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Abbreviations:

BFC	<i>British Fashion Council</i>
CFR	<i>Charter of Fundamental Rights of the European Union</i>
DTSA	<i>Defend Trade Secrets Act of 2016</i>
ECHR	<i>The European Convention on Human Rights</i>
EEIG	<i>The European Economic Interest Group</i>
EPC	<i>The European Private Company</i>
EPC	<i>European Patent Convention</i>
EPO	<i>European Patent Office</i>
EUIPO	<i>European Union Intellectual Property Office</i>
EURATOM	<i>European Atomic Energy Community</i>
EUTMD	<i>European Trademark Directive</i>
EUTMR	<i>European Trademark Regulation</i>
Inc	<i>The corporation</i>
IoT	<i>Internet of Things</i>
IPR	<i>Intellectual Property Right</i>
JV	<i>Joint Venture</i>
LLC	<i>Limited liability company</i>
LVMH	<i>Louis Vuitton Moët Hennessy</i>
M&A	<i>merger and acquisitions</i>
MBCA	<i>The Model Business Corporation Act</i>
PTO	<i>United States Patent and Trademark Office</i>
SCE	<i>Societas Cooperativa Europea</i>
SE	<i>Societas europeae</i>
TEU	<i>Treaty of the European Union</i>
TFEU	<i>Treaty on the Functioning of European Union</i>
U.S.C	<i>United States Code</i>
WIPO	<i>World Intellectual Property Organization</i>

Introduction

This dissertation focuses on the main issues that relate to the foundation of a fashion firm. It means to carry out the function of “skeleton” on which all the work is based on. It could also be interpreted as a “cycle”. All may start from an idea, a project in common or an entity that already exists but desires to be something new and more powerful. Since then, one or a group of people must choose where to found its or their “creature”: for the purpose of this dissertation, between Europe and the United States. After that, a deep and substantive analysis of the two legal systems may be faced in order to determine the preferable legal and economic structure on which the company should be based on. After that, with the help of Banks, investors or own capital, the core of the business may start. The company should promote the goods produced; have a name, create new and innovative collections. Nowadays, all business activities have to take into consideration the transformations to which our era is subject to. E-commerce plays a fundamental role in the retailer and distribution sectors: every aspect of our life is becoming more and more digitalized. Consumers have the possibility to buy their favourite items on internet. The website of the shop in question offers an instantaneous purchasing even if one is at home. Coming back to the founder or founders of the fashion activity, he, she or they may desired that other competitors do not reproduce the products create, or that one of the employees discloses the secret of the processes of manufacturing or the innovation of a material or a new mechanism. This is the reason according to which Intellectual Property Rights play a fundamental role in the fashion sector. They generally avoid competitors from reproducing, using or sell products that look like or have the same characteristics of those from another company. Therefore the new fashion entity has its own corporate structure and it begins to be remarkable among the consumers. The next step is to expand the business through the conclusion of contracts with third parties. The licensing, distribution and franchising agreements allow the owner of the brand to have “collaborators” who helps to make the products recognizable at local level or at international level. At the end, with merger and acquisition agreements and joint venture agreements, the “fashion life circle” reaches its end. In fact, this kind of business negotiation permits the company to transform into a new entity, remodelling its “shape”.

It seems that the establishment of a fashion business resembles a nice story, in which the fashion business is the main character around which many implications co-exist. Unfortunately, the fashion world is subject to huge changes, first of all because of the economic crisis that is affecting the economy, the way of producing business since 2008, secondly because of the exit of the United Kingdom from Europe: the so called “Brexit”. Brexit deeply influences and changes the fashion sector, as London is one of the major centres for fashion business. The British Capital is the headquarters of the British Fashion Council (BFC), a non profit trade organization of British fashion designers. It was established in 1983 and promotes the fashion British Design not only in the country, but also internationally. Twice per year, it organises the London Fashion week, an international prestigious event which guests all the major exponents in the sector. Before the Referendum that took place on 23rd June 2016, a survey was launched by BFC to know the opinion of five hundred designers about their opinion on Brexit: 90% was for remaining in Europe, while only 4,3 % voted for leaving. After results of the referendum, the BFC with the Creative industries Council developed a strategy for the British industries, supported by the government. The main issues were: the talent and skills, the trade deals with non European countries, customs tariffs and red tape and intellectual property rights. A meeting with Vicky Forde, a member of the European Parliament was organised and a conversation with the competitors in Milano and Paris was held in order to discuss the implications of Brexit. In March 2017 the BFC hosted a roundtable with the Minister of State for Digital and Cultural Policy, representing the following fashion industry fields: retail, e-commerce, brands, photographers, investors, legal and designers. The report from that meeting warned that if the EU loses its legislation on protection intellectual property, as all designers will receive a significant impact, contributing negatively to the economy. Moreover, closing the London Fashion Week would have a negative impact not only on British economy, but on competition, as London would be excluded from the European fashion capitals. It is clear, the Brexit influences on a great scale the world of fashion economy.

Personally, the fashion world has always fascinated. I have always been interested in what happens behind the scenes: when you visit many cities not only in Europe, but also abroad, the same brands appear, but the product sold are often

different,are modelling on the tastes of local customers. Moreover, fashion law is not intended as an academic subject, as it does not have its own juridical history and “evolution”. However, I discovered a nice book at the library of the law University, dealing with fashion business law and I found out that this field of law was taught at the Fordham Law School since 2006 and that in 2010 the first world academic center dedicated to fashion law was established: the Fashion law Institute. Furthermore, in many different universities started to offer lectures in fashion law. It is clearly underastable my choice to compare the European legislation to the American one. Europe is the “home” of fashion,where it was born. One should think about Paris, Milano or London, the capitals of the fashion world. Therefore, the “old” continent is put in comparison with the new one, where technologies have been developed and where huge capitals govern the business sector. New York, the American fashion capital with its 5th Avenue often caught in the movies and Los Angeles, the capital of the film industry, where actors and many fashion people desire to live. As mentioned above, the United States was the first country to introduce an official fashion academic subject. The tradition is combined with the innovation, the fashion culture is combined with the business.

I thought that writing my Master Thesis on fashion business law would have been a great opportunity to reconcile my legal academic background and my passion and interest in the fashion world. The main question that may arise is: to what extent does the fashion world influence our life? An answer may will provide through the issues faced in this dissertation.

