

# LAW À LA MODE

Special Edition – INTA 2015



Fashion, Retail and Design Group

## DUBAI'S d3

*National talent meets international brands*

## COMBATTING COUNTERFEIT GOODS ONLINE

*Are Alibaba's anti-counterfeiting efforts enough?*

## A GUIDE TO PROTECTING A NEW FASHION ITEM

*Our top 10 tips on IP protection for fashion items*

## THE ITALIAN IP BOX

*An opportunity for the fashion industry*

## "SAY IT WITH FLOWERS" ... BUT BEWARE OF KEYWORDS!

*Paris court confirms that using trademarks as Google Adwords keywords is lawful*

## LIFE AFTER B&B HARDWARE V. HARGIS INDUSTRIES

*Implications for brand owners*



# Contents

## **DUBAI'S D3.....03**

*National talent meets international brands*

## **COMBATTING COUNTERFEIT GOODS ONLINE.....04**

*Are Alibaba's anti-counterfeiting efforts enough?*

## **A GUIDE TO PROTECTING A NEW FASHION ITEM.....06**

*Our top 10 tips on IP protection for fashion items*

## **THE ITALIAN IP BOX.....08**

*An opportunity for the fashion industry*

## **"SAY IT WITH FLOWERS"... BUT BEWARE OF KEYWORDS!..... 10**

*Paris court confirms that using trademarks as Google Adwords keywords is lawful*

## **LIFE AFTER B&B HARDWARE V. HARGIS INDUSTRIES..... 11**

*Implications for brand owners*

# Editorial

DLA Piper's Fashion, Retail and Design group is pleased to bring you this special edition of *Law à la Mode*, marking the 137th INTA Annual Meeting in San Diego.

Our group's lawyers have extensive experience advising the fashion and retail sectors and engaging with these industries. Those members with experience in trademark and branding law will be attending this year's INTA Annual Meeting.

In this special edition of *Law à la Mode*, we focus on a number of topical and pertinent issues for brand owners. Reflecting the firm's global footprint, the contributions come from geographically diverse locations, including Dubai, Hong Kong, London, Milan, Paris and the US.

We hope you enjoy it, and we look forward to having the opportunity to meet with you during the conference and getting your feedback on how these issues affect you and your business.

If you have any comments, please get in touch with the Fashion, Retail and Design Group via our email address: [fashion@dlapiper.com](mailto:fashion@dlapiper.com).



**ANN FORD, RUTH HOY AND  
GIANGIACOMO OLIVI**

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Ruth Hoy and Désirée Fields



# DUBAI'S d3 NATIONAL TALENT MEETS INTERNATIONAL BRANDS

By Katie Montazeri (Dubai)

Dubai's new Design District – popularly known as d3 – promises to deliver an ecosystem for fashion and design in one of the region's prime retail hubs. d3 was established by the Ruler of Dubai as a collective space to nurture new ideas in fashion and design.

Legislation with the specific aim of establishing a design community is unusual, and existing hubs (such as Shoreditch) have mostly grown organically. However, the purpose-built facilities at d3 have designers' specific interest in mind. In particular, up-and-coming labels and designers can utilise studios, ateliers and workshops. In the longer term, d3 will also establish its own hotels, retail space and residential areas. Ultimately, the d3 ecosystem will occupy 25 million square feet adjacent to Dubai's business district.

d3 is one of several government-led initiatives aiming to diversify the UAE economy and foster the growth of SMEs. By facilitating design-led business, Dubai's leaders hope that the number of jobs within the sector will increase and make a greater contribution to GDP. A broader aim is to promote UAE and regional designers and to host design industry-related events. The GCC luxury fashion market was estimated to be worth AED 54 billion in 2013, AED 23 billion of which was attributable to the UAE. However, a relatively small proportion comprises home-grown labels, and another goal of d3 is to raise the profile of local brands.

