On Trend: EU Policy Making in Brussels

Sustainable Clothing

Social Media in the Fashion Retail Space

New Consumer Rights Directive
10 commandments for online retailers

Online Market Places Responsible for Trademark Infringements
Decision L’Oréal v eBay clarifies the rules

New EU Rules on Textile Labelling

A Word from the Industry’s Mouth
Antonio Bandini, designer of Chinese fashion brand Ilaria

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The timing for the release of this Autumn edition of Law à la Mode could not have been better, in the midst of fashion weeks in London, Milan, Paris and New York. We are pleased to introduce you to this season’s edition of our fashion-style legal magazine distributed to selected contacts all over the world by DLA Piper’s Fashion, Retail and Design (“FRD”) Group.

With a Belgian editorial team for this edition, we wanted to give a flavour of an up and coming fashion capital in the heart of Europe. With a mix of cultures from Europe and beyond, Belgium is fast becoming a key location for new design and innovation in fashion. More than just moules, frites and beer, we are fortunate enough to have some of the most renowned fashion academies in Antwerp and Brussels generating internationally known designers such as Dries Van Noten, Ann Demeulemeester, Martin Margiela and Olivier Theyskens.

As Belgium is also the hub of EU policy development and creation, we share with you our thoughts on the trends around policy making – steering you through the agenda and potential activity (page 4).

Sustainability being the buzz word of the moment in relation to product development, we have an insight from our UK team on the interplay between the sustainability debate and the fashion industry (page 5).

In the wake of the global financial crisis, this season our US team evaluates what a shift in the wider economic market has meant for franchising activities in the US (pages 6–7), and we discuss the impact of the climate on the UK retail market (pages 12–13).

With more of a focus than ever on the ability to effectively market products to consumers, our experts analyse the finer details of production techniques for cosmetic advertising (page 8) and present our new 10 commandments for online retailers originating from the EU (pages 10–11). We also look into the new EU Regulation on textile labelling, which will impact on all designers (page 9), and a recent CJEU judgement focussed on the liability of online market places where users offer infringing goods (page 14–15).

In our regular “A word from the Industry’s Mouth” we share an in-depth insight from a leading Chinese brand hoping to broaden its global fashion image (pages 16–17). And last, but not least, our series devoted to fashion and social media in which our US team evaluates the developing role of social media in the fashion retail space (pages 18–19).

If you have any comments please get in touch with the FRD Group via our email: fashion@dlapiper.com

We hope that you enjoy browsing through this season’s collection of articles.

By

Belgian Editorial Team
Jean-Louis Kerrels
Barbara Ooms
Emma Greenow
Julie De Bruyn
With what can seem to be an overwhelming increase in the quantity and complexity of EU regulation facing the fashion industry, understanding and taking action in this area can seem as if you are navigating a tangled web of issues and stakeholders.

The recent EU regulatory agenda has included policy reviews in relation to the intellectual property framework, the Digital Agenda, Online Behavioural Advertising, Consumer Rights and redress amongst others. Each of these developments has a direct impact on business activities in the fashion industry in Europe and, for this reason, interaction from rightsholders into the creation of the regulatory framework is essential.

In recognition of this fact, fashion houses and brands are investing heavily in strategic discussions at EU level in order to directly provide input into many of the forthcoming changes. Through enhanced regularised contact with legislators and the provision of timely and helpful advice, all stakeholders are trying to move towards more workable and less cumbersome regulatory obligations for businesses.

An effective example of the need and value of increased dialogue was shown in the drafting of the recent recommendations for Online Behavioural Advertising, where industry, consumer groups and legislators worked together through dialogue to develop a series of best practice principles which all parties supported. As a result of this process, the contributors may well have diverted a further regulatory burden for all stakeholders.

Following the changes brought about by the Lisbon Treaty, it is vital for all fashion industry participants to engage and input into all 3 key EU institutions, the European Commission, the European Parliament and the Council of the European Union.

Legislative advocacy by rightsholders can take many forms – from the traditional methods such as meet and greet sessions with key stakeholders, press releases and local media, to the more sophisticated and targeted advocacy including social media campaigns, video messaging and awareness raising. All methods have definite advantages however it is key to know when to link each method into your activities.

The face of the regulatory framework for the fashion industry is changing rapidly and this trend is likely to continue into 2012 – what is of key importance is your inclusion and input into these forthcoming discussions.

Trade and Government Affairs Brussels works with clients to ensure that they have effective and strategic legislative advocacy at European and national level. We currently work with a range of clients in assisting with their input to legislative stakeholders in drafting and amending the regulatory framework, representing their policy interests at EU level and keeping them informed and updated of regulatory change.
Economically, the clothing industry is a success story worth over £500 billion globally, employing approximately 26 million people. But when looking at its global lifecycle, this high value sector also has a significant environmental footprint.

Initially led by the Department for Environment, Food and Rural Affairs (DEFRA), the UK’s Sustainable Clothing Roadmap was launched in 2007 with the aim of improving the sustainability of clothing. The Roadmap is intended to provide guidance across the whole lifecycle of clothing, from the crops grown to make the fabrics, through the retail stage to end of product life.