The structure of my work is the following: the first chapter deals with different corporate structures from which an entrepreneur or a group of entrepreneurs may choose; the second chapter represents the core of the fashion business, the intellectual property rights; the third and last chapter shows the kinds of contractual negotiations that may arise out during the “life” of a fashion company.

1. Chapter: The foundation of an international fashion company. Practical aspects.

1.1 Introduction

Company law is that kind of law whose intent is to define the modalities according to which business activities between partners or shareholders in relation to third parties, such as creditors or representations, may be organised.

From a juridical point of view, the worldwide legal system is divided into common law and civil law, therefore two different approaches may be taken regarding the founding process. In fact, the Anglo- American approach is liberal in capitalisation but strict in publication, as the balance sheet plays a fundamental public role, while the Continental European approach, for example Germany, adopts a system which is strict in capitalization but liberal in publication. As the legal basis of company law takes different directions respectively in Civil law and Common law countries, it is important to understand the different forms of business organization may take place.

After a fashion company has been established, the status of “being unique”, the promotion of the company and the range of contracts may play a fundamental role in promoting the fashion business worldwide. While the third chapter will deal exclusively with these topic, one paragraph of this chapter will be wholly dedicated to the “new generation” aspects of promoting a potential fashion company, namely, the retail and e-commerce themes. Moreover, a brief mention of the Inditex phenomena will be dealt, as it represents an example of how a potential fashion company may have success and expand its business.

The chapter is structured as follows: firstly, the choice of the legal entity in both legislation will be dealt, with reference to the directives and regulations that characterize the European legal framework and the Codes and Acts that are fundamental in American corporate law. Therefore, the analysis of new trends of business expansion will be touched, in particular the e-commerce.

1.2 How to choose the business entity in Eu and US

1.2.1 The legal framework and the business organisations under European law

Firstly, the legal basis of Company law are the National Codes for both, Civil

law and Common law countries, in particular: Companies Act 2006¹, Delaware Corporation Law² and GmbH-Gesetz/Aktiengesetz³.

However, the European legal framework is based on the Treaty of Lisbon (TL), which comprises the Treaty on European Union (TEU) and the Treaty on Functioning of the European Union (TFEU), amending three different Treaties: the previous Treaty on European Union (Amsterdam, Nice and Maastricht), the Treaty establishing the European community and the Treaty establishing the European Atomic Energy Community (EURATOM). Charter of Fundamental Rights of the European Union, the freedom to conduct a business within the limits of Article 17 of the Charter (right to property).⁴

Art. 288 TFEU provides three “methods” under which the Union legislation is applied, respectively, the Regulations (para. 2), the Directives (para. 3) and lately, the Decisions (para. 4). Briefly, while the Regulations have general application, as they are binding in all aspects and they are directly applicable to all Member States (MSs), the Directives are binding only if their result is achieved upon each MS, leaving the National Authorities to choose the form and the methods of implementation. Lately, the Decision may be considered as individual acts, as they are binding only upon whom they are addressed, such as, companies. Moreover, Recommendations and Opinions do not have binding force.

Under a European economic perspective, the European Company Law finds its principal justification in the Right of Establishment which is enshrined in the second

1 The companies Act 2006 is an Act emended by the Parliament of the United Kingdom, forming the primary source of UK company law. This legislative source provides a unified code of company law for the UK and it is continuously updated. The main aspect of such Act are the codify of certain common law principles; the implementation of the European Takeover and transparency obligations Directives; the introduction of new provisions for private and public companies.

2 It relates to the USA and it will be introduced in the next paragraphs of this chapter.

3 The German Company Act embraces texts regarding the types of business structures that can be established in the country. Germany has to observe the Commercial Code and the European Directives as well. The main form of a company under this jurisdiction is the GmbH-Gesetz/Aktiengesetz, that is the private limited liability company and public company.

4 Art. 17 Charter of Fundamental Rights of the European Union, states as follows: “1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.”

chapter of TFEU, in particular in artt. 49⁵, 50(1) and 2(g),⁶ 53⁷ and 54(2 para.)⁸; artt 114,⁹ 115¹⁰ and 352¹¹ TFEU

As a result, TFEU defines the term “Company” in broad terms, defining that they should be treated like natural persons. Moreover, the recognition of a foreign company is both, a consequence and a pre-condition of the freedom of establishment.

5 Art 49 TFEU states as follows: “*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*”

6 Art 50.1 TFEU reads as follows: “*In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives*”, while art 50.2(g) TFEU states: “*The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:...(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union*”

7 Art 53 TFEU reads as follows: “*In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.*”

8 Art 54 para 2 TFEU provides the definition of Companies or firms as follows: “*Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.*”

9 Art 114 TFEU recites as follows: “*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons. 3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective. 4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them. 5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific*

1.2.1.1 The harmonization project

As there is not a codified European Company Law, each MS tends to continue to operate in such a sector with different company acts. In order to establish a positive environment for European undertakings, investors and employees, a modern and efficient European company law may adopt solutions to take place.

The harmonisation of company law promotes the achievement of freedom of establishment under TFEU and, as a consequence, the growth and development of European internal market. Moreover in such respect, the freedom to conduct a business

evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.⁶ The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved. When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.⁷ When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.⁸ When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.⁹ By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.¹⁰ The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedures.”

10 Art 115 TFEU states as follows: “Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.”

11 Art 352 TFEU states as follows: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.² Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.³ Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.⁴ This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.”

according to the Charter of Fundamental Rights may be achieved.

In the next section, the directives which contributed to harmonise the European Company Law will be analysed.

1.2.1.1.1 Directives regarding European company law

The directives which applied the harmonisation programme within Europe are twelve. A brief explanation of them will be provided below.

1.2.1.1.1 A) The disclosure Directive(First Directive)

The Disclosure directive(so called, the first directive)¹² covers three different subjects, namely: the disclosure of basic documents related to the company and the persons obliged to bind the company; the validity of obligations entered into by a company and, finally, the nullity applied to both, the cases by which it may arise and the retroactive effect. Such a directive is of fundamental importance, as it is applied to all public and private limited liability companies.

1.2.1.1.1 B) The Capital Directive(The second Directive)

The Capital Directive¹³ (called the second Directive) sets the minimum capital requirement for EU public limited liability companies at EUR 25 000, covering the formation of public limited liability companies and ruling on maintaining and altering their capital.

1.2.1.1.1 C) The National merger Directive(The Third Directive)

The National Mergers Directive(the Third Directive)¹⁴ deals with mergers between public limited liability companies in a single EU country. It covers protection for shareholders, creditors and employees.