The licensing authorities have taken the unusual step of allowing d3 businesses the choice of establishing either an onshore or free zone entity. Foreign investment rules in the UAE restrict non-UAE shareholdings in onshore entities to 49 percent, with the majority share held by a UAE entity. Although non-UAE nationals may own 100 percent of the share capital in a free zone company, these companies may not trade onshore. d3 is technically part

of the Dubai Technology & Media Free Zone, but businesses operating within d3 will have the choice of establishing either an onshore LLC or a free zone licence (which may be 100 percent foreign-owned). Both entities will be permitted to operate within d3.

d3 is being launched in several phases and the first licences have already been issued. Going forward, d3 seems likely to be a catalyst for change in the UAE's design sector. For example, the IPR regime in the UAE is not always consistently implemented. Enforcement can be slow, there are no specialist IP courts and certain remedies (such as injunctions) are rare. Historically, the UAE market tended to license-in IPRs (most notably, brands and trademarks) from outside, meaning that the main impact of these challenges was felt outside of the UAE. As the UAE's own creative output increases, and its market matures, this may well drive increased recognition and awareness of IPR. Certainly, a robust enforcement regime will place the UAE in an excellent position to cement its reputation as the design and retail hub of the Middle East.



# COMBATTING COUNTERFEIT GOODS ONLINE

Are Alibaba's anti-counterfeiting efforts enough?

By Edward Chatterton and Ian Jebbitt (Hong Kong)

A report released by the Chinese State Administration for Industry and Commerce (SAIC) in January confirmed what many fashion brands already knew: the Chinese e-commerce giant, Alibaba, was making too few efforts to combat the sale of counterfeit goods on its marketplace websites Taobao and T-mall. Alibaba was, the report alleged, turning a blind eye to the sale of counterfeit goods.

Yet the report appears to have taken Alibaba by surprise as, after years of being criticized for being an outlet for online fakes, it had already made significant efforts to combat the sale of counterfeit goods. These included employing a task force of over 2,000 employees and 5,400 volunteers to carry out daily online surveillance and random inspections of goods sold on Alibaba's marketplaces. Late last year, it was reported that Alibaba had spent more than US\$160 million trying to stop the sale of counterfeit goods on its websites. Yet, according to the report, this was not enough.

Two days after the release of the report, Alibaba executives met with SAIC officials to discuss how to move forward. During the meeting, Alibaba's chairman (and Asia's richest man) Jack Ma vowed to "actively co-operate with the government" and increase spending on anti-counterfeit activities to halt the sale of counterfeit goods on its marketplaces.

Following the report, Alibaba announced that it would step up its efforts to stop the sale of pirated goods by hiring 300 employees to form an “anti-counterfeit special operations battalion”. Yet, clearly, it will take a great deal more than an additional 300 people to keep Alibaba’s sites free from the sale of counterfeit goods. At this stage, it remains to be seen whether Alibaba will establish any further initiatives to combat the sale of fake goods on its marketplaces. Further pressure was then piled on Alibaba by a report by the US Trade Representative which said that, while it would keep Alibaba off its “notorious markets” list, it was concerned by the SAIC report and encouraged Alibaba to “continue to work with all stakeholders to address ongoing complaints”.

Unlike other marketplace platforms Taobao does not charge merchants with transaction fees. Over half of Alibaba’s revenues are generated through online advertising. For a business that generates over half of its revenue through online advertising, maintaining its credibility in the eyes of businesses and consumers alike should be a key priority if it wishes to expand its operations to a global market. If consumers are unable to trust that products they purchase on Alibaba’s marketplaces are the real deal, they may turn their attentions elsewhere, reducing the value of the available advertising space on its sites.

However, there appears to be a growing trend for Alibaba to shift the responsibility of monitoring the sale of counterfeit goods onto brand owners. Alibaba has publicly welcomed approaches from brand owners and industry associations with a view to protecting intellectual property rights and improving its takedown procedures and anti-counterfeiting measures. Earlier this year, Alibaba announced that a memorandum of understanding had been entered into with Louis Vuitton to halt the sale of counterfeit products on Alibaba’s marketplaces and to educate consumers about counterfeit goods. Under this partnership, it was agreed that Taobao would proactively

take down listings of suspected counterfeit goods, and that Alibaba would implement measures to prevent sellers from listing fake items on its marketplaces.

