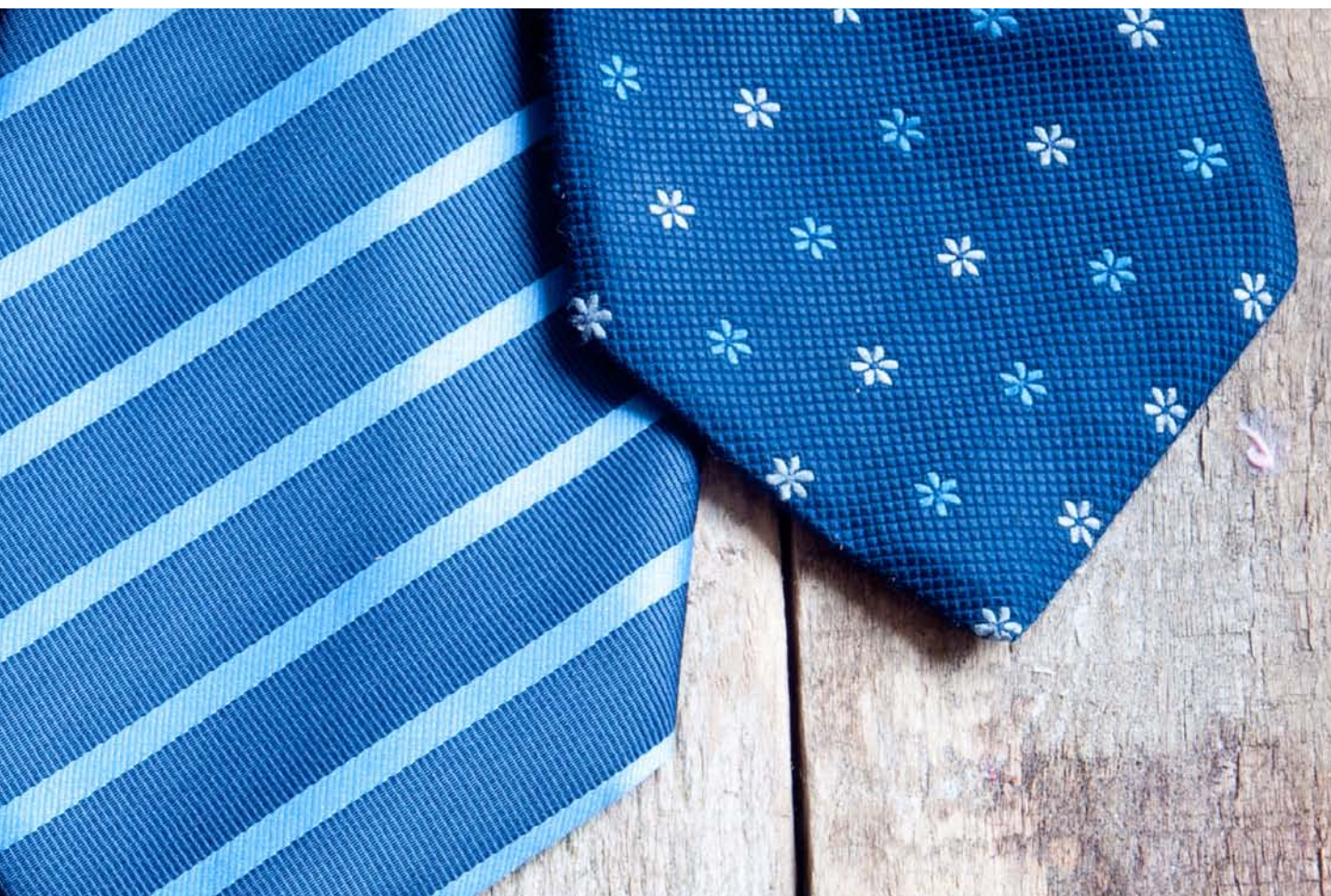


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URBAN MARKETS AND FAKES:

TOMMY HILFIGER V DELTA CENTER



CRISTINA MESA

Over the last few years, online sales of counterfeit goods have become the biggest source of concern for trademark owners. However, this does not mean that the traditional forms of sale of these goods are going off without a hitch. In this field, the new problem are urban markets – areas with a cosmopolitan flair and a touch of nostalgia, where the entire spectrum of generations can be found, which is winning over *millennials* and revitalizing our city centers.

In this context, the recent judgment by the Court of Justice of the European Union (CJEU) in *Tommy Hilfiger v Delta*¹ constitutes a clear boost to the fight against piracy in physical markets, and confirms the obligation of Member States to protect intellectual property rights effectively. It should be borne in mind that the impact of counterfeits on the economy worldwide amounts to €338,000 million and in the EU, an astounding 5% of the goods that are imported are fakes². It is precisely the good “health” of this market that has compelled the European legislator to reinforce