12 Directive 2009/101/EC,It replaces Directive 68/151/EEC(the 1st Company Law Directive). The current consolidated version includes amendments introduced by Directive 2003/58/EC (now repealed) and Directive 2012/17/EU

13 Directive 2012/30/EU. It replaces Directive 77/91/EEC (the 2nd Company Law Directive). The consolidated version includes amendments introduced by Directive 2006/68/EC and Directive 2009/109/EC

14 Directive 2011/35/EU. It replaces Directive 78/855/EEC (former 3rd Company Law Directive).

1.2.1.1.1 D) The Account Directive (the Fourth Directive), The Consolidate Accounts Directive (the Seventh Directive) and The Statutory Audits Directive (the Eighth Directive)

The Account Directive (the Fourth Directive), the Consolidate Accounts Directive (the Seventh Directive) and the Statutory Audits Directive (the Eighth Directive)¹⁵ can be considered as embryonic European accountancy code. Their aim is to give a true and fair view of the company's assets, liabilities, financial position and profit or loss.

1.2.1.1.1 E) The Draft of the Structure of the Public Company (the Fifth Directive)

While the 1st and the 2nd Directives, deal with the external regulation of companies, the Fifth Directive is related to the internal structure of them. Such a Directive was proposed in 1972 by the Commission, which tried to make distinctions on the structure of public companies: the one tier System (notably the UK) and two-tier system (preferred by countries such as Germany). Since there, it was noticed that both systems have their merits and weak points, and, as a result, regulating that aspect was basically considered as impossible. Consequently, a margin of discretion was left to the Member States.

1.2.1.1.1 F) The Division Directive (the Sixth Directive)

The Division Directive¹⁶ (The Sixth Directive) deals with the aspect of the division of public limited liability companies in a single EU country. It provides protection for shareholders, employees and creditors.

15 Respectively: 78/660/EEC, 83/349/EEC and 84/253/EEC. They were replaced by Directives 2013/34/EU, which introduced the obligation for EU listed companies to provide a corporate governance statement in their annual report, and 2006/43/EC whose aims are to improve the reliability of the financial statements of companies by establishing minimum requirements for the statutory audit of annual and consolidated accounts. In addition, another directive, n 2009/49/EC, tries to simplify the financial reporting requirements for micro-enterprises in order to improve their competitiveness and release their growth potential. Further, the Regulation n.1606/2002 on the application of international accounting standards harmonises the financial information which are presented by publicly traded companies in order to guarantee protection for investors. Moreover, in 2015 a Regulation on insolvency proceedings set common rules on the court competent to open insolvency proceedings, the applicable law, and the recognition of the court's decisions when a debtor becomes insolvent. The main scope is to avoid the transfer of assets or judicial proceedings from one Member State to another, improving the legal position of companies or individuals. Lastly, a current proposal launched in December 2016 for a directive on preventive restructuring frameworks would help increase the efficiency of restructuring, insolvency and discharge procedure

16 Directive n.82/891/EEC

1.2.1.1.1 G) The Groups Directive(The Ninth Directive)

The 9th Directive was projected by the Commission to regulate the legislation about the groups, but later the proposal was withdrawn. In 2003 the Commission launched the 2003 Company Law Action Plan, but with no success. Therefore, the actual legal framework in that field presents fragmentations and it is embodied in other legal acts.

1.2.1.1.1 H) The Cross-Border Mergers Directive(the Tenth Directive)

The Cross-Border Mergers Directive(The Tenth Directive)¹⁷ is applied to all companies with share capital apart from undertakings for collective investment in transferable securities. It deals with cross-border mergers of limited-liability companies, aiming to simplify the cross-border mergers between companies with share capital.

1.2.1.1.1 I) The Branches Directive(the Eleventh Directive)

The Branches Directive's¹⁸(The Eleventh Directive) scope is to harmonise the disclosure requirements in relation to branches of companies. For example, it deals with the person who carries out disclosure formalities and the penalties as a consequence of the failure of such task.

1.2.1.1.1 J) The Single Member Company Directive(the Twelfth Directive)

The Single Member Company Directive (The Twelfth Directive) relates to the conception of company by Single National laws. Therefore, the twelfth directive aims to eliminate the differences in the legislation of Member States in respect to single-member company.

1.2.1.1.1 K) The Takeover Bids (the Thirteenth Directive)

The Takeover Bids Directive¹⁹(The Thirteenth Directive) deals with the common method of obtaining control over a company, that is the acquisition of the shares of that company in a quantity that represent, as a minimum level, a controlling percentage of the voting rights. This mechanism is called "Takeover Bids". Therefore, in 2004 the

¹⁷ Directive n.2005/56/EC

¹⁸ Council Directive 89/666/EEC

¹⁹ Directive 2004/25/EC

European Commission announced the harmonization of laws of Member States on take over and general bids.

1.2.1.1.1 L) The Cross Border Movement of the registered seat(the Fourteenth Directive)

The Cross Border Movement of the registered seat²⁰ (the Fourteenth Directive) introduces disclosure requirements for foreign branches of companies. It covers EU firms setting up branches in another EU country and non-EU firms setting up branches in the EU.

1.2.1.1.1 M) The Shareholders Directive

The Shareholders rights Directive²¹ introduces narrow requirements for a specific number of shareholders rights at the general meeting in order to abolish the main obstacles to a cross-border vote in listed companies having their registered office in a Member State. The timely access to relevant information on general meetings and easier proxy voting is also introduced for shareholders in listed companies.

1.2.1.2 The main forms of business organizations in EU

The principal forms of European business organisation find their legal basis in EC Regulations. They are: the Societas Europaea, (SE) the Societas Cooperativa Europea (SCE), the European Private Company(EPC) and the European Economic Interest Group (EEIG).

1.2.1.2 A) The Societas Europaea (SE)

The Societas Europea ²²,also called the European Company (SE), can be defined as a public limited-liability company which is regulated by Community law, directly applicable in all Member States. A SE may only be founded within the territory of the European Community through four different methods, namely: the formation of a subsidiary by two or more companies; the transformation (conversion) of an existing

²⁰ Directive n.89/666/EEC amended by Directive n. 2012/17/EU

²¹ Directive n.2007/36/EC (amended by Directive 2014/59/EU). In 2017 a new reform of the directive, is agreed, in order to help the tackle managers' excessive short-term risk-taking and ensure a better focus on the real performance of companies for investors and their asset managers, proxy advisers and intermediaries.