Fashion brands can benefit from entering into such arrangements since they speed up the takedown process by removing the need for brand owners to monitor and report counterfeit listings, but it is highly likely that only the major international brands will be able to enter into similar collaborative agreements with Alibaba. For smaller fashion brands, Taobao has an online channel for overseas companies to file complaints about goods being sold on its marketplaces, allowing brand owners to issue takedown requests against infringing listings. However, filing a complaint is not a straightforward procedure: brand owners are required to submit documentation to support their complaint and merchants are able to issue counter-notices against the takedown requests. With all of these steps, taking down infringing listings becomes an arduous process, and many have found that goods that have been taken down often reappear as revised listings.

SAIC’s scathing report on Alibaba’s anti-counterfeiting efforts makes one thing clear: by publicly criticizing its biggest e-retailer, China’s regulators are looking to make a strong statement about the importance they place on protecting intellectual property and innovation.

Given the high demand for designer labels in China, the relative ease with which apparel and fashion accessories can be copied and the sheer scale of the problem facing Alibaba in policing Taobao and T-mall, it is not surprising that these marketplaces are a thorn in the side of many fashion brands. Regardless of the efforts made by Alibaba or by China’s regulators, this is a problem which is likely to continue for some time to come.





## A GUIDE TO PROTECTING A NEW FASHION ITEM

# OUR TOP 10 TIPS ON IP PROTECTION FOR FASHION ITEMS

By Ruth Hoy and Désirée Fields (London)

So you think you have invented the next bestseller in the fashion industry – children’s shoes that grow with your child! Protecting your invention from exploitation by third parties will be key to the success or failure of your business venture. Before you embark on this process, here are our top 10 tips to help you keep your creation safe:



**Consider what aspects of your invention are capable of protection from third parties:** Your idea itself is *not* protected – and if you had done your research you may have discovered that it has already been done. Luckily for you, copyright does not exist to protect ideas, only the *expression* of ideas. However, depending on the jurisdiction in question, the design of your shoes may be protected by design rights, the name and logo you created for your shoe range by trademark rights, and the mechanism by which your shoes “grow with your child” by patents.



**Understand that intellectual property rights are territorial in nature:** Accordingly, you will need to apply to register your rights in all countries of interest. The jurisdictions in which you should seek protection depend on a number of factors, including the location of your business, consumers, manufacturers, distributors and suppliers. The likelihood of third-party infringements in a particular jurisdiction as well as costs associated with protecting intellectual property rights are also key considerations.



**Realise that types and levels of protection vary significantly depending on the country in question:** By way of example, in the US, fashion designs are afforded little protection under trademark and patent law. In contrast, protection available in the EU is much more comprehensive, including copyright protection in design drawings and design right protection for the actual designs.



**Obtain comprehensive clearance searches:** Clearance searches should be carried out in any country in which you anticipate doing business, at the very least in respect of any proposed trademarks and brand names. While a screening or knockout search is a good starting point to identify any obvious obstacles, it is advisable to instruct local counsel to carry out full clearance searches to reduce the risks of a chosen trademark being attacked by third parties. Clearance should be carried out at the earliest opportunity to allow time to consider alternative trademarks and branding strategies. At least in respect of European Community-registered designs, it is far less common to carry out clearance searches because there is no opportunity for third parties to file oppositions and their validity is usually only challenged when an infringement action arises. However, this position is not the same with respect to all national registered designs.





**File relevant applications immediately:** Because trademark and design rights in most countries are established through registration, once clearance searches have confirmed that a chosen trademark (or design) is available for use, it is advisable to immediately file any applications for registered rights in the relevant jurisdictions. Delaying the filing of applications after a clearance search is risky: third parties may file applications for the same or a confusingly similar mark in the interim.

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**Commence use:** You should always commence using your registered rights immediately and seek local advice regarding the requirements for keeping a registration in force. In some countries, such as the US, failure to use a trademark for a certain period of time constitutes prima facie evidence that the trademark has been abandoned. In the EU, trademark registrations become vulnerable to cancellation for non-use if they have not been used for a consecutive period of five years or more.

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**Educate yourself and others:** Effective enforcement of intellectual property rights depends on the detection of third-party infringements. It is therefore important to educate anyone in your business and any third party with access to your intellectual property rights on intellectual property protection. Training will allow such individuals to identify issues of concern and to flag them up to a nominated person within your business.