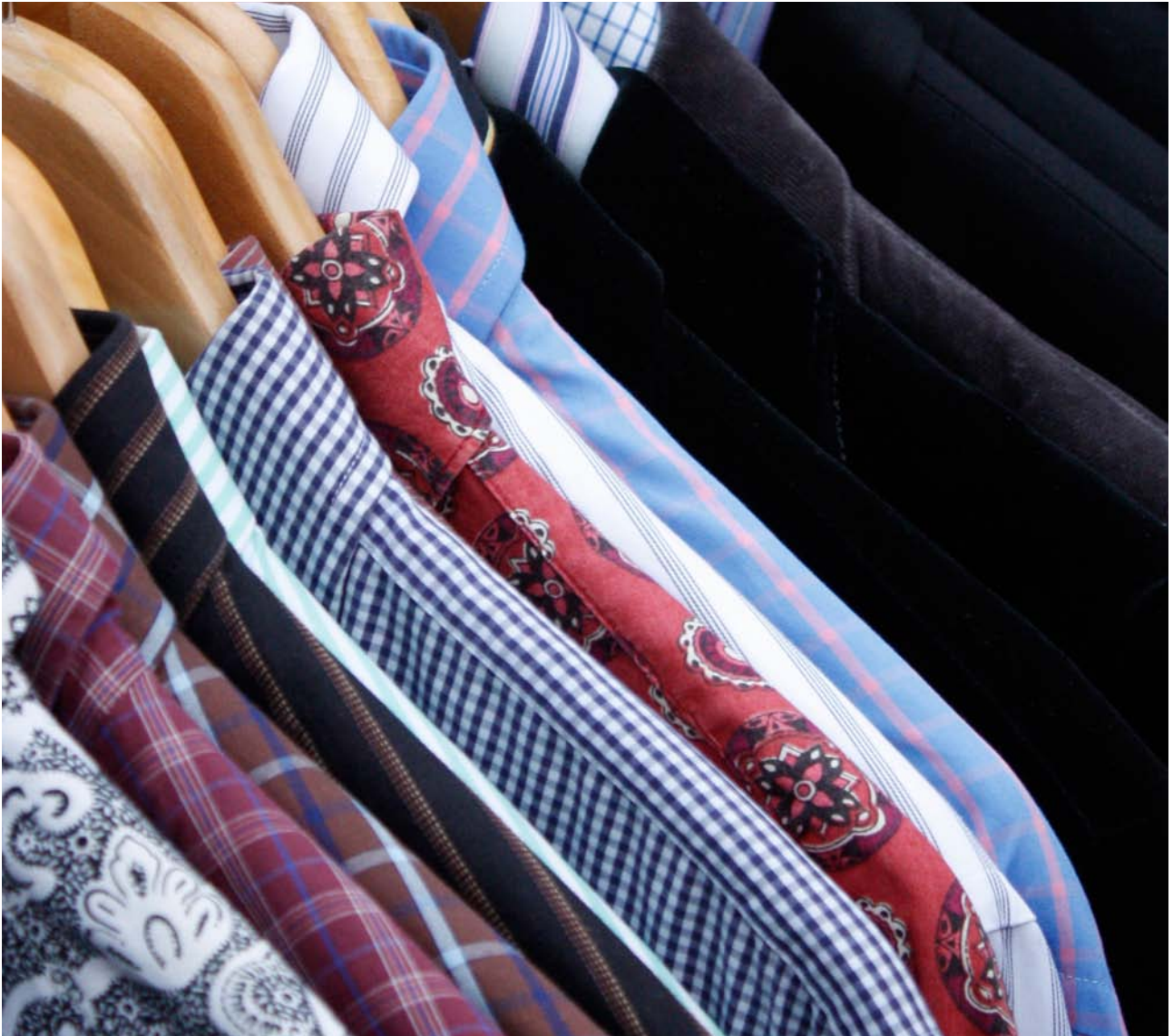
the fight against piracy with instruments such as the intellectual property directive³. This directive forms the backbone of the judgment we analyze below.

The conflict arose due to the sale of counterfeit goods in Prague market halls under several famous brand names. The brands affected, which included Tommy Hilfiger, Lacoste and Burberry, were not satisfied with simply taking the market traders to whom the sales areas had been sublet to court. Instead they sought to tackle the root of the problem, and also urged the Prague courts to issue an injunction against Delta Center as tenant of the marketplace. What did they request? Basically that they:

1 CJEU judgment of July 7, 2016 in C-494/15.

2 “Trade in counterfeit and pirated goods. Mapping the economic impact”. OECD y EUIPO..

3 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.



- *“refrain from any conclusion or extension of contracts for the rental of sales areas in those halls with persons whose conduct was held by the judicial or administrative authorities with final effect to constitute an infringement or a risk of infringement of the rights conferred by the marks mentioned in the application;*
- *to refrain from any conclusion or extension of such contracts where the terms of those contracts do not include the obligation on market-traders to refrain from infringing the applicants’ intellectual property rights or the clause according to which Delta Center may terminate the contract in the event of the infringement or likelihood of infringement of those rights, and*
- *to submit, in some situations described by the applicants, its excuses in writing and to have a report published, at its own expense*

However, given that Delta Center simply sublets areas in the market, can brands request that an injunction be issued directly against the owner (or tenant) of the property? Delta Center is obviously not the entity that is offering counterfeit goods to the people of Prague. This notwithstanding, according to article 11 of the intellectual property directive, regarding respect for intellectual property rights, rightholders may also apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right⁴.

Yet the High Court of Prague ruled against the brands, concluding that Delta Center could not be considered an “intermediary” on the terms of the Directive. Moreover, the court came to say that an interpretation as broad as “intermediary” would lead us to absurd situations, such as considering companies that supply electricity to counterfeiters as intermediaries—and therefore responsible.

“

En los últimos años el comercio electrónico de productos falsificados se ha convertido en el mayor quebradero de cabeza de las marcas, pero ello no significa que debamos desatender el comercio tradicional de estos productos. ”

As was to be expected the brand owners decided to appeal the decision and in view of the doubts in interpretation, the Prague Supreme Court chose to submit two requests for a preliminary ruling to the CJEU.

WHAT IS AN “INTERMEDIARY”?

The first request submitted for a preliminary ruling sought to determine the meaning of “intermediary”:

Is a person with a lease of premises in a market, who provides stalls and pitches on which stalls may be placed to individual market-traders for their use, an intermediary whose services are used by a third party to infringe an intellectual property right within the meaning of Article 11 of Directive 2004/48?⁵

The CJEU offers an extremely broad definition of the term “intermediary”, defining it as any economic operator who provides a service capable of being

used by one or several persons to infringe intellectual property rights, without the need for a direct relationship between the intermediary and the infringer.

When interpreting this concept the CJEU has adhered closely to case law on internet-related issues, where an access provider (telephone companies, hosting services, etc.) despite remaining neutral in the service provided is always considered an “intermediary”. Following this analogy, the CJEU reasons as follows:

“The fact that the provision of sales points concerns an online marketplace or a physical marketplace such as market halls is irrelevant in that connection. It is not apparent from Directive 2004/48 that the scope of the directive is limited to electronic commerce. Moreover, the objective stated in recital 10 of that directive of ensuring a high, equivalent and homogeneous level of protection of intellectual property in the internal market would be substantially weakened if an operator which provides third parties with access to a physical marketplace such as that at issue in the main proceedings, on which those third parties offer in that marketplace the sale of counterfeit branded products, could not be the subject of the injunctions referred to in the third sentence of Article 11 of that directive”⁶.