²² Issued by the Regulation on the Statute for a European Company n.2157/2001, supplemented by Directive N 2001/86/EC (the SE directive)

public limited-liability company by merger of two or more existing public limited-liability companies; the formation of a holding company; and by two or more public or private limited-liability companies. Moreover, all the formations must always involve companies from at least two different EU member states and, in the case of a transformation, the company must have had a subsidiary in another member state for at least two years. Lastly, a SE must be registered in the same Member State where the administrative head office is set. Examples of SE located in the EU are: Allianz and LVMH Moët Hennessy Louis Vuitton whose headquarters are respectively in Munich and Paris.

1.2.1.2 B) The Societas Cooperativa Europaea (SCE)

The Societas cooperativa Europaea, also called The European Cooperative Society²³ can be considered as an optional legal form of a cooperative. The scope of such legal entity is to facilitate cooperatives' cross-border and trans-national activities. The State Members of a SCE carry out common activities preserving their independence and aim to satisfy each member's needs. Therefore, members benefit proportionally to their profit and not to their capital contribution.

1.2.1.2 C) The Societas Privata Europaea European Private Company (EPC)

The Societas Privata Europaea, called as the European Private Company (SPE) is a kind of legal entity which intends to cut costs in order to facilitate the establishment and development of small and medium sized enterprises in the European Single Market. Unfortunately, the European Institutions have not developed yet a definitive legislation on the Statute of EPC.²⁴

1.2.1.2 D) The European Economic Interest Group (EEIG)

The European Economic Interest Group²⁵ (EEIG) is a supranational type of enterprise which facilitates the co-operation in European research projects especially

23 Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society.

24 It is currently based on the proposal of the EU commission for a Council Regulation on the Statute for a European Private Company presented in June 2008.

25 EC regulation Nr. 2137/85

for small and medium-sized enterprises. In fact, the EEIG helps its members to develop or improve their own fields of activity which, otherwise, would be too expensive by the single members, in order to increase its efficiency. Consequently, not only the efficiencies of each state member is increased, but also a strategic competitive position in the European Single market is so developed. Moreover, its duration can be unlimited or set for short-terms projects.

1.2.2 The legal framework and the main forms of business organizations under US law

1.2.2.1 The Model Business Corporation (MBCA)

In the United States a general comprehensive American Company law does not exist as it is a Federal State. As a result, each State adopts its own Statute, which leads to legal risk and uncertainty when a corporation operates in many different states. In order to limited such inconvenience, the Model Business Corporation Act,(MBCA)²⁶ a "model statute" drafted by the American Bar Association was projected to provide states an opportunity to harmonize their corporation statutes, making easier for corporations to do business in many states. In addition to statutory harmonization, an identical statutory language is adopted by many different state legislatures encouraging a court in one state, when interpreting a statute. Therefore, the MBCA can be considered as a comprehensive body of corporate law which covers all aspects of doing business as a corporation, such as, the steps needed to form a corporation, the effect of limited liability, the structure of corporate governance, corporate formalities required to maintain limited liability, voting rights and shareholder rights.

1.2.2.2 The Delaware Corporation law

The Delaware Corporation Law is the Statute that governs the corporate law in the State of Delaware. Its importance is due to the fact that since the early 20th century

²⁶ In 1950 the Committee on Corporate Laws of the ABA's Business Law Section published the Model Business Corporation Act (MBCA) The first revision was approved in 1969, when the Committee adopted the Revised Model Business Corporation Act. The Act continued to evolved until 1984, the date of the second Revision. Since there, every systematic attempt to revise and adjust the provisions have become updated. Consequently, in 2010 the Committee adopted an official review of the MBCA and its effort was published in June,2016.

about one million companies have established their corporations or limited liability companies in that State. Today more than 60 percent of the Fortune 500 companies are incorporated in Delaware.²⁷ There are many reasons that explain this phenomena.

The first one, is that the Delaware Corporation law Statute offers predictability and stability, offering mandatory requirements in order to protect investors and providing flexibility for corporations which want to form their business. Secondly, Delaware is generally recognized for its judicial system, and for the expert and impartial judges that rule in corporate law.²⁸ Consequently, a historical legal tradition has provide written opinions that are part of the most important body of precedents in corporate law, which influences all the other States. Lastly, the state of Delaware has a wide amount of lawyers expert in Delaware corporate law.

1.2.2.3 The main forms of business organisations in USA

In the Usa the business entities are divided into two main categories: the legal entities and the non legal entities. Within the first classification, the most common legal entities for business are the corporations and the limited liability companies, while in the second one, the sole proprietorship and the partnership are the most adopted.

In the next paragraphs all subdivisions will be analysed.

1.2.2.3.1 The US business entities

1.2.2.3.1.1 The advantages to form a business entity

Starting a business entity has many advantages, because of the less cost and the initial low risk, which can be covered by insurance through personal guaranties. Consequently, a bank usually signs a lease or loan agreement with the individual, in case of sole proprietorship or with the partnership, in case of more partners.

²⁷ These data has been acquired from the Official website of the State of Delaware

²⁸ The Delaware Court of Chancery is a court of equity which is specialized in specific jurisdiction over corporate disputes. It does not have juries but only five expert jurists selected through a merit-based selection process. Therefore the Court of Chancery is flexible, responsive and efficient. The Tribunal of second instance is directly the Delaware Supreme Court, which has five justices which have considerable experience with Delaware's business law.

1.2.2.3.1.2 The sole proprietorship

The sole proprietorship is the simplest form of business entity, as the individual can be a consultant, open a small shop or be a retailer. The only obligations of a sole proprietorship is to assume a name and file a business certificate in the county clerk's office and, on the base of that, may open a bank account.

1.2.2.3.1.3 The partnership

If two or more people have a good idea, they can share they own skills to establish a general partnership(partnership). In fact, each partner not only is liable for the obligations of the partnership but can also assume liabilities for the partnership. Moreover, they have to assume a name and file a business certificate at local level and may sign a written partnership agreement in order to both, establish a business structure and clarify the resolution of potential disputes.