In April 2011, DEFRA’s delivery body, the Waste and Resources Action Programme (WRAP) took over responsibility for the Roadmap. By then nearly 300 stakeholder organisations along the UK’s fashion and clothing supply chain had participated, with around 40 having committed to taking action.

Each stage of the lifecycle generates different environmental issues. Even within a single stage, the environmental impact can vary considerably. Cotton growth involves significant water use, toxicity from fertiliser, pesticide and herbicide use. Whereas synthetic fibre production involves the generation of significant quantities of greenhouse gasses from the processing of fossil fuels. No matter what the fibre, dyeing and finishing processes can involve heavy water use, resulting in hazardous waste from pre-treatment chemicals. Around 90% of UK clothing is imported, further adding to the carbon footprint, and this is before energy is used in the consumer use stage through laundering and tumble drying. In the UK alone we discard approximately one million tonnes of unwanted clothing a year – 50% of which ends up in landfill.

To date, key milestones have been achieved in terms of evidence gathering, awareness raising and consultation between stakeholders. The most recent action plan includes activities such as:

- John Lewis committing to remove polystyrene from the inside of their packaging from 2012 and to roll-out garments with a “save energy” message on labelling
- Since its launch in 2008, the Oxfam and M&S Clothes Exchange has seen more than three million unwanted garments be diverted from landfill into reuse and an extra £3 million raised for Oxfam
- Tesco is in the roll-out phase of its initiative on working with animal welfare groups to develop sourcing policies for cashmere, angora, feathers and Australian merino wool
- Adidas has organised and managed energy workshops for suppliers where information, tools, best practice examples as well as financing options were presented

Next steps include implementation of the actions and dissemination of best practices.

While there is growing awareness both within the industry itself and amongst consumers, evidenced by the fact that over 150 retailers in the UK now have fair trade/organic initiatives, this will continue to be an on-going global challenge.
The State of Franchising Industry

The United States is the birthplace of both the business model of modern franchising and the legal framework of franchise regulation. Over the past 5 decades, American consumers have come to rely on franchised businesses in every aspect of their daily lives, including food, lodging, hair salons, automobile service, home care and children’s and senior services. Franchised businesses consistently outperform comparable non-franchised businesses, creating jobs and economic activity in local communities across the country. According to a recent study conducted by PricewaterhouseCoopers for the International Franchise Association Educational Foundation, there are over 825,000 franchised businesses in the United States, representing 300 different business sectors. These franchises employ nearly 18 million Americans, accounting for 1 out of every 8 jobs. The franchise industry contributes over $2.1 trillion to the U.S. economy, and has grown by 40% over the past decade.

Types of U.S. Franchise Systems

Broadly speaking, franchise systems in the U.S. can be divided into two types: business format franchises and product distribution franchises. Business format franchises provide for a license of a trademark, and a uniform business system for its franchisees, in the form of training, marketing support and materials, operation manuals, and ongoing support and supervision. Business format franchises account for the majority of the franchise systems in the United States. Product distribution franchises, on the other hand, are a special kind of supplier-dealer relationship. In general, there is a license of a trademark, but seldom does the franchisor prescribe a uniform business system for its franchisees. Product distribution franchises are prevalent in certain business sectors, particularly with respect to soft drink production and distribution, automobile dealerships and gas stations.

Successful Foreign Franchisors in the U.S.

While the United States remains a juggernaut in exporting franchise systems that have become household names in foreign countries, many international franchise systems have also enjoyed success in the United States, such as “Yogen Früz” (Canada), “Tim Horton’s” (Canada), “Kumon” (Japan), and “Action Coach” (Australia). All international franchisors entering the U.S. market are treated just as U.S. domestic franchisors, and face the same regulatory and business environment.

Laws and Regulations Applicable to Franchising

Franchising is a regulated industry in the United States, both at the federal level and at the state level. The U.S. Federal Trade Commission has adopted a Franchise Rule that applies in all 50 states. The FTC Franchise Rule requires that every franchisor deliver a “Franchise Disclosure Document” (“FDD”) to each prospective franchisee before carrying out a franchise transaction; and the FDD must contain certain prescribed information. In addition, more than a dozen individual states have their own franchise disclosure laws, which not only require the delivery of an FDD, but also that the franchisor register the FDD with the state before it can offer to sell franchises. Finally, some states regulate ongoing franchisor-franchisee relationships, and have laws governing aspects of these relationships such as termination, renewal, and transfer. While these myriad regulations may seem daunting to a prospective franchisor, federal and state franchise laws and regulations have sufficiently developed over the last several decades so that, in most cases, these legal hurdles can be overcome with appropriate guidance and counsel.
Business Challenges that the U.S. Franchising Industry Faces

Due to the slow recovery after the 2008 financial crisis, franchisors and franchisees in the United States face a number of economic challenges in expanding their businesses. The most critical challenge in the past few years has been the lack of access to reliable sources of financing. The International Franchise Association, the oldest and biggest industry organization in the world, has been at the forefront in advocating for a more franchise-friendly lending environment, and otherwise in assisting its members in finding new ways to expand their businesses. As General Counsel to the IFA since its inception, DLA Piper has been involved in many such efforts.

The United States: A Fertile Ground for Foreign Fashion Franchisors?