The CJEU’s answer to the first request submitted for a preliminary ruling is that a tenant of market halls who sublets the various sales points situated in those halls to market-traders can be considered an intermediary on the terms of the Directive. Obviously.

⁴ “Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC” article 11 of the intellectual property directive.

⁵ Paragraph 20 Tommy Hilfiger and Delta case.

⁶ Paragraph 29 Tommy Hilfiger v. Delta. .





What is missing from the CJEU's judgment is that it has not provided a series of criteria that, beyond this specific case, help us to determine when a specific market operator can be considered an intermediary.

PHYSICAL AND DIGITAL MARKETS

The second question submitted by the Prague Supreme Court for a preliminary ruling refers to the specific measures that can be imposed on intermediaries:

"Is it possible to impose on a person with a lease of premises in a market, who provides stalls and pitches on which stalls may be placed to individual market-traders for their use, measures, as provided for in Article 11 of Directive 2004/48 under the same conditions as those formulated by the Court of Justice [in the judgment of 12 July 2011 in L'Oréal and Others, C 324/09, EU:C:2011:474] with regard to the imposition of measures on the operators of an online marketplace?"

The CJEU's reply is yes. It consequently chooses to apply to traditional sales the same criteria that are applicable to electronic sales in *L'Oréal v eBay*⁸. Thus, although it is the Member States that decide which type of injunctions they make available to rightholders, the CJEU points out that they must be fair, equitable and not be unnecessarily complicated or costly for defendants, that is, for intermediaries:

"Nor can the intermediary be required to exercise general and permanent oversight over its customers. By contrast, the intermediary may be forced to take measures which contribute to avoiding new infringements of the same nature by the same market-trader from taking place"

In short, at the end of the day what the CJEU is saying, is that an injunction can only be issued against an intermediary if it ensures a fair balance between the protection of intellectual property and the absence of obstacles to legitimate trade¹⁰. A logical decision since in our opinion imposing an excessive burden on intermediaries—physical or digital—is an obstacle to improving competition in the European Union.

⁸ CJEU judgment of July 12, 2011 in C-324/09 *L'Oréal SA et al. v. eBay International AG, et al.*

⁹ Paragraph 34 *Tommy Hilfiger v. Delta*.

¹⁰ Paragraph 35 *Tommy Hilfiger v. Delta*.



CAN I USE THE IMAGE OF A FAMOUS PERSON WHO IS NO LONGER LIVING FOR ADVERTISING PURPOSES?

COMMENTARY ON THE RECENT
SUPREME COURT JUDGEMENT IN THE DALÍ CASE

CAROLINA PINA

A great many fashionable brands have used in their advertising campaigns the images of people who, despite no longer being alive, continue to have considerable selling power. There are even marketing studies which show that advertising campaigns that link the products or services being advertised to deceased celebrities are more effective.

Each year, Forbes magazine publishes its ranking of the dead celebrities who, through the exploitation of their image, generate most revenues (the so-called “delebs” or dead celebrities). The exploitation of the image of Marilyn Monroe, for example, despite the time which has passed since her death, has come to be valued at over 15 million dollars, and Elvis Presley’s image rights generate an average of 55 million dollars each year.

The question to which this leads us is whether fashionable brands in Spain can use the images of deceased celebrities without authorization, and therefore without paying anything in exchange?

Unfortunately, the regulation in Spain of post mortem image rights is very vague, leading to much uncertainty in its interpretation. The provisions of Organic Law 1/1982 of May 5, 1982 on the civil law protection of the right to honor, personal and family privacy and one’s own image (Organic Law 1/1982) refers only to the post mortem protection of publicity rights, and simply stipulates which persons are legally entitled to prevent the use of the image of the deceased for which no authorization was given during his/her lifetime. It makes no mention, however, of the commercial exploitation of publicity rights post mortem¹.

The Pre-amble to the law in question merely stipulates that *“although the death of the subject of law extinguishes the rights relating to the personality, the memory of such subject is a prolongation of the personality which also merits protection by Law, it being for this reason that protection is envisaged when the injury has been sustained after the subject’s death (...).”*

In other words, according to the Preamble of the Law in question, the rights relating to a subject’s personality are extinguished upon his/her death, it being only the memory of the deceased which is afforded protection.

According to article 4 of Organic Law 1/1982, actions seeking the protection of the fundamental own image rights of deceased persons may be brought by whomever

the deceased named for this purpose in his/her will, or failing this, by his/her spouse, ascendants, descendants or siblings who are alive at the time of death. Failing all of the above, it is up to the public prosecutor to bring such actions, acting either ex officio or at the behest of any interested party, although no more than eighty years must have passed since the demise of the subject concerned.

In the famous Paquirri Case (1988)², the Constitutional Court analyzed the post mortem protection of own image rights and reached the conclusion that the plaintiff—the Spanish singer Isabel Pantoja (to whom so much is owed by those of us who work in the field of honor, privacy and publicity rights)—lacked the legal standing required to bring an action for the violation of the bullfighter’s fundamental own image rights, based on the understanding that fundamental rights cease to exist upon the death of the subject concerned. The Constitutional Court found that when the holder of such rights dies and his/her personality is extinguished—pursuant to article 32 of the Civil Code—rights of a strictly personal nature such as publicity rights also cease to exist. A person’s death implies the extinguishment of his/her personality, meaning that the object worthy of protection under constitutional law no longer exists. However complex a task this may be, it is therefore necessary to draw a distinction between the protection of the memory of the deceased and the economic rights relating to a person’s image.

Another precedent to which attention should be drawn is the La Chulapona³ case, in which the Supreme Court found that the deceased singer’s heir was entitled to bring an action for infringement of the economic rights associated with her mother’s image, which she had inherited. Although in this case the conclusion reached was that the cultural and historic use made of such rights by the defendant meant that consent was not required, what is important here is the Supreme Court’s acknowledgement that had it not been for this cultural interest, the defendants would have been required to obtain the consent of the heir. This implied an indirect acknowledgement of the economic content of own image rights.

¹ According to article 1.3 of Organic Law 1/1982, image rights are generally non-transferable.

² Constitutional Court judgement dated December 2, 1988.

³ Supreme Court judgement dated December 21, 1994.

⁴ Supreme Court judgement no. 414/2016.