1.2.2.3.2 The US legal business entities

1.2.2.3.2.1 The advantages to form a legal entity

In the Usa most fashion companies are established as corporations or limited liability companies. The main reason is that these kinds of entities permits the ownership to the reduce their liability to the quantity of money they have invested in the company. Additionally, the designation of corporation as “Inc” or a limited liability company as “LLC” creates a sort of stability to both, the investors and customers, while the companies or sole proprietorship may not. Moreover, the financing is more facilitated for legal business entities, as the founders are the initial source for startup companies funding.²⁹

1.2.2.3.2.2 The Corporation (Inc)

The foundation of a corporation is characterized by the performance of legal

²⁹ The first step of funding a legal business entity is called “seed capital”.Then an “angel investing” financial phase is followed, in which the investments have generally a range between \$ 100.000 and \$1 million,while the last stage is named“venture capital”,where the investors are investments companies or institutional investors.

formalities in order to ensure the limited liability protection of the corporate form. In fact, it can be established only when the certificate of incorporation in the office of the secretary of the state is filed by the incorporator. This document has to include mandatory elements, such as the name of the corporation, its purpose and the name of the incorporator. Moreover, a corporation must have officers and a board of directors in an odd number,organise annual meetings of shareholders and directors³⁰ and keep a minute book which includes the state law of the state where the incorporation is forms, the initial statement of the incorporator and a copy of the initial certificate of incorporation.

1.2.2.3.2.3 The limited liability company (LLC)

A LLC is called a "hibrid entity" because it combines the limited liability protection of an Inc and the organisational structure of a partnership. In fact, a LLC is not required to follow the same formalities of an Inc, it is more flexible and less costly and it can be considered as an entity in which the general partnership or the sole proprietorship has limited liability. Generally, an operating agreement when the LLC is established is required by state laws. Such a document plays the same function of a certificate of incorporation in an Inc. In fact, it has to include the way in which profits are distributed, losses are allocated and interest can be transferred.

1.3 The worldwide expansion of the fashion business in the new era

1.3.1 The interaction between the world of retail, consumers protection and e-commerce

Once the form of the business company has been set, the next step is to expand the business. In the fashion area, that means that not only Intellectual Property Rights issues may arise, but also a huge variety of contracts such as, the distribution agreement, the license agreement, the franchising agreement may be stipulated. However, a detailed analysis of them will be provided in the next chapters of this dissertation. Nowadays, the expansion of fashion business in an international environment is focused on many aspects that may not exist about twenty or thirty years ago. For instance, the retail aspects, the e-commerce and green fashion topics serve to launch and promote the business in the fashion area. The next paragraphs will deal with those areas which

³⁰ For example, in a start up business the corporation is obliged to have one or three directors.

characterise the new features of the expansion of an ideal fashion company.

1.3.1.1 The new approach to retail world and the relation to consumer protection law

The retail sector is the most important interaction that occurs between the seller, (the retailer) and the customer, (the consumer). Under a traditional point of view, such interaction takes place in a physical store placed in a street. Nowadays, because the technological era has become a fundamental aspect in our lives, also the world of retail is subject to the influence of the online world. However, what it is obvious is that the physical retailer wins over the digital purchase as it provides a touch experience to the customers. Therefore, to keep alive such an advantage, which is still missing in the digital world, the retailers need to “reinvent themselves”. In reason of that, the retailers need to find a way to attract visitors in the stores and to create loyal customers. This evolution of the way to sell products is embodied by the so called “co-creation”³¹ which refers to the situation when the customer actively contributes to the outcome, (which can be a transaction or an experience or even both). For instance, the retail may create an event in the store, inviting popular person to attract consumers or attending a lecture in which one can learn something or asking for some questions.

Lastly, it is clear that the retail world is strictly interconnected to the consumers protection law. In fact, the consumers protection law is related to the advertising and sale of consumers products. Consequently it helps the consumers not to subject to fraud by untrustworthy retailers who may provide a counterfeit advertisement. Moreover, retail law and consumer protection aim to prevent businesses from practice unfair practice or fraud. Many divergences occur in European and American consumers protection law, because of each legislation provides different standards of protection. In Europe a program of harmonisation³² among Member States plays an essential law in the consolidation of consumer law, while in the American system many Federal mechanisms³³ for consumers protections may develop the same function.

31 The explanation of the term is inspired by the article written by Nikki Bard, <<https://www.forbes.com/sites/nikkibaird/2017/01/31/co-creation-the-future-of-retail-stores/#4d4832853f45>> (Jan 31, 2017) accessed 3rd April 2017

32 The main Directives under European system are: the Unfair Commercial Practices Directive 2005/29/EC; the Consumer Rights Directive 2011/83/EU; the Payment Services Directive 2007/64/EC and the Late Payments Directive 2011/7/EU

33 The main consumer protection agency at the federal level is the United States Federal Trade

1.3.1.2 The e-commerce era

It is inevitable that the retail sector is living a digital transformation. Nowadays, retailers are becoming also “technology operators”, resulting in partnerships with tech companies, included device manufacturers, software developers and connectivity providers.³⁴ When the world of retailers deals with the connected devices and technologies, a huge amount of personal data is used for customer intelligence, production and supply chain optimization.³⁵ In order to have a comprehensive view of such an essential “update” in the fashion retailer business, the next paragraphs are going to provide in a nutshell the phenomena of Online Shops and Mobile E-commerce.

1.3.1.2.1 Online shops

Nowadays more and more physical stores have their website, where the consumers may have a look of the products and eventually buy them online. Generally, a brand aims to create its own e-commerce store(called also online shops)³⁶, to provide an alternative to the face to face purchasing. In order to expand the business, a retailer may create its own website, by concluding an agreement with a third party software developer touching many aspects, such as the design, development and set-up of the shop,the fees and payment terms, intellectual property and the related infringement matters,data protection and privacy, liability and insurance, sales tax collection and

Commission (“FTC”), then also the U.S. Consumer Product Safety Commission(“CPSC”) plays an important role.

34 From the source <<https://www.lvmh.com/news-documents/news/viva-technology-rendezvous-with-the-digital-transformation/>>accessed 4th May 2017,from June 30th until 2nd July 2016, LVMH was a partner of the Viva Technology show, which brought together the major players in the digital transformation in Paris. The Group hosted a Luxury Lab in a 500-square-meter space dedicated to welcome around fifty 50 innovative start-ups from the luxury sector. Moreover, LVMH developed a technology system, called Set On Demand, able to show the customer the items in the stock, the aspect of the products, the preferred design and proportions. Such a system automatically logs the order and sends the finished product to LVMH workshops within three weeks.