Franchising in the United States is a developed industry with mature markets; American franchisees have tremendous entrepreneurial spirit; the economic environment is improving slowly but surely; and franchise laws and regulations are stable and quite manageable – perhaps these factors could form the groundwork for a successful fashion retail franchise program here in “the Land of Liberty.” Unlike other parts of the world (such as the EU and certain Asian countries), franchising has not penetrated deeply into the fashion retail industry in the United States. There may be an opening for non-U.S. fashion retailers to try to replicate in the United States the success that they have historically enjoyed in many other parts of the world, particularly because entering into a country via franchising can greatly reduce the cost of direct market entrance.
Models with dazzling white teeth, full eyelashes and voluminous hair are commonplace in magazines and on screen. It is almost expected these days that images used in advertisements are retouched – wrinkles are removed, hair extensions and lash inserts are used and models look almost too good to be true.

In the UK, the Committee of Advertising Practice (“CAP”) and the Broadcasting Committee of Advertising Practice (“BCAP”) the regulatory bodies responsible for the UK advertising codes, have signalled a curtailment of such practices by publishing new guidance for the cosmetic sector. The guidance clarifies how advertisers can use pre and post-production techniques in cosmetics advertising “to advertise their products without misleading consumers”. It gives examples of production techniques which, depending on their use, are likely to mislead by exaggerating the performance of a product compared with those that are not.

Applying the relevant provisions of the CAP and BCAP codes, the guidance covers:
1. Pre-production techniques such as styling, make-up, eyelash inserts and hair extensions;
2. Post-production techniques such as re-touching of photographic images using digital or other technology; and
3. Qualifications or disclaimers such as superimposed text.

An example of a pre-production technique that is likely to mislead is the use of lash inserts that are longer or thicker than the model’s natural lashes or that do more than replace damaged or missing lashes. An example of a post-production technique that is likely to mislead is retouching, removing or reducing the appearance of fine lines and wrinkles around the eyes for an eye cream advertisement.

In addition, superimposed text, which qualifies the advertisement or contains a disclaimer, is only permitted to the extent it clarifies some aspect of the advertisement. Superimposed text cannot be used as a qualification or disclaimer to excuse those activities that are disallowed. Consequently, if an advertisement is inherently misleading, it will remain so regardless of any superimposed text.

This clampdown follows a rise in complaints by the public to the Advertising Standards Agency (“ASA”), the UK advertising regulator. The ASA recently banned two L’Oréal adverts which were considered misleading due to excessive airbrushing. L’Oréal has acknowledged digitally retouching the images to “clean up make-up” and “reduce dark shadows” in Lancôme’s ‘Teint Miracle’ advert featuring Julia Roberts and Maybelline’s ‘The Eraser’ advert with Christy Turlington. However, the ASA held that the adverts were misleading as the images did not accurately represent what the products were capable of achieving without the use of post-production techniques.

It will be interesting to see how these guidelines will impact the future of cosmetics adverts. Will the guidelines be adhered to by the industry and to what extent will guidance in the UK have an impact on international campaigns? One thing is certain, in the UK, the ASA will take a very strict view on cosmetics adverts in future.

On 19 July 2011, the European Council adopted without debate a set of new rules to harmonise the use of textile fibre names and related labelling, marking and determination of fibre composition. The general objectives are to facilitate the introduction in the European market of new fibres and innovative products and to ensure accurate provision of information to consumers. In addition, the Regulation will reinforce legal clarity by replacing the current Directives on Textile Names with a single legal instrument.

Clear and accurate labels

The Regulation explicitly states the responsibility of manufacturers and importers for ensuring the supply of the label or marking and the accuracy of the information contained therein when placing a textile product on the market.

Only textile products exclusively composed of the same fibre may be indicated as “100%”, “pure” or “all”. Multi-fibre products need to be labelled or marked with the name and percentage by weight of all constituent fibres in descending order. A fibre that represents 5% of the total weight of the textile product, or fibres which collectively account for up to 15% of the total weight of the textile product may be labelled “other fibres”.

Only the names of textile fibres listed in Annex I of the Regulation can be used for the description of fibre compositions on labels and markings of textile products.

Manufacturers are entitled to request, by following a simplified procedure, the addition of new textile fibre names to the list.

Fur and leather should be clearly stated on textile product labels

For many consumers it is hard to see the difference between good quality fake fur and real fur. Consumers will no longer risk inadvertently purchasing real fur or leather products when they would prefer not to do so for ethical reasons. The phrase “contains non-textile parts of animal origin” needs to appear in future on labels when a garment contains real fur or leather.

“Made in” labels – assessment report to be completed by 30 September 2013

The Commission is asked to present a study, by 30 September 2013, on the feasibility of an origin labelling scheme to give consumers “accurate information on the country of origin and additional information ensuring the full traceability of the textile product” (see our Spring edition of Law à la Mode). This assessment report may be accompanied by a legislative proposal.

The Commission’s report should also assess the feasibility of standardising labelling requirements for care (this is currently carried out voluntarily), size and allergens.

Exemption for self-employed tailors

The mandatory labelling requirements set forth in the new Regulation will not apply to customized textile products made up by self-employed tailors.