“Unfortunately, the regulation in Spain of post mortem image rights is very vague, leading to much uncertainty in its interpretation.”

A Supreme Court judgement of June 20, 2016 in respect of the unauthorized exploitation of the image of Salvador Dalí, also raises some interesting questions with respect to the post mortem protection of publicity rights. The case related to an exhibition of the so-called “Clot Collection” sculptures by Salvador Dalí at the Real Círculo Artístico de Barcelona. Visitors to the exhibition were given the opportunity to purchase a range of products which included the name and image of the famous Catalan artist. His image was also used in the promotion of the exhibition in a variety of forms. The Dali Foundation brought actions for the unauthorized use of publicity rights, in addition to actions for the infringement of trademarks and intellectual property rights.

The Barcelona Court found that trademark and intellectual property rights had been infringed but it dismissed the claims of violation of image rights on the grounds that the plaintiffs lacked the necessary legal standing.

The Plenary session of the Supreme Court's Civil Law Chamber concluded that since Dalí's will contained no express provision designating the person by whom the actions envisaged in Organic Law 1/1982 should be exercised, the foundation lacked the necessary legal standing, meaning that an action could only be brought by the Public Prosecutor. The ground on which the cassation appeal was based was also dismissed because the appellant was seeking protection not of the deceased's memory, but of interests of a strictly economic nature which fell outside the scope of the protection corresponding to such memory according to the terms of the said law.

In relation to the economic content of publicity rights, the judgement in question echoes the judgement of the Constitutional Court no. 81/2001 of March 26, 2001, which affirmed that: *“The protection of the economic, financial or commercial value of the image affects legal interests other than those attaching to personality rights, and although such interests are worthy of protection and are indeed protected,*

they do not form part of the content of the fundamental right to one's own image referred to in article 181. The injury caused to the memory of the deceased, just like an infringement of the fundamental right to one's own image when he/she was alive, can be sustained through the “use of the name, voice or image of a person for advertising, commercial or similar purposes” (article 7.6 of Organic Law 1/1982).”

The conclusion to be drawn in the light of this judgement would appear to be that the mere use of a person's image for commercial purposes is not sufficient to constitute an unlawful violation of image rights post mortem, since there is an additional requirement to be met: injury caused to the deceased's memory. From a practical viewpoint, the existence of an injury to the memory of a deceased person is clearly difficult to establish.

The Dali judgement once again leaves a number of questions unanswered, and the fact is that there continue to be numerous unresolved issues and much legal uncertainty in relation to the post mortem protection of image rights. Having said this, it should also be borne in mind that protection of publicity rights can be sought through other legal channels, such as an action for “misappropriation of another party's reputation” under unfair competition law⁵.

The comments set out above relate to the Spanish legal system. In comparative law, this is an even more complex field since there exists no single generally accepted concept of either image rights or their post mortem protection.

What this means, in practice, is that the circumstances of each case must be examined to establish the legal framework applicable in each territory in which the deceased person's image is to be used, to establish whether prior consent needs to be obtained.

⁵ Law 3/1991 on unfair competition.



UK COMPETITION AND MARKETS AUTHORITY INVESTIGATES POTENTIAL MODEL AGENCY CARTEL

“ At this stage of the proceedings, the CMA has merely issued a so-called ‘statement of objections’. ”

SAM VILLIERS

On 25 May 2016, the UK's Competition and Markets Authority (CMA) alleged that five top London model agencies breached competition law, in what is the first competition enforcement case taken by the CMA in the creative industries.

According to the CMA's press release, model agencies FM Models, Models 1, Premier, Storm and Viva *‘agreed to exchange confidential, competitively sensitive information, including future pricing information, and in some instances agreed a common approach to pricing’* during the period of April 2013 to March 2015.

The Association of Model Agents (AMA), which is the trade association of the UK model industry, was also named as a party to the alleged infringement. The CMA suspects that the AMA was involved in key aspects of the infringement by *‘regularly and systematically circulating to its members emails, known as ‘AMA alerts’, encouraging model agencies to reject the fees being offered by specific customers and to negotiate a higher fee’*.

The CMA also states that the five model agencies subject to the alleged infringement were members of a Council which managed AMA's business; the CMA alleges that the five agencies were able to use the AMA and its Council *‘as a vehicle for price coordination’*. The famous words of the Scottish philosopher Adam Smith, from his 1776 book, *The Wealth of Nations*, exhibit their longevity: *“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”*.

It should be noted that these are simply the provisional

findings; the CMA has not yet been established that there has been a breach of competition law. At this stage of the proceedings, the CMA has merely issued a so-called ‘statement of objections’, which gives the parties notice of a proposed infringement decision.

The parties now have the opportunity, until September 2016, to make written or oral submissions in response to the allegations made against them. The CMA must take these representations into consideration before it may adopt a finding decision.

If the CMA eventually adopt an infringement decision against the 5 agencies and the AMA, it may issue fines amounting to as much as 10% of the annual turnover of each of the undertakings.

Chapter 1 of the UK's Competition Act 1998 prohibits agreements between firms, decisions by associations of firms and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the UK.² As a cartel, this infringement, if proved, would certainly be categorised as a ‘by object’ infringement—in other words, distorting of competition by its very nature—meaning that the CMA would not have to prove that attempts to collude had any discernible anticompetitive effects on the market.

¹ <https://www.gov.uk/government/news/model-agencies-and-trade-association-alleged-to-have-broken-competition-law>

² This Chapter is largely based on Article 101 of the EU's Treaty on the Functioning of the European Union (TFEU), which prohibits similar agreements, although those which may affect trade between EU Member States.

In some respect, it may be considered odd for a cartel to emerge in this market. We have historically come across cartels where there are high barriers to enter the given market. If entry barriers are low, there is little to stop new entrants joining, and competing, rendering maintenance of high prices difficult. Therefore, unlike the high start-up costs involved in manufacturing car parts or pharmaceuticals, there would appear to be low barriers to entry in this market - it would surely be relatively straightforward and cheap to spot a talented would-be model on the street, at the train station or in a café?

This would, however, ignore the network effects inherent in the way model agencies operate. Model agencies act as two-sided platforms: models join an agency to be put in contact with potential clients, and clients approach the agency to hire models. The more famous faces an agency can add to its books, the more clients it attracts. Consequently, the more high profile clients an agency has, the more models flock to that agency. This market structure makes it easy for a small number of top players to emerge.