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**Introduce an intellectual property policy:** An inconsistent approach to intellectual property filings and enforcement can endanger your intellectual property protection strategy internationally. This risk can be reduced by a written intellectual property policy setting out guidelines on the types of intellectual property your business owns, which jurisdictions are of key interest, trademark filing procedures and strategies, what types of third party infringements to take action against and whom to notify potential infringements to.

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**Make third parties aware of your rights:** Putting third parties on notice of your rights – for example by marking your design drawings with your name, date of creation and a copyright notice, your shoes with registered design symbols and the name of your shoe brand with a registered or unregistered trademark symbol – may assist with deterring third parties from infringing your rights.

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**Take enforcement action:** Finally, intellectual property rights do not enforce themselves. It is therefore important to monitor at least trademark and domain name registrations and search for unauthorised brand usage on the Internet. Where a disconcerting third-party use has been identified, it is advisable to consult local counsel to explore available enforcement options. Enforcement actions usually take place in local trademarks registries or courts. However, in the case of domain names, the most cost-effective enforcement action is filing a complaint under the relevant dispute resolution procedure associated with the domain name.





# THE ITALIAN IP BOX

## AN OPPORTUNITY FOR THE FASHION INDUSTRY

By **Roberto Valenti (Milan)**

The patent box regime, adopted at the end of 2014 with Italy's Stability Law, was recently modified by the Investment Compact Decree and implemented into law at the end of March 2015. A distinctive feature of the Italian regime is that the measure now also covers trademarks and designs.

A discounted tax rate is applied not only to profits deriving from the exploitation of patents (as one would be led to believe by the name!) and copyrights, but also royalties deriving from the exploitation of trademarks and designs. The percentage of profits deriving from intellectual property rights to be excluded from taxation will be 30 percent in the first year, 40 percent in the second year and then 50 percent for the remaining three years.

The new regime is optional and can be accessed by any entity carrying out business activities in Italy, under the condition that the IP right is the result of R&D activities carried out either directly or through agreements with third parties. Foreign entities carrying out business activities in Italy through a permanent establishment can also benefit from the regime, provided that they are resident in a country that has a double tax treaty in force with Italy and undertakes to effectively exchange information with Italy.

The option for the regime is irrevocable and has effect for the subsequent five fiscal periods. After the first five fiscal periods, it will be possible to renew the option.

The patent box regime provides for the exclusion from taxation, both for corporate income tax (IRES) and for local income tax (IRAP), of 50 percent of income deriving from the licensing of qualifying intangible assets.

The exemption is also granted to those entities that do not license their intangible assets but use them in manufacturing processes or provide services using one of the eligible intangible assets. The portion of income deriving from the use of the IP must be identified through an advanced pricing agreement (APA) with the Italian tax authorities.





incurred under R&D outsourcing agreements signed with entities that are part of the same group. These provisions also aim to include in the regime income from repatriated intangibles assets.

The patent box regime is one of the Italian government's measures to create an appealing environment for technological development in Italy for Italian and foreign investors. Other measures include incentives granted to start-up companies, a notional interest deduction for entities funded with equity and tax credits granted for research and development expenses.

An essential condition to be eligible for tax property rights is the result of R&D activities, carried out by the company either directly or by outsourcing.

Currently, Italy's Ministry for Economic Development is drafting its ministerial decree to implement the law – an essential part of this new approach, which will define what would constitute R&D expenses. This is a delicate phase, essential for the success of the initiative in creating an appealing environment for the growth of the economy of intangibles in Italy.

The IP box represents an important step to stimulate innovation and, overall, an incentive to foreign investments in the country. It is therefore in the interest of the trademark and design owners in various sectors (first of all fashion) to gain information on this measure.

The same APA procedure could also be entered into when intangibles are licensed to entities that directly or indirectly control the licensing entity, are controlled by the licensing entity or are controlled by the same entity that controls the licensing entity. However, in this case the APA is optional rather than mandatory.

Furthermore, potential capital gains realized upon the sale of the assets are entirely exempt from taxation, under the condition that at least 90 percent of the compensation received is reinvested into research and development activities.