The new Regulation will enter into force 20 days after its publication in the Official Journal, which is expected to be in early Autumn 2011. However, for the new labelling requirements, clothes manufacturers will have a 2½ year transition period to introduce new labels.

The original Proposal for the Consumer Rights Directive was submitted by the European Commission in 2008 and contained some controversial provisions, which could have had a significant adverse impact on online (fashion) traders. In this respect, the Council did not accept provisions requiring traders to refund the return cost of goods of 40 € or more from anywhere in the EU. The Council also rejected the controversial plan to force online retailers to ship to every EU

On June 23, the European Parliament adopted the Consumer Rights Directive.* Among the changes is a 14 day EU-wide right for consumers to change their mind about their online purchases, as well as new information requirements.


* After formal approval by the Council of Ministers, the Directive is expected to be published in the Official Journal of the European Union in early Autumn 2011. Member States will have a maximum of two years to implement the new rules.
Member State, provided that merchants specify early in the purchasing process to which countries they ship and explain why they do not ship to others.

Online retailers will be in compliance with the provisions of the new Consumer Rights Directive if they obey the following 10 commandments:

1. **14 day withdrawal period** – The period during which consumers can change their minds regarding an online purchase is extended from 7 working days to 14 calendar days. For sales contracts, the 14 day term starts from the day when the consumer acquires physical possession of the product(s). Where multiple goods are ordered by the consumer in one order but are delivered separately, the term starts from the date when the consumer acquires possession of the last product. If the trader fails to inform the consumer about its withdrawal right, the withdrawal period shall expire 12 months from the end of the initial withdrawal period.

2. **New exceptions to withdrawal right** – For certain goods, the withdrawal right does not apply. In addition to the exceptions to the withdrawal right already mentioned in the Distance Selling Directive (such as goods made to the consumer’s specifications or clearly personalized by the consumer), the Consumer Rights Directive adds a few more exceptions to the withdrawal right, for instance for sealed goods which are not suitable for return due to health protection or hygiene reasons and which were unsealed after delivery (such as underwear or swimwear). The previous exception for auction sales (e.g. purchases on auction websites such as eBay) is no longer included in the new Directive.

3. **Obligations of the trader in case of withdrawal** – Traders must refund all payments received from the consumer, within 14 days of the day on which the trader was informed of the consumer’s decision to withdraw, which is more burdensome for online retailers than the 30 days under the Distance Selling Directive. Such reimbursement must include delivery costs, although the trader is not required to reimburse the supplementary costs if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader (e.g. “next day delivery”). The trader has to carry out the reimbursement using the same means of payment as the consumer used for the initial purchase, unless the consumer has expressly agreed otherwise.

4. **Increased price transparency** – Traders are obliged to disclose the total cost of the product or service, as well as any extra fees. If the total cost cannot be reasonably calculated in advance, the manner in which the price is calculated must be provided by the trader.

5. **Information on who pays for returning goods** – Traders must clearly explain beforehand that the consumers bear the cost of returning the good(s) after they change their mind, otherwise the trader has to pay for the return itself.

6. **No surcharges for payment by credit card or customer service helplines** – Traders are prohibited from charging consumers more for paying by credit card (or other means of payment) than what it actually costs to offer such means of payment. In the event the trader offers a customer service helpline, consumers will not be bound to pay more than the basic telephone rate.

7. **Information on digital products** – Traders must include clear information on the functionality of digital content (including applicable technical protection measures) and any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

8. **Customers must be aware and give express consent when entering into binding agreements** – Consumers must explicitly confirm that they understand that they have to pay a price. This provision was included to prevent fraudsters from trying to trick consumers for ‘free’ services, such as horoscopes or recipes.

9. **Banning of pre-ticked boxes** – When offering additional options during the purchase process (e.g. for express delivery), pre-ticked (or pre-selected) boxes, where consumers are forced to untick the boxes if they do not want the extra service, are prohibited.

10. **Consequences of failure to deliver** – If the trader fails to deliver the goods at the time agreed upon or within a 30 day period from the conclusion of the contract, the consumer can call upon him to make the delivery within a period appropriate to the circumstances. If the trader fails to deliver the goods within the appropriate time, the consumer will be entitled to terminate the contract. Upon termination of the contract, the trader must, without any undue delay, reimburse all sums paid under the contract.

Although at first sight these new rules only seem beneficial to consumers, online retailers will benefit as well, since the stronger protection for online buyers will boost consumer confidence and consequently increase cross-border online purchases.
The latest figures published by the UK Insolvency Service for the first quarter of 2011 showed that retail administration appointments jumped by 55%, with retail company voluntary arrangements (CVAs) increasing by 30%.

**Chain store demise**

For many retailers struggling with the current economic environment, payment of the quarterly rent bill can be the final straw. Following the last rent quarter date in June, several well known chains such as Habitat, Focus DIY and Jane Norman filed for administration and others such as Dixons and Thorntons issued profit warnings and laid out plans to close stores in order to re-shape their businesses for survival.