This means that in seeking to compete with agencies like Storm, which has attracted the likes of Kate Moss and Cara Delevingne, new entrants would arguably have to overcome an entry barrier. This market feature is what explains why there are only a handful of major agencies and, ultimately, why the CMA has put them under the spotlight.

It is still not clear whether or not the CMA will take its investigation further; however, assuming it has gathered the requisite evidence to prove an infringement, fines may be imminent in what would be considered a high-profile (not to mention glamorous) scalp for the CMA.







Digital Economy:

Tax implications from the Mexican perspective

ARIANA MARTÍNEZ AND GABRIELA COSÍO

Since the news broke out about EU commission ordering Ireland to recover from Apple €13 billion of illegal tax aid in the period of 2003 -2014, there has been a lot of speculation as to what this means for other companies in the sector not only in Europe but in general in the world. In this sense, what is of the utmost importance from the resolution by the EU Commission is the disclaimer regarding the decrease on the amount if other countries were to require Apple to pay more taxes on the profits recorded by its subsidiaries in Ireland in such period. This might be the case if we consider that Apple's profits like those of most digital economy businesses could have been recorded in other jurisdictions where the functions are performed, the assets are held and the risks are born. The latter evidences the relevance of the tax treatment in jurisdictions such as Mexico for entrepreneurs, merchants and investors that are now involved in the digital economy. This is why the present article explains the main business models of the digital economy and their tax implications and how BEPS Action Plan is intending to avoid profit shifting by, among others, make companies pay taxes where the value is created, i.e., where the functions are performed, the assets are held and the risks are born.

In regards to the direct taxation, in Mexico there is a figure of the permanent establishment by: (i) a place of business in Mexican territory; (ii) dependent agents (employees) that conclude contracts in name or on behalf of the foreign resident or (iii) independent agents that operate outside

of their normal course of business, through which the company receives the same tax treatment as a Mexican resident for the income attributable to such figure. Additionally, the tax reform that enter into force in 2014, incorporated certain elements of the BEPS Action Plan, among others, it gave the Mexican tax authorities the possibility to request from the representatives of foreign companies that intend to apply tax benefits from a Double Taxation Agreement an affidavit stating that the income is subject to taxation in the country of the recipient entity, as well as the limitation of the deduction of certain payments to controller or controlled entities that are considered disregarded for tax purposes or inexistent abroad and in certain cases y which the foreign entity does not consider the payments are taxable income.

On the other hand, the treatment applicable to the indirect taxation (VAT) is still around the place where: (i) the services are rendered, (ii) the goods are sent, or where there is no shipment, (iii) where the goods are delivered; i.e., in Mexico there is no indirect taxation linked to the place where the beneficiary is, as we understand happens in the European Union.

¹ In this case SCo is a Company that would manage the warehouse, deliver goods and provide after sale customer service.

² In this case OpCo is a Company that would manage the sites in the X/México region, would have physical and digital inventory and would process payments.

BUSINESS MODELS AND THEIR TAX IMPLICATIONS IN MEXICO

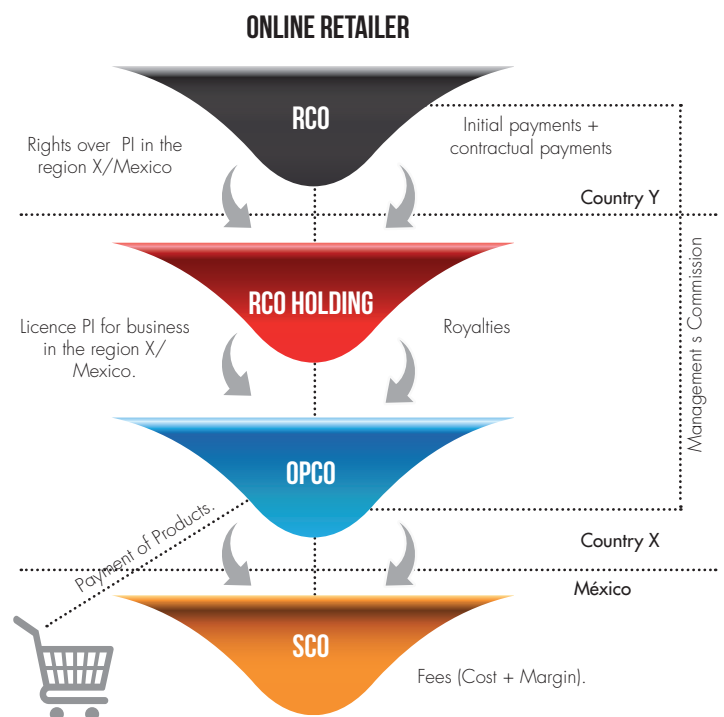
E-TAILING

Tax Consequences in México

1. SCo¹ would have a minimum taxable base due to the risk and functions being limited to routine services rendered to OpCo.
2. The income derived from online sales would not be taxable in México since the sales are done by OpCo and the Company does not have a permanent establishment in Mexico.

VAT Consequences

1. In business to business (B2B) transactions the VAT would be transferred and paid by the supplier or transferred and withheld by the beneficiary. Depending on the country there might be mechanisms to credit or recover VAT, as it happens in Mexico.
2. In business to client (B2C) transaction, in Mexico, in the case of physical products, online sales are subject to VAT at the rate of 16%, since the delivery is performed in Mexican territory considering that the goods are stored in SCo (located in Mexico) to the end consumer; nevertheless, the withholding and payment obligation relies on the end consumer in Mexico. This is the reason why in practice the mechanism is not very functional.
3. The physical products imported would be subject to VAT at the rate of 16% over the value of the goods plus the import tax and other contributions and rights.
4. In regards to the digital products, there is VAT reverse charge so that the end consumer is the one that has to report a virtual VAT that might be credited in the same monthly period.



RCO

I+D.
Operates the site in State Y.
Coordinates services for sales and acquisitions.
Owner of the local PI.

RCO HOLDING

Has stock of the regional subsidiaries.
Owner of PI for the region X/Mexico.
Sublicences IP to the regional subsidiaries.