35 The definition is provided by<<http://www.itu.int/en/ITU-T/gsi/iot/Pages/default.aspx>>accessed 4th May 2017: “*The Internet of Things (IoT) has been defined in Recommendation ITU-T Y.2060 (06/2012) as a global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on existing and evolving interoperable information and communication technologies.*”

36 The definition is provided by <<http://www.businessdictionary.com/definition/online-shopping.html>>accessed 4th May 2017 “*Online Shopping is the act of purchasing products or services over the Internet. Online shopping has grown in popularity over the years, mainly because people find it convenient and easy to bargain shop from the comfort of their home or office. One of the most enticing factor about online shopping, particularly during a holiday season, is it alleviates the need to wait in long lines or search from store to store for a particular item.*”

others. From the customer's point a view, an online shop website includes the terms of sale,shipping,use covering payment and ordering processing, return and exchange policies,choice of law, dispute resolution, choice of law, limitation of liability, and copyright and trademark policies.

1.3.1.2.2 Mobile e-commerce

A further development of e-commerce and besides the online shopping, may lay in mobile service applications in tablets or smartphones. The so called “Apps”³⁷ have been developed by many brands to enable costumers to shopping worldwide. Consequently, the consumers download the apps on their mobile device an may obtain pricing information, reviewing products or scanning barcodes in stores and completing product purchase through the app in question. Such a mechanism works only if the retailer enters into a development agreement with the operator of the app store³⁸, covering m matters such as technical requirements,advertising, privacy, revenue sharing,and consequences resulting from the suspension and termination of the app.

1.3.1.2.3 A comparison between European and American Legislation

It is understandable that the retailers have to deal with a huge amount of personal data, and in order to act “legally” they have to comply with the standards required by the related market.

The European Convention on Human Rights(ECHR) and the Charter of Fundamental Rights of the European Union (CFR) deal respectively at their article8,with the right to respect for private and family life and the personal data

37 The definition is provided by<<https://www.techopedia.com/definition/28104/app>>accessed 5th May 2017: “An app is a mobile application, most commonly referred to as an app, is a type of application software designed to run on a mobile device, such as a smartphone or tablet computer. Mobile applications frequently serve to provide users with similar services to those accessed on PCs. Apps are generally small, individual software units with limited function.”

38 The definition is provided by <<http://www.businessdictionary.com/definition/app-store.html>>accessed 5th May 2017: “ An app store is an online marketplace where users of smartphones and other mobile devices can browse, purchase and download applications or "apps", that increase the capabilities of their devices.

themselves.³⁹⁴⁰ The European legal framework in this respect is characterized by the Data Protection Directive, 85/46/EC, the e-Privacy Directive, 2002/58/EC⁴¹ and from May 25th 2018, the General Protection Regulation. The last one will replace the first one and will provide for a new accountability approach, whereby retailers will have to demonstrate compliance also with obligations to carry out data protection impact assessments and to implement data protection. This means that retailers will have to integrate the data governance process with appropriate safeguards, considering also personal data minimization, portability and cyber-insurance policies. Moreover, data breaches will have to be reported to national authorities (and in certain circumstances individuals), within seventy-two hours of the infringement.

Regarding the US legal system, the US Constitution at the first Amendment considers the Freedom of association in relation to the confidentiality of membership list,⁴² while at the fourth Amendment it deals with the protection against unreasonable searches and seizures.⁴³ However, the secret paradigm prevails, meaning that if an information is secret, it is legally protected; if one discloses such a piece of information, it is logically more vulnerable. Various States of the US adopted the Uniform

39 Art 8 ECHR recites as follows: *“Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

40 Art.8 CFR: *“Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority”*

41 In January 2017, the Eu Commission published a Proposal for a E-Privacy Regulation that would change the applicable rules relates to web preferences, cookies and online tracking. Even if it is in a primitive stage, the retailers should be informed on eventual changes that eventually will take place in the European market.

42 This principle was elaborated in the case NAACP v. Alabama ex rel. Patterson, 357 U.S.449,460-61 (1958), stating that: *“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”*

43 It states as follows: *“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

Commercial Code,⁴⁴ applied to the e-commerce sales and the Charter of Fundamental Rights of the European Union (CFR).⁴⁵ According to the last, the contracts can be electronically signed and executed, binding legally the signature to the same responsibilities of a hand contract. The proper term is the “clickwrap” or the “browseup” agreement. The first one requires an affirmative acceptance through clicking “I agree” button; on the other side, a “browswrap” consists of a list of instructions of the website terms, making the user acknowledged of the acceptance of the agreement. Generally speaking, the more detailed the terms and the greater the evidence the consumer has accepted them, the less likely a court would find them unenforceable.

1.3.1.3 The biggest international fashion retail: the phenomena of Inditex

As an example of one of the biggest retailer worldwide is Inditex.⁴⁶ His founder, Amancio Ortega, was born in Spain from humble origin and nowadays is the fourth richest man in the world.⁴⁷ In 1975, Ortega and his business partner Rosalia Mera, decided to open their first store in the city of A Coruna, close to Arteixo, calling it “Zara”. Ten years later, a holding company for Zara was created: Industria de Diseno Textil S.A. or Inditex. After only three years, in 1988, the company began expanding internationally opening a Zara store in Portugal in the city of Oporto. In 1991, Inditex created the company Pull and Bear, followed by the acquisition of the 65 percent share of Massimo Dutti. Later on, in 1998, Inditex launched the brand “Berska”. Today, the company's flagship store is still Zara, but Inditex owns also the chains Massimo Dutti, Berska, Stradivarius, Zara home, Pull and Bear, Oysho, Uterqüe and Zara Home. In the meantime, from Portugal, the company expanded its business not only in Europe, but also internationally, precisely in: Cyprus, Malta, Israel, Turkey, Japan, Venezuela, Saudi Arabia, Vietnam, New Zealand, Paraguay, Aruaba, Nicaragua, Puerto Rico, Jordania,

44 It was published in 1952 and has been often revised since then. It is a collection of laws, having effect only if it is adopted by the state. Nowadays, almost fifty states have adopted it, ensuring a sort of “harmonisation” in such subject. The main issues that are regulated are the sale or transfer of personal property.

45 It is a U.S. federal law giving the same value to electronic signatures and handwritten signatures in contracts.

46 Source taken by <<https://www.forbes.com/companies/zara/>> accessed 8th May 2017

47 Source taken by <<https://www.forbes.com/profile/amancio-ortega/>> accessed 8th May 2017

Malesia, Russia, Armenia, Georgia, Ecuador and Albania. Moreover, the factories are set not only in Spain, but also in Morocco, Portugal, Turkey, China, Brazil and Vietnam.