In fact, research compiled on behalf of PricewaterhouseCoopers by the Local Data Company indicates that the UK’s multiple retailers closed 20 stores a day on average across the UK between January and the end of May this year. With the growth of multi-channel sales and distribution models, many chains are finding that they now require fewer stores in fewer locations and only wish to retain those stores with larger floorplates. As such, this negative trend looks likely to persist for some time yet as the large multiples actively manage down their store portfolios.

**What are the ingredients for a successful CVA?**

Given the increasing trend towards the use of CVAs by struggling retailers in particular, we consider some of the key requirements for the successful implementation of a CVA.

A company voluntary arrangement is a statutorily recognised binding arrangement between a company and its creditors for the compromise or settlement of its debts. Those who can propose a CVA are the company’s directors or any administrator or liquidator and the proposal provides for a nominee to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation. When used outside of an insolvency process, a CVA is akin to a debtor-in-possession procedure as it allows the directors to retain control of the business subject to oversight by the appointed supervisor.

A CVA requires the approval of 75% by value of the company’s creditors in person or by proxy and is then binding on all the creditors for so long as the company complies with the terms of the proposal. A CVA is a flexible procedure as there are no restrictions on what the proposals must provide for in relation to settling liabilities. However as creditors must agree to the CVA, the directors need to prepare a proposal...
which is compelling to creditors and this generally means offering something better than creditors would otherwise receive if the company just went into insolvency.

**CVA the JJB way**

JJB Sports achieved a groundbreaking CVA in April 2009 following earlier failed attempts to secure the support of creditors to a CVA by electrical superstore Powerhouse and shoe retailer Barratts. JJB’s first CVA provided for 140 stores to be closed and rent to be paid monthly rather than quarterly in the remaining 250 stores. The key to securing consent from landlords was the provision of a £10 million compensation fund for the closed store landlords which equated to around six months’ rent.

**Focus on non-trading stores**

Following the success of the JJB CVA, Focus DIY agreed a CVA with landlords in order to reduce its exposure to 38 non-trading stores that had been costing the group £12 million a year. This CVA included a compensation fund which equated to around six months’ rent. Whilst Focus DIY recently went into administration, it appears that the CVA agreed almost two years ago certainly provided additional time to try and restructure the remaining business although this ultimately proved unachievable outside of a formal insolvency process. This underlines another crucial requirement that a successful CVA still requires there to be a viable business at the core.

**Round two – JJB**

JJB’s second CVA approved in April this year provided for the closure of a further 43 unprofitable stores over the course of 12 months and a possible further closure of 46 stores if the company fails to improve its financial performance over the next two years. Under the CVA, creditors are set to receive between 25p and 29.2p in the pound for the sums they are owed, which compared favourably to the estimated 1p they would have received had JJB gone into administration. JJB also obtained a £25 million loan from the Lloyds Banking Group which was required in order to secure the CVA and is needed to revamp the remaining stores. A critical element of the proposal however was the offer of a ‘clawback’ option which will give creditors a share of between £2.5 million and £7.5 million in shares or cash if the CVA is successful.

The British Property Foundation, which represents landlords, explained their approval of the arrangement was only made possible by the offer of a ‘clawback’ option and its hope is that this mechanism will establish a precedent for future CVAs.

The JJB ‘retail’ model for a CVA with clawback and compensation arrangements will continue to evolve in the current environment as the pressure increases on certain retailers to achieve a speedy exit from unprofitable stores in order to ring fence profitable operations. Thus far landlords are the key creditors whose interests have been compromised but we await the widespread extension of this CVA model to other groups of retail creditors.

DLA Piper’s Restructuring team has been involved recently with a wide range of retailers including All Saints, Jane Norman, Focus DIY and the Homeform Group which operates Maben Kitchens, Dolphin Bathrooms, Sharps Bedrooms and Kitchens Direct brands.
Online marketplaces such as auction sites are often used as platforms for selling unlawful fashion products. On 12 July, 2011, the CJEU rendered an important decision concerning the unlawful offers of cosmetic products with L’Oréal’s trademarks on eBay. For the first time, the decision has clarified the circumstances under which online marketplace operators may be held responsible for unlawful trade-marked products offered for sale on their platform site, under trade-mark law, the E-Commerce and the IP Enforcement Directives.

**Private individuals**

When a private person sells an unlawful trade-marked product through an online marketplace, the trademark holder will not be able to invoke its trademark rights to oppose such sale if the sale takes place in the context of a private activity (e.g. a person that sells its fake designer handbag on an online marketplace). An infringement requires that the trademark is used in the context of an economic activity with a view to an economic advantage. This requirement will be fulfilled if, considering the volume, the frequency or other characteristics, the sales by the individual “go beyond the realm of a private activity”.

**Operators of online market places**

There may be an infringement by an operator of an online marketplace if the marketplace is operated using search engine keywords that correspond to certain trademarks and such keywords lead an internet user interested in the products of a particular trademark to a sponsored link of the online marketplace. Two situations have to be distinguished:

- Firstly, where the operator is simply promoting its own online marketplace by such keywords (rather than promoting a particular offer for sale). The keywords are then not being used in relation to the goods for
which the trademark is registered, in which case there is no infringement (unless the trademark is a well known trademark).