OPCO

Operates the site in the region X/Mexico.
Physical and digital stock.
Process of payments.

SCo

Operates the warehouse.
Delivery by courier service.
After-sales services.

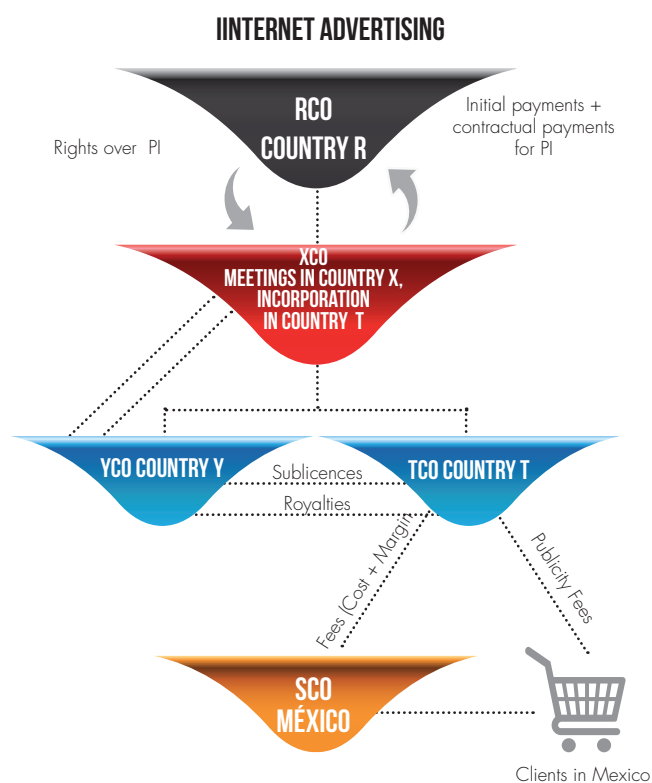
INTERNET ADVERTISING

Consequences in Mexico

1. SCo would have a minimum tax base due to the fact that its functions are limited to providing certain services of technical support, marketing and promotion..
2. The income for advertising services may not be taxed in Mexico, since TCo, the Company that appears as the counterparty in the contracts, does not have a permanent establishment in Mexico.

VAT Consequences

1. In B2B transactions, the VAT would be transferred and paid by the supplier or would be transferred and withheld by the beneficiary. Depending on the country there might be mechanisms to credit or recover VAT, as it happens in Mexico.
2. In B2C transactions, in which TCo provides access to the platform in Exchange of information from the consumers (in the case of Mexican consumers), in Mexico there is no specific regulation around VAT payments in transactions similar to barter of data for services. Therefore, in principle such transaction won't be subject to VAT in Mexico.



RCO

I+D.
Operates the sites and online services,
Development of the pre-existing PI rights.

XCO

Does not carry out development or supervision services.

YCO

Does not carry out activities, only celebrates meetings.

TCO

Operates the site in the region T/Mexico. Opposing party in the Agreements.

SCo

Technical support to the clients in Mexico.
Marketing and promotion.



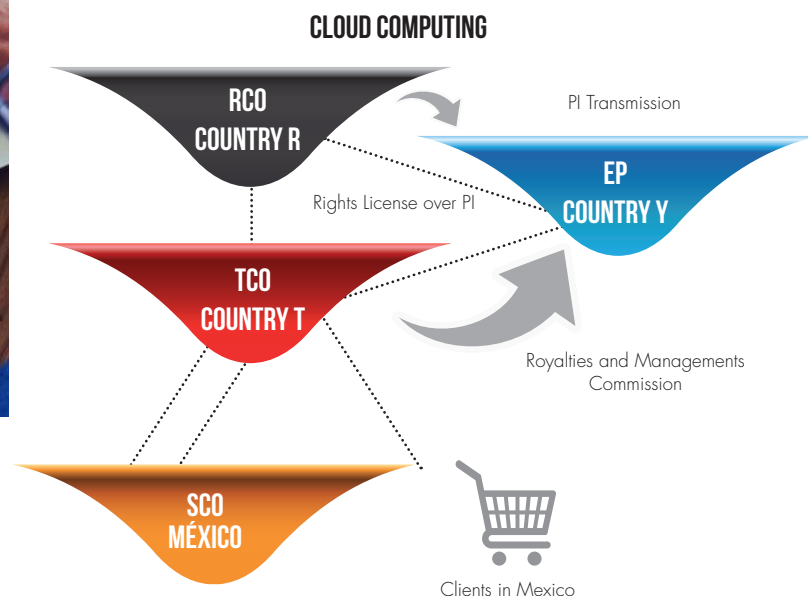
CLOUD COMPUTING

Consequences in Mexico

1. SCo would have a minimum taxable base since its risks and functions are limited to marketing and promotion.
2. The income for the sale of digital services is attributable to TCo and may not be subject to taxation in Mexico since TCo does not have a permanent establishment in national territory.

VAT Consequences

1. In B2B transactions, VAT would be transferred and paid by the supplier or transferred and withheld by the beneficiary. Depending on the country there might be mechanisms to credit or recover VAT, as it happens in Mexico.
2. In B2C transactions between TCo and the Mexican clients, virtual VAT would be triggered for the importation of services performed by the consumer.



RCO

I+D.
Owner of the worldwide rights of PI.

TCO HOLDING

Localization of Software.
Execution of Transactions.
Data Center/Server.

EP Y

Management of PI.
Coordination Services.

SCo

Marketing and Promotion.