It can be noticed that Inditex works in an international dimension, bringing its success all over the world. It is also an example of how the retailers have to adapt their business to the digital era. In fact, since September 2010, Zara joined the e-commerce marketplace, launching websites in France, Italy, Germany, Spain, Portugal, Belgium, the Netherlands, Austria, Luxembourg and Ireland. One year later, Inditex brought all the owned brands to the e-commerce platform to the U.S.

Surprisingly, even if the company does not enjoy the popularity that the advertisement generally carries out, the statistics suggest that the group has not suffered the consequences of the global economic crisis.⁴⁸ According to El Corte Inglesias,⁴⁹ the reason lies on the fact that Zara embraces the so called “Fast Fashion”. The term is related to a situation which is typical in the fashion industry. In fact, in order to get new trends to the market as cheaply and quickly as possible, the fashion retailers introduce new products more times in a single week. As a results, the profits are multiplied.

1.4 Conclusion

In this chapter, the first step of the establishment of a fashion company has been touched. Indeed, the business generally starts from shaping the kind of company that one may desire to found. Different models of legislation may be adopted, according to settlement of the headquarters. On one hand, under a European perspective, the European harmonization project consists of twelve Directives, which build the pillars of the company structure, while many Regulations offer the models that a potential company must comply with. On the other hand, the US legislation can be considered as easier under a legislative profile, as only the MBCA and the Delaware Corporation Law may have a consistent impact over the fifty US States. Moreover, an entrepreneur or a

48 According to http://markets.on.nytimes.com/research/stocks/news/press_release.asp?docTag=201705251034BIZWIRE_USPRX___BW5674&feedID=600&press_symbol=169538 >25th May 2017, accessed 8th May 2017: “Inditex lives a net profit jump to 10% in the last year, while sales touch a record of EUR23.31 billion (\$24.76 billion), with 13% growth in store and online sales”

49 El Corte Inglés S.A. Is the only remained department store chain that has remained in Spain. It has the headquarters in Madrid and it is the biggest department store in Europe. The complex enshrines many luxury brands, such as: Gucci, Louis Vuitton, Dolce & Gabbana, Burberry, Cartier, Armani, Hugo Boss and Versace.

group of them who intend to launch a business can choose only from few possible business models.

As the following big steps will be dealt in the next chapters, a brief overview of the “modern” aspects that a fashion company may face with has been introduced, respectively the retail sector and the e-commerce matter. In fact, the retail world, in order to be updated to the transformations that, not only the fashion sector, but also the general business are coping with, is subject to an “evolution”. That means that the retailers have to be more and more acquainted with the e-commerce, specifically in the online shops and mobile e-commerce spheres.

Lastly, the development of the fashion group “Inditex” has been presented to give an example on how a fashion retailer may internationally expand and keep being up to date to the digital era.

2.Chapter:Intellectual property rights in the fashion world

2.1 Introduction

Intellectual Property Rights (IPR) are the core aspects in the fashion world. Once the form of its internal structure has been founded and acted, all the goods produced need protection from confusion, deceive, selling, use, distribution from third parties.

Copyright protects the design and the artistic expression of the product: not the idea itself, but its concrete realization. Patents, which are divided into design and utility, aim to protect the “invention” applied to the good: a new technical material or a new tool applied to it, that make it unique and industrially repeatable. Moreover, trade secrets are fundamental in the industry, as their scope is to protect confidential information about the product: the secret of how to realize it or the techniques used. Lastly, but not less important, trademarks. Trademarks are essential in the fashion sector, as they directly protect the consumers, make them non confused about the origin and the quality of the good. Nowadays, it is much easier to reproduce an item from a luxury brand, therefore trademarks are crucial to avoid “fake” imitations. Trade dress belongs to the categories of trademark, as it relates only to the look and appearance of the fabric product. In reason to that, a particular topic arises: the single colour trade mark protection. It may be considered as a subcategory of trade dress and it is becoming more and more important in relation to colours that make the public clearly not confused about the good they are linked to. For instance, Tiffany Blue or Louboutin Red. They are remarkable colours that distinguish only that specific jewelry or shoe.

International protection of IPR is provided by treaties ratified internationally, respectively: the Paris Convention, for all industrial intellectual property rights,⁵⁰ the

50 According to WIPO website, <http://www.wipo.int/treaties/en/ip/paris/summary_paris.html> accessed 26th June 2017: “*The Paris Convention is applied to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models (a kind of "small-scale patent" provided for by the laws of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications (indications of source and appellations of origin) and the repression of unfair competition. The substantive provisions of the Convention fall into three main categories: national treatment, right of priority, common rules.*(1) *Under the provisions on national treatment, the Convention provides that, as regards the protection of industrial property, each Contracting State must grant the same protection to nationals of other Contracting States that it grants to its own nationals. Nationals of non-Contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a Contracting State.*(2) *The Convention provides for the right of priority in the case of patents (and utility models where they exist), marks and industrial designs. This right means that, on the basis of a regular first application filed in one of the*

Berne Convention,⁵¹ for copyrights, the Patent Cooperation Treaty⁵² and the Madrid Protocol, for trademarks⁵³. US IPR finds its legislation also in the United States Code or U.S.C.⁵⁴

The analysis of the IPR will be conducted through case laws and references to fashion brand industries such as Tiffany & CO, Louboutin, Nike and Adidas. The theoretical aspects will be dealt in order to have a clear comprehension of the meaning and purpose of each IPR and strictly in relation to the fashion sector, both in European

Contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection in any of the other Contracting States. These subsequent applications will be regarded as if they had been filed on the same day as the first application. In other words, they will have priority (hence the expression "right of priority") over applications filed by others during the said period of time for the same invention, utility model, mark or industrial design. Moreover, these subsequent applications, being based on the first application, will not be affected by any event that takes place in the interval, such as the publication of an invention or the sale of articles bearing a mark or incorporating an industrial design. One of the great practical advantages of this provision is that applicants seeking protection in several countries are not required to present all of their applications at the same time but have 6 or 12 months to decide in which countries they wish to seek protection, and to organize with due care the steps necessary for securing protection.(3) The Convention lays down a few common rules that all Contracting States must follow. The most important are: patents, marks, industrial designs, trade names, indication of source and unfair competition."

51 According to Wipo web<http://www.wipo.int/treaties/en/ip/berne/summary_berne.html>accessed 26th June 2017: "The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. The three basic principles are the following: (a) Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (principle of "national treatment"). (b) Protection must not be conditional upon compliance with any formality (principle of "automatic" protection). (c) Protection is independent of the existence of protection in the country of origin of the work (principle of "independence" of protection). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases."