- Secondly, where the market operator is promoting its customers’ offers for sale by using keywords corresponding to trademarks. This use of such keywords therefore involves use of a trademark in relation to the goods for which the trademark is registered. There are two further conditions for an infringement: there needs to be a link between the keyword and the trade-marked goods (e.g. the use of the keyword “shu uemura”, that corresponds to L’Oréal’s national word mark “Shu Uemura”, and which creates an association in the minds of consumers that the trade-marked goods mentioned in the ads and sponsored links can be acquired through that marketplace). In addition, the use of the keyword must have an adverse effect on one of the functions of the trademark. This is the case if the internet user cannot distinguish whether the offer is coming from the trademark holder or from a third party.

There is no infringement insofar as the service of an operator only consists of enabling its customers to display trade-marked products but it does not make any use of these trademarks itself in its own commercial communication. The operator may, nevertheless, be liable under other rules of law, such as the E-Commerce Directive, in particular the liability of intermediary service providers.

According to the E-Commerce Directive, internet service providers are usually not liable for the illegality of products offered by third parties on their service. However, this exemption does not apply if the operator has assisted with the infringement, e.g. by optimising the presentation or promoting the offers. For this he must have had an active role of such a kind that he had knowledge of or control over the offer relating to trade-marked products. This exemption does also not apply, even if the online market place operator has not played an active role, if he was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers were unlawful and, in the event of it being aware, failed to act expeditiously in accordance with the E Commerce Directive.

The operator of an online marketplace can be ordered not only to end an intellectual property infringement, but also to prevent further infringements. However, the Court ruled that it cannot be expected from the operator to actively monitor all the data of each of its customers to prevent any future infringements. This point will probably need further clarification in the future (particularly in light of the recent UK decision Twentieth Century Fox Film Corporation and others v British Telecommunications plc [2011] EWHC 1981 Ch, 28 July 2011). Moreover, it does also not mean that the Court order may be a general and permanent prohibition on the selling on that marketplace of goods bearing the trademarks.

Finally, the operator of an online marketplace may be ordered to take measures to make it easier to identify its customers.
In preparation for the A/W 2012 collection we met Antonio Bandini, fashion director of emerging Chinese luxury brand Ilaria, who kindly welcomed Law à la Mode and showed us a preview of the catalogue for the forthcoming season.

**First of all, Antonio, how is it that a Chinese luxury brand hired an Italian designer?**

The founder of Ilaria, who was educated in Italy and worked for a number of Italian brands, recognises the natural style we have in Italy. Therefore, when she felt the need for stylistic support for her own line, she decided to look for a designer in Italy. Basically, the reasons she chose me are twofold: because I am Italian and because of my background (we had actually previously met while I was working with Valentino).

**Is your style somehow influenced by the fact you are designing for a Chinese label?**

Not at all. My collections for Ilaria are actually very international. Moreover, I have realised that what Chinese women want is not different from what is required in Europe.

**What are the main characteristics of Ilaria and what makes it unique?**

Ilaria is a Chinese luxury brand, but it also has strong connections with Italy. Both my creativity and the fabrics we use are Italian. Save for silk, which is local, we choose the materials in Italy and only make use of the best quality textiles such as Agnona, Ferla and Loro Piana. The manufacturer is Chinese, but quality is of paramount importance and I personally perform all the fittings during my frequent visits to China, where I spend at least 8 to 10 days a month to follow the production.
Can you tell us a bit more about your career highlights before Ilaria? We have seen you in “Valentino: The Last Emperor” the documentary about legendary Valentino Garavani, to whom you were first assistant for a number of years, but certainly that’s not all.

Indeed. I started my professional career at Salvatore Ferragamo, where I spent 3 wonderful years. I was so passionate about my job I would cry when not working! After that I moved to Paris, to assist the head designer of Guy Laroche, with whom I had already worked while at Ferragamo. This was a tremendous opportunity for me. In Paris I came to know the French approach to fashion, which is almost a sacred one. That’s why the French ateliers of a certain standard, even of prêt-à-porter, can almost compare with haute couture in clothing construction. After Ferragamo and Guy Laroche I had a brief experience in the mass market, working for a company which produced clothes for Zara and H&M. It was a completely different perspective: I had my designs manufactured in 40-50 thousand pieces rather than a few hundreds, no luxury at all and high speed. But that served me to understand it was not my path and that I was meant to follow my passion: luxury and the creation of something truly beautiful and unique. Luckily, chance got me to Valentino, where I spent 9 years working side by side with a legend, learning and enriching my background enormously. That also gave me exposure to haute couture at the highest possible levels, to the best fabrics and embroidery in the world and to the jet set. The drawback of that experience is that I got accustomed to such a level of perfection and quality in my work that I then found it difficult to accept anything less in Italy!

Going back to Ilaria, where and how is the brand distributed and where are your collections presented?

Ilaria is exclusively sold in mono-brand shops. At present there are 5 Ilaria boutiques in Beijing and we are opening a boutique in Shanghai. By the end of 2011/beginning of 2012 we aim to have 10 shops in China. So far we have had our fashion shows in Beijing, but the next one will be in Shanghai to mark the opening of our first boutique there.

How is the brand promoted?