APP STORE

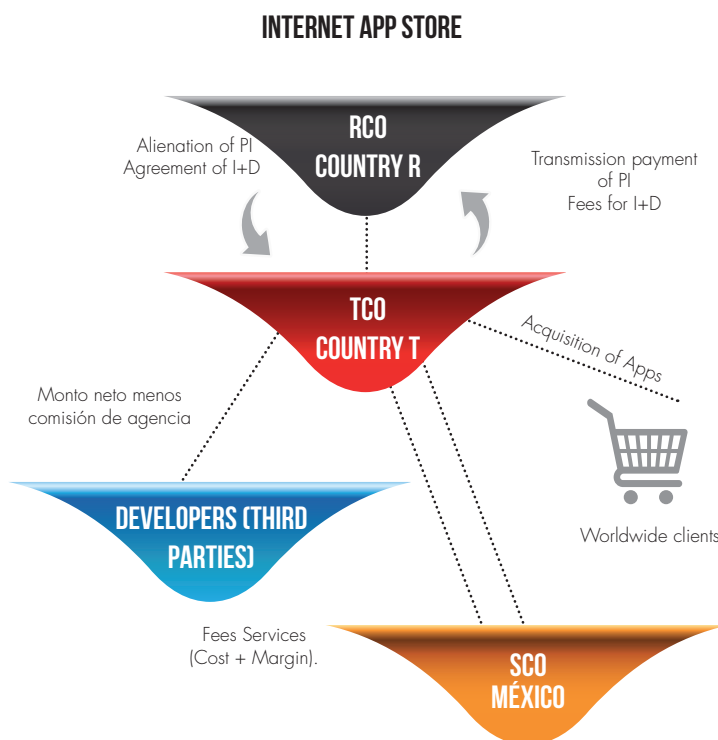
Consequences in Mexico

1. SCo would have a minimum tax base since its risks and functions are limited to marketing and promotion.
2. All income deriving from the sale of apps would be attributable to TCo and wouldn't be subject to taxation in Mexico, since TCo doesn't have a permanent establishment in Mexico.

VAT Consequences

1. In B2B transactions, VAT would be transferred to and paid by the supplier or transferred to and withheld by the beneficiary. Depending on the country there might be mechanisms to credit or recover VAT, as it happens in Mexico.
2. The transactions between TCo and the developers would be considered as B2B transactions subject to similar terms with respect to VAT.
3. TCo would have to pay VAT in Country "X" for the services that it renders to consumers in such country.
4. In the case of services provided by TCo to foreign consumers, the VAT rate in the Country "X" could be low or even 0%.
5. In the countries of the consumers, when the destination criterion is applicable, the service rendered would trigger VAT. In the case of consumers located in Mexico, the VAT would be virtual and would rely on the consumers.

Considering that the worldwide tendency consists in taxing the creation of value, in Mexico we are working on eliminating frictions that may stop the development of the digital economy generation an optimal environment for the creation and growth of innovative companies, through extensive advisory services based on a vast knowledge of the industry and through the participation in projects regarding the amendment of tax, regulatory and administrative regulations. This way we are promoting the development of the digital economy under a regulatory framework that guarantees legal security for the taxpayers.



RCO

I+D.

TCO

Owner of the worldwide rights of PI.
 Management of Local Markets.
 Owner of the worldwide rights of PI.
 Marketing Strategist.

SCo

Operates the site in the region X/Mexico.
 Physical and digital stock.
 Process of payments.

TERCEROS DESARROLLADORES

Operates the warehouse.
 Delivery by courier service.
 After-sales services.



THE LOCHTE CASE

SPONSORSHIP CONTRACTS
AND INAPPROPRIATE CONDUCT

CAROLINA PINA Y RICARDO LÓPEZ

Good behavior is to be recommended, not just in sports competitions but in everyday life too. The major fashion and sports brands can terminate their contracts with athletes in the event of inadequate behavior, inappropriate comments or heavy nights out.

Celebrities are often used in the fashion world as brand ambassadors, through sponsorship contracts or endorsement agreements. However, at times the commercial benefits of these brand ambassadors can be overshadowed by inappropriate or downright negative behavior:

Just recently, in August during the Olympic Games, Speedo announced its decision to terminate its sponsorship agreement with the US swimmer Ryan Lochte. Ralph Lauren also issued a statement saying that it would not be renewing its contract with the swimmer. Lochte was dropped by these companies due to his reprehensible conduct during the Olympic Games in Río de Janeiro when he lied about being assaulted.

Although not directly related to image rights, in the world of haute couture we find John Galliano's claim against Dior due to the termination of his employment contract as a result of the designer's anti-Semitic remarks.

These cases lead us to consider whether behavior such as this, which firms consider contrary to the brand's values, are a valid reason for terminating a sponsorship and/or endorsement agreement.

There have been similar cases in Spain. For example, in a recent judgment handed down on January 22, 2016¹, the National Appellate court ordered the authorities to indemnify a cyclist who in 2005 had been penalized due to being accused of doping. The judgment is interesting because when calculating the compensation, the court took into account all of the contracts the cyclist had signed with various sponsors which were terminated when the case hit

the news, causing the cyclist serious damage.

The Alicante Provincial Court judgment of December 30, 2008², regarding the termination of the agreement signed by Kelme with an F.C. Barcelona player is also important. The player, who had signed an agreement with the company to lend his image to promote Kelme products, made a statement criticizing the imprisonment of a terrorist who was on hunger strike. When it learnt of these statements, the company decided to unilaterally terminate the contract on the grounds that the player had infringed the penalty clause pursuant to which he had undertaken not to get involved in matters "that adversely affect Kelme's reputation". The Alicante court held that the statements were a ground to terminate the contract indicating that although "the [footballer's] statements were covered by freedom of expression and opinion", "v". The fact is that consumers could associate the brand, which used the player's image, with his political statements, damaging the company economically, as well as its reputation.

In light of the above, it should be borne in mind that sponsorship agreements and endorsement agreements between a public figure and a company should include these clauses which allow, in the event of a scandal by the person representing the company's image, the contract to be objectively terminated.

Indeed, certain conduct by models or athletes endorsing the brand may adversely affect its reputation and associate the brand with undesirable conduct, causing not just reputational damage, but also economic damage, due to a possible drop in its sales.

¹ National Appellate Court judgement of January 22, 2016

² Alicante Provincial Appellate Court judgment no. 901/2008, of December 30, 2008.



#surreptitiousadvertising #fakereviews

 **CRISTINA MESA**

The ingenuity of advertising agencies in getting us hooked on a brand on social networks is almost infinite. However, national authorities are now starting to keep a close eye on the strategies used in the industry. Hiring models, celebrities and bloggers has come under scrutiny and fashion businesses are going to have to redefine their communication strategies if they want to avoid problems with the law.