As per the nexus approach identified by the OECD in the report *"Countering Harmful Tax Practice More Effectively, Taking into Account Transparency and Substance Action 5: 2014 Deliverable"*, income that is eligible for the exemption is determined by applying the ratio between qualifying expenses and overall expenses. Qualifying expenses include 30 percent of the expenses incurred for the acquisition of already existing intangible properties, as well as expenses



# “SAY IT WITH FLOWERS”... BUT BEWARE OF KEYWORDS!

## PARIS COURT CONFIRMS THAT USING TRADEMARKS AS GOOGLE ADWORDS KEYWORDS IS LAWFUL

By Karine Disdier-Mikus and Farid Bouguettaya (Paris)



Following the CJEU decisions in *Google v. Louis Vuitton* and *Interflora v. Marks & Spencer*<sup>1</sup>, the Paris High Court<sup>2</sup> recently confirmed that use of a third-party trademark as a Google AdWords keyword is lawful when there is no risk of consumer confusion about the origin of goods or services.

Florajet, a company which sells flowers online, purchased INTERFLORA as a keyword to advertise its goods and services on Google AdWords. Interflora considered that such use infringed its rights and brought an action for trademark infringement and unfair competition against Florajet.

On 5 March 2015, dismissing all of Interflora's claims as unfounded, the Paris High Court held that insufficient evidence had been provided to demonstrate that the trademark INTERFLORA had a reputation in the French market. However, even if such reputation could have been established, the trademark's reputation was not sufficient alone to prohibit use of INTERFLORA as a keyword.

The court noted that such use could only result in trademark infringement where there was a likelihood of confusion as to the origin of the relevant goods or services on the part of the public. Here, the court acknowledged that there was no risk of confusion about the origin of the goods and services since the mark INTERFLORA was not displayed in the advertising text and Interflora did not provide any evidence that the public could be confused into thinking that the goods and services were offered by Interflora when the advertising text only referred to Florajet.

Although it is in line with CJEU case law, the decision issued by the court appears harsh. It ordered Interflora to pay damages for abusive proceedings for the following reasons:

- Interflora did not respect a well-established principle under French law according to which trademark infringement and unfair competition cannot be used cumulatively as separate causes of action in relation to the same facts.
- Interflora was claiming very high damages (nearly €6 million!).
- Interflora, which brought a similar action in front of the CJEU in *Interflora v. Marks & Spencer*, was aware of the extent of its rights and the merits of its claims, which the court considered to be very “fanciful”.

There is no doubt that trademarks may be used as keywords as long as the advertising *per se* does not create confusion in the mind of the public. However, more guidance from the court about the circumstances in which trademark infringement may be found where no use of the trademark is made in the advertising text itself would have been helpful.

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<sup>1</sup> ECJ, 23 March 2010, joined cases C-236/08 to 238/08, *Google v. Louis Vuitton Malletier*; ECJ, 22 September 2011, case C-323/09, *Interflora v. Marks & Spencer*

<sup>2</sup> Paris High Court, 5 March 2015, *Interflora v. Florajet*



# LIFE AFTER B&B HARDWARE V. HARGIS INDUSTRIES IMPLICATIONS FOR BRAND OWNERS

By Andrew Deutsch and Tamar Duvdevani (New York)

The United States Supreme Court has decided a question of trademark law that is important to brand owners. Opposition proceedings in the Trademark Trial and Appeal Board (TTAB) often turn on whether a trademark applied for is likely to be confused with an already registered trademark. The owner of the registered trademark may separately sue for infringement in a federal court, claiming that the use of the junior trademark creates a likelihood of confusion. The Supreme Court held that if the TTAB rules first on likelihood of confusion, that decision will be binding in the later infringement action, provided that: (1) the ordinary elements of issue preclusion are satisfied; and (2) the plaintiff in the infringement action does not claim use of the registered trademark on goods other than those listed in its registration. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, No. 13-352, 575 U.S., 2015 WL 1291915 (March 24, 2015).

*B&B Hardware's* holding has the potential to change trademark litigation and enforcement strategies. It could make TTAB oppositions more important and expensive. Until now, parties have often spent relatively limited resources on TTAB oppositions as compared to an infringement action. However, the TTAB may become the arena where the crucial issue of likelihood of confusion is definitively decided. With the higher stakes of preclusion, parties will now consider putting their strongest case forward at the TTAB. Typically streamlined opposition proceedings may evolve into something more like full-scale litigation, with more discovery disputes and requests for oral arguments. Losers before the TTAB may be more likely to seek *de novo* court review of an adverse TTAB determination on confusion.