Ilaria heavily relies on its boutiques, trunk shows and the presentation to the press. The brand promotion includes local events and fashion shows. Our first major fashion show was attended by 1,200 people, including foreign press. With the September issue of Vogue China we will also have our first press campaign.

Do you foresee an online presence for Ilaria in the near future?

Absolutely. We are already working on the website. Although I personally believe that in the world of luxury the touch and feel are extremely important, I am conscious that nowadays customers require the ability to buy luxury goods also online.

Is there any plan to distribute Ilaria outside of China?

For sure. Our ultimate goal is to create a Chinese brand which is also appealing in the rest of the world. That said, although there is already a considerable interest for the brand in Europe, with some showrooms requesting our clothes and editorials in fashion magazines, at present our corporate policy is to focus most of our business in China, where the market is booming, consumers are in high demand for luxury goods and there is great spending power.

To conclude, in you career did you happen to see cases of counterfeiting?

Yes, counterfeiting, imitations and claims about designs. For instance, I remember that a French company once complained about the use by another company of a flower print which the French company claimed to have created. But those issues are dealt with by the legal departments rather than by the designers themselves.
Social media in the retail fashion space takes many forms. For example, Bergdorf Goodman, one of America’s most well-known high-end department stores located in the heart of New York City, tweets upwards of 50 times a day providing fashion tips, insider information about brands and designers sold at the store, and details about sales, discounts and promotional offers. Although a newspaper once characterized the store as “snotty” and “imposing,” Bergdorf Goodman has started to rebrand itself as “warm and welcoming”, with its Twitter handle @bergdorfs leading the change. Perhaps the most notable aspect of this social media strategy is that the department store has effectively handed over its entire corporate identity to a single individual: Cannon Hodge, Bergdorf’s social media manager.

By comparison, Nordstrom, another US department store, supports employees’ use of social media to engage with customers. One employee, @NordstromDave, uses the Twitter platform to establish himself as knowledgeable and passionate about his work, and then uses the private messaging function on Twitter to communicate and close sales with repeat clients. Although there is a corporate @Nordstrom Twitter handle, @NordstromDave is a great example of empowering employees to use social media as another platform to make sales and build customer relationships by pushing the interaction down to people who work directly with the customers themselves.

In the retail fashion arena, there is an understandable concern about encouraging – or even permitting – employees to use social networking as part of their jobs, thereby representing the company. Not only does such decentralized communication threaten corporate’s traditional tight control over messaging and branding, but it also exposes companies to various legal liabilities. Further, in contrast to other industries, fashion functions as a physical manifestation, or extension, of a person’s identity. As a result, missteps by a fashion brand are taken much more seriously by consumers who closely associate their identities with a style or brand.
For a retail company which permits employees to use social media, the most important action item is to create a social media policy regulating use and outlining best practices. Such a policy should include the following:

- **No disclosure of confidential information:** Be sure that your employees never discuss proprietary information, including sales data and plans, company finances, future business performance, business plans, strategies, product launch information, unannounced plans or any other confidential information.

- **Respect for privacy:** Employees must remember that identifying or discussing other Personnel – including guests, suppliers, friends, and coworkers – without express written permission can expose both the company and the individual to liability. For example, posting photographs requires written consent forms from every photographed individual.

- **Protect ownership of trademarks and copyrights:** Employees should be reminded not to violate the trademark or copyright rights of others. Plagiarism must be avoided and should be punished; proper permissions or attribution is required. Copyright and fair use laws must be respected and adhered to accordingly.

- **Be respectful:** Make sure communications are in good taste. Do not permit your employees to denigrate or insult others, including other brands and competitors. Be sensitive about linking to content: redirecting to another site may imply an endorsement of its content.

- **Disclosure & transparency:** Many countries require individuals being paid by a company to disclose any such relationship or affiliation. Be sure to know which jurisdictions require particular disclosure requirements.

- **Maintain a local focus:** Social media is global in scale but local in impact. Your on-the-ground employees will often understand the customers better than anyone else. The most effective social media engages not only with customers, but also with the local community. Such interaction creates overall goodwill in the brand experience.

- **Engage the customer:** The most compelling use of social media goes beyond one-way statements such as discounts and promotions. These interactions ask questions, respond to comments, and take the time to get to know recurring fans/guests. Engagement builds a loyal following and opens the two-way conversation for suggestions, feedback and collaboration. This will require additional monitoring and a greater time commitment, but the results can be extremely effective.

While most companies will decide between a corporate-driven or a employee-based social media approach, there is also a third strategy to consider: customer-initiated social media. J.Crew, an all-American clothing retailer, has a particular “preppy” and “hipster” following that has generated countless fan blogs where devoted customers analyze fit, color, pricing, store stock, marketing campaigns and branding. J.Crew has deliberately chosen to not engage with these grassroots fan blogs, even though there is evidence that many of these websites serve as persuasive marketing tools to reinforce the brand among consumers as well as increase sales. Given this efficacy, the decision to not directly engage with these fan sites provides a poignant lesson: know your customer. A typical J.Crew customer might be repelled by mainstream marketing, and so official sponsorship of an unofficial fan site would only serve to delegitimize its credibility. Thus, unsponsored and unaffiliated social media may be exactly the strategy a “hipster” fashion brand requires.