#surreptitiousadvertising

We have already discussed the extent to which undisclosed advertising proliferates on social networks in other editions of this newsletter. Athletes sponsored by sports clothing brands, actresses that speak wonders of beauty creams,

Instagram users that fill their profiles with fashion sunglasses...The problem arises when the supposed spontaneity of the celebrities comes to form part of the show. That is, what consumers are led to believe is the way the celebrity usually dresses, hides a contract worth thousands of euros.

The reason why brands prefer to hide that they have paid for these advertising services is simple – “spontaneous” recommendations by the celebrity in question make the message they are trying to transmit to consumers more believable. However, the warnings by the main regulatory advertising bodies are turning into material actions.

Both the US and British authorities have turned their attention to the fashion world, cracking down on practices that they classify as undisclosed advertising and warning of the possible liability of all the players in the game: the brands, the advertising agencies and even the celebrities lending their image.

The UK Competition and Markets Authority (CMA) recently commenced an investigation into SOCIAL CHAIN, a UK advertising agency that used Twitter, Instagram and YouTube to launch hidden advertising campaigns. On August 11 of that same year the advertising agency reached an amicable agreement with the CMA in exchange for the following undertakings:

1. *“The Company will ensure that any editorial content it uses to promote the products of a third party, where a trader has paid for the promotion, will make that fact clear in the content through images or sounds clearly identifiable by the consumer. For the avoidance of doubt, this includes editorial content which is published on a continuing basis, even if publication began before the date of these undertakings. In particular the Company will:*

- a. Not accept instructions to design, draft, prepare or arrange the publication of editorial content which promotes a product but does not make clear that a trader has paid for the promotion;*
- b. Not design, draft, prepare or cause to be published editorial content which promotes a product but does not make clear that a trader has paid for the promotion;*

- c. Not instruct (directly or indirectly) any publisher of the editorial content to not make clear that a trader has paid for editorial content to promote a product;*
- d. Check before publication that the editorial content makes clear that a trader has paid for it to promote a product, and where necessary take steps to ensure that this is made clear*
- e. Comply with the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing, in particular Section 2 on the Recognition of Marketing Communications (including any subsequent amendments); and*
- f. Make best endeavors to ensure that the Company, its employees and any third parties acting in its name or on its behalf comply with this undertaking, including but not limited to introducing suitable policies and procedures and monitoring compliance with those policies and procedures”.*

During this investigation the CMA made it clear that the persons involved in the campaign are responsible, including the brands, the advertising agencies and the celebrities themselves who endorsed the products. Proof of this is that the CMA also contacted 43 bloggers, youtubers and Instagram users who had collaborated with the agency under investigation.

The US Federal Trade Commission (FTC) has adopted a similar stance, requiring businesses to cooperate more than they do. Therefore, the custom of adding the hashtag #ad or #publi to sponsored adverts on social networks is not always enough. Why? Because the usual practice tends to be to hide the hashtag among many others, so that consumers cannot see that the content is paid advertising:

#summerholidays #friends #summerweddings
#nicesunglasses #ad #lavidadecolorrosa
#dolcefamiente #toocoolforschool

¹ <https://www.ftc.gov/system/files/documents/cases/160315lordandtaylororder.pdf>

In the fashion world the agreement reached between the FTC and LORD & TAYLOR after the latter recognized that it had paid dozens of influencers to disseminate their collections on social networks is important. The terms of the agreement are particularly strict with the fashion firm, prohibiting the company from launching new campaigns in which it gives customers the impression that the product endorsed is, in reality, a spontaneous recommendation. More important still, it forces the company to require all of those who participate in its communication campaigns to comply with this obligation, including both advertising agencies and the bloggers themselves¹.

#fakereviews

The CMA is also addressing the problem of the numerous false reviews on the Internet and has made it clear that writing or paying for a false review is in breach of consumer protection legislation that could involve civil and even criminal penalties.

In order to raise awareness among businesses that these practices are unlawful, the CMA published an open letter warning retailers of their potential liability:

"If your business's website allows people to review products or services – whether they are yours or someone else's – you should publish all genuine, relevant and lawful reviews. If the way you manage or present reviews misleads consumers, your business could be in breach of the Consumer Protection from Unfair Trading Regulations 2008

(CPRs), which prohibit unfair commercial practices that distort consumers' decisions²".

One of the companies investigated was the fashion firm WOOLOVERS, which was accused of faking the reviews published on its website. The firm's strategy was to only publish the more favorable customer reviews on its website. Staff were told to only approve reviews that were four stars or over (on a scale of five). The result? Almost half of the reviews received were never published. However, the company reached an amicable agreement with the CMA thanks to the following undertakings:

- 1. Where the Company displays Customer reviews that are visible to customers in the United Kingdom, it will ensure:*
 - a) it puts in place Moderation Policies for Customer reviews that do not prevent genuine, lawful and relevant negative reviews from being displayed; ;*
 - b) it displays all Customer reviews, including negative reviews, provided they are genuine, lawful, relevant and in line with its Moderation Policies;*



- c) *all staff involved in the moderation and display of Customer reviews receive appropriate training on the Moderation Policies;*
- d) *that the Company monitors compliance of all staff involved in the application of its Moderation Policies to ensure that all genuine, lawful and relevant Customer reviews that comply with its Moderation Policies are displayed; and*
- e) *Customer testimonials are presented on the Company's website in a way that clearly distinguishes them from Customer reviews³".*

In Spain these practices may also be considered misleading advertising. Consequently businesses should always put the necessary mechanisms in place in their communication strategies to avoid misleading advertising, or at least, be fully aware of the risks they face if they do not do so.

¹ <https://www.ftc.gov/system/files/documents/cases/160315lordandtaylororder.pdf>

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545223/online-reviews-retailers-open-letter.pdf

³ <https://assets.publishing.service.gov.uk/media/57ac439ae5274a0f5200007c/summary-of-undertakings-woolovers.pdf>.

“ The CMA is also addressing the problem of the numerous false reviews on the Internet. ”



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The background of the entire page is a detailed fashion design workspace. It features two pencil sketches of a woman in a high-collared, structured jacket. Surrounding the sketches are various fashion-related items: a yellow measuring tape with black markings, several buttons in orange, red, and cream, spools of thread in blue, green, and red, and various fabric swatches in polka-dot, solid, and patterned colors. Sewing needles and pencils are also visible.

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