Registered trademark owners who believe their chances of success are greater in federal court may consider a three-step process where trademarks applied for are already being used: (1) bring an opposition proceeding in the TTAB; (2) sue for infringement in federal court before the TTAB addresses the confusion issue; and (3) then immediately move to suspend the TTAB proceeding.

In addition, the types of evidence submitted to the TTAB may also change: parties may now urge the TTAB to consider marketplace uses and surveys based on how trademarks are actually used on goods when determining likelihood of confusion.

The exceptions to preclusion identified in *B&B Hardware* have the potential to create new kinds of disputes in infringement actions. For example, to avoid preclusion, a party may contend that the TTAB's bar on live testimony prevented it from effectively attacking the credibility of an adverse witness on issues such as intent or fraud.

The full impact of *B&B Hardware* will become clearer as the courts and TTAB begin applying the decision, and litigation strategies will evolve accordingly. In the meantime, trademark owners and applicants should carefully analyze their options on a case-by-case basis. Each trademark will present a different set of facts and strategic considerations, and there will not be a one-size-fits-all answer to where likelihood of confusion issues should be litigated.



# The Global Co-Chairs of our Fashion, Retail and Design Group wish you a very successful INTA Annual Meeting



**Ann Ford**  
Washington, DC

Ann is based in our Washington office. Ann has extensive experience in working with both mature and emerging companies on developing and strengthening fashion and retail brands. Chambers & Partners USA has described her as having "a loyal following among fashion, media and retail clients, one of whom describes her as 'aggressive but with excellent judgment, very easy to get along with, and keen to minimize legal proceedings.'"



**Giangiacomo Olivi**  
Milan

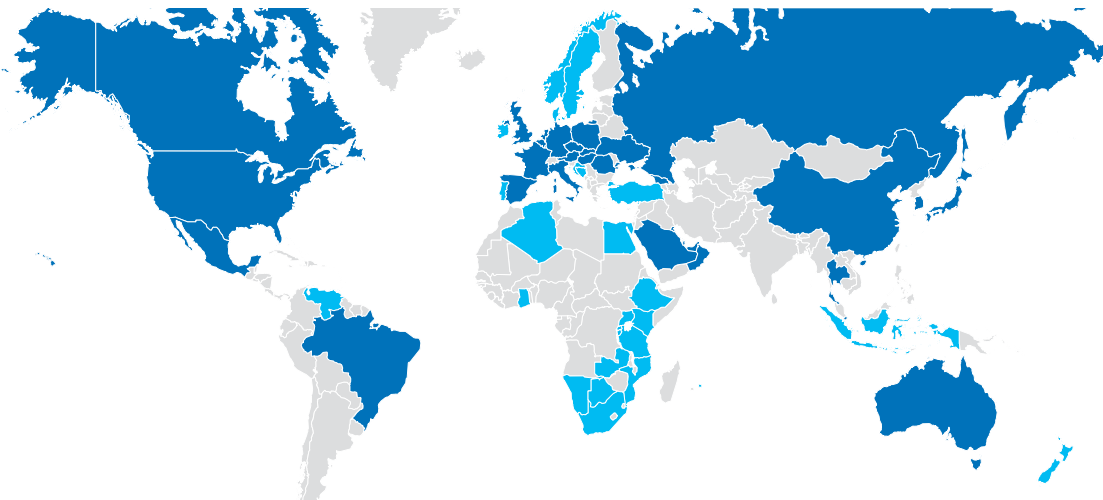
Giangiacomo is based in our Milan office. He has extensive experience in fashion-related matters, advising leading Italian and international clients.

Chambers & Partners Europe and a number of other client surveys have identified Giangiaco as a leading individual. He also won the Top Legal 2011 Lawyer of the Year Award for TMT.



**Ruth Hoy**  
London

Ruth is based in our London office. She advises our fashion clients on a range of intellectual property issues including trademarks and design rights. Chambers & Partners describes Ruth as commanding "a great level of expertise in trademark and copyright matters. She impresses sources with her technical prowess and first rate commercial acumen."



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