As social media continues to ingrain itself within the communications landscape, it is becoming increasingly important for fashion retail stores to consider how to utilize social media campaigns as part of their strategy to keep fans and customers engaged with their brands. Whatever the approach, the goal is to build a rapport that keeps customers engaged and coming back for more, while also protecting your company from any inherent liabilities.

[Visit our practice group’s blog at remarksblog.com or follow us on twitter at @remarksblog]
The retail industry has never had a wider choice of medium to exploit, nor has it ever been more vulnerable. Brands are under pressure to go global and keep up with new technology, whilst still protecting the designs that make them household names.

DLA Piper is a law firm with a dedicated cross-border Fashion, Retail and Design team born out of their leading Intellectual Property and Technology practice, who are on hand to assist retail brands, whether you need localised or global assistance.
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Cologne
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Munich
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ABOUT DLA PIPER
DLA Piper is a global law firm with 4,200 lawyers in 76 offices across 30 countries. From its offices across Asia Pacific, Europe, the Middle East and the United States, legal and business advisers provide a comprehensive range of services to local, regional and international businesses.
Brand-i

Brand-i is a new website which aims to arm consumers with the information they need to avoid buying counterfeit goods online. A consumer wanting to purchase a particular brand of goods can simply search for a list of approved retailers. Or, if the consumer is concerned about a particular website then they can find out if it is an authorised retailer for any of the brands. The site has only recently been launched in the UK and there are already some big name brands involved, for example Timberland, Links and Abercrombie & Fitch. To make the site a success it needs as many brands as possible to get involved so that it becomes a comprehensive directory which consumers can rely on. If you are interested in joining the directory of brands, which involves an annual subscription fee, then please visit www.brand-i.org for more details.

Family friendly retailing

As our modern society becomes increasingly commercialised and sexualised, children are confronted with a wallpaper of adult marketing, products and media which many parents feel threatens to erode their innocence. On 6 June 2011, the British Retail Consortium published a report which aims to tackle this problem, by setting out “good practice” guidance for retailers. The guidance includes practical recommendations such as ensuring that clothing ranges are age appropriate, everyday shoes are practical, and marketing featuring child models shows them in natural poses in a childlike environment. The report was developed by nine retailers including Argos, Next, Marks & Spencer, and Tesco. Other retailers have been encouraged to sign up. The report reflects a growing sentiment around Europe, coinciding with the release of the UK Government-commissioned review *Letting Children be Children*, and the adoption of a resolution of the Italian Ministry for Equal Opportunities and the local advertising standards authority to tackle advertisements conveying degrading messages based on gender stereotypes.

Domain names

After years of tortuous debate and discussions, the Internet Corporation for Assigned Names and Numbers (ICANN) has finally approved plans to launch an extension of the number of generic top-level domains (gTLDs). The plans will allow organisations to depart from standard gTLDs such as .com and .org, and acquire more creative options which exploit their brand name, product category and slogans. Applications for new gTLDs will be accepted from 12 January 2012 to 12 April 2012, and applicants must demonstrate a legitimate claim to the domain. Since prices start at $185,000, joining the party doesn’t come cheap, but that is unlikely to put off major brands. We wait with baited breath to see which savvy organisations successfully get their hands on .shop and .fashion!
City Harvest and supporters in the fashion industry are joining forces this Fall in an effort to raise awareness and funds to help eliminate hunger in New York City. During September – Hunger Action Month – there will be a month long series of exciting events and special promotions hosted by designers and retailers created to inspire the philanthropist in us all. If you are interested in participating in Fashion Feeds New York, please email rpinheiro@cityharvest.org.

“The Fashion World of Jean-Paul Gaultier: From the Sidewalk to the Catwalk”, Montreal Museum of Fine Arts (17 June – 2 October)

SIMM Madrid International Fashion Fair, Madrid (1 – 3 September)

Japan Jewelry Fair, Tokyo (1 – 3 September)

Moda Shanghai, Shanghai (6 – 8 September)

Vogue Fashion’s Night Out (8 September)

New York Fashion Week (16 – 18 September)

London Fashion Week (16 – 21 September)

Milan Fashion Week (21 – 27 September)

Paris Fashion Week (27 September – 5 October)

“The 18th century back in fashion”, Chateau de Versailles, Paris (until 9 October)

“Royal Faberge Exhibit” (with Catherine Middleton’s Wedding Dress on Display), Buckingham Palace, London (23 July – 3 October)

“So London”, Le Bon Marché, Paris (27 August – 15 October)

“Walter Van Beirendonck, Dream The World Awake”, MoMu (Mode Museum), Antwerp (Belgium) (14 September – 19 February)

“Daphne Guinness”, Gallery Fit, New York (16 September – 7 January)

Fashion Week Tokyo (16 October – 22 October)

“Hussein Chalayan, récits de mode”, Musée des Arts Décoratifs, Mode et Textile, Paris (5 July – 13 November)

World Models Market, Berlin (3 – 6 November 2011)

Lifestyle and Fashion Expo Arabia, Riyadh (Saudi Arabia) (5 – 9 November)

“From Catwalk to Cover”, Fashion and Textile Museum, London (18 November – 26 February)