52 According to WIPO web<<http://www.wipo.int/pct/en/faqs/faqs.html>>accessed 26th June 2017: "The PCT is an international treaty with more than 145 Contracting States.¹ The PCT makes it possible to seek patent protection for an invention simultaneously in a large number of countries by filing a single "international" patent application instead of filing several separate national or regional patent applications. The granting of patents remains under the control of the national or regional patent Offices in what is called the "national phase". The PCT procedure includes: Filing: you file an international application with a national or regional patent Office or WIPO, complying with the PCT formality requirements, in one language, and you pay one set of fees. International Search: an "International Searching Authority" (ISA) (one of the world's major patent Offices) identifies the published patent documents and technical literature ("prior art") which may have an influence on whether your invention is patentable, and establishes a written opinion on your invention's potential patentability. International Publication: as soon as possible after the expiration of 18 months from the earliest filing date, the content of your international application is disclosed to the world. Supplementary International Search (optional): a second ISA identifies, at your request, published documents which may not have been found by the first ISA which carried out the main search because of the diversity of prior art in different languages and different technical fields. International

and American legislations.

The first paragraph is dedicated to Copyright; the second to Patents; the third to Trade Secret; the fourth to Trademark and the fifth and last paragraph to Trade dress.

2.2 Copyright

2.2.1 Introduction

Copyright is a tool for the protection of fabric designs and other types of artistic expression eligible for the protection. It relates to the artistic aspects of a product, but not to its functional element, such as photographs, jewelry, images on shoes and handbags, websites, software and many others. The essential key to understand how the copyright protection works is that it covers not the idea itself, but the expression of it. However, this kind of IPR is not the spreadest in the fashion industry.

In the next paragraphs, a brief overview of copyright protection from American and European legislations will be presented.

2.2.2 The protection of copyright under US law

According to the U.S.C, the copyright law protects “original works of

Preliminary Examination (optional): one of the ISAs at your request, carries out an additional patentability analysis, usually on an amended version of your application. National Phase: after the end of the PCT procedure, usually at 30 months from the earliest filing date of your initial application, from which you claim priority, you start to pursue the grant of your patents directly before the national (or regional) patent Offices of the countries in which you want to obtain them.”

53 The definition of Madrid Protocol is provided by http://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html accessed 29th June 2017: “The Madrid System for the International Registration of Marks is governed by two treaties: the Madrid Agreement, concluded in 1891 and revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967), and amended in 1979, and the Protocol relating to that Agreement, concluded in 1989, which aims to make the Madrid system more flexible and more compatible with the domestic legislation of certain countries or intergovernmental organizations that had not been able to accede to the Agreement. States and organizations party to the Madrid system are collectively referred to as Contracting Parties. The system makes it possible to protect a mark in a large number of countries by obtaining an international registration that has effect in each of the designated Contracting Parties. An application for international registration (international application) may be filed only by a natural person or legal entity having a connection – through establishment, domicile or nationality – with a Contracting Party to the Agreement or the Protocol. A mark may be the subject of an international application only if it has already been registered with the trademark office of the Contracting Party with which the applicant has the necessary connections (referred to as the office of origin). However, where all the designations are effected under the Protocol (see below), the international application may be based simply on an application for registration filed with the office of origin. An international application must be presented to the International Bureau of WIPO through the intermediary of the office of origin.”

54 It is the codification of the federal statutes of the United States. Every six years the Office of the Law Revision Counsel of the House of Representatives publishes the main edition.

*authorship fixed in any tangible medium” that fall within any of several specific categories.*⁵⁵ *The categories protected are “pictorial, graphic, and sculptural works,” but courts often deny protection to fashion designs by deeming them “useful articles”*⁵⁶*to which copyright does not extend.”* The Copyright protection is obtained with the registration to the Copyright Office and it lasts until the life of the author plus seventy years or shorter of ninety-five years from the first publication or one hundred twenty years from the creation. Moreover, this IP can be assigned by an instrument in writing or it can be licensed.

2.2.3 The Protection of copyright under European law

The EU copyright legislation is enshrined in an harmonization program made up by ten directives which regulate the fundamental rights of performers, authors, producers and broadcasters. The scope of protection is to promote creativity, cultural diversity and ensures the access for consumers to digital content and services across the Member States. In Accordance to Berne Convention, copyrights have to be registered to the national competent authority or WIPO in order to obtain international protection and they last until the death of the author or for more seventy years since then.

2.2.4 The protection of copyright in the fashion industry

As mentioned above, copyright does not play a main role in the fashion industry. By the way, cheaper brands are often accused of infringement because reproducing work of art from expensive brands. For instance, Diane von Furstenberg, a remarkable fashion designer, often sued many retailers for infringing her characteristic distinctive styles, mainly Forever 21 Retail Inc, Target Brands Inc., Mango On-Line Inc. The owner of the exclusive brand accused these companies of reproducing and selling dresses almost identical to her designs.

2.2.5 Conclusion

Copyright protection in the fashion industry is relevant as it protects the artistic

⁵⁵ 17 U.S.C. § 102(a)

⁵⁶ 17 U.S.C. § 101

elements which are parts of the specific item: creativity will always be protected if it is used as design print impressed on it. It is interesting that on 22 March 2017, the United States Supreme Court ruled that the designs made on Varsity Brands' cheerleading uniforms are can enjoy fcopyright protection. Specifically, the Copyright Act states that: *"The design of a useful article, as defined in this section, shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article"*⁵⁷ It represents an example of the importance of copyright protection even if not so spread.

2.3 Patent

2.3.1 Introduction

Patents may be classified into two types: utility patents and design patents. Utility patents provide protection to innovation in product functionality, for example a zip, a new mechanism on a pair of glasses or a new device on a handbag. Design patents, which are more common in the fashion sectors, protect the ornamental appearance of the product or its component, such as pockets, footwear or jewelry. Companies often apply for design patents when the copyright protection is not helpful or appropriate for the issue in question. The increasing reliance on this form of protection, which provides the owner with the right. This kind of protection is growing more and more, because it prevents third parties from producing, using or selling a product that looks like the patented by the public. On the other end, the registration of a patent to the European Patent Office (EPO)⁵⁸ or to the U.S. Patent and Trademark Office (PTO)⁵⁹ is more expensive than the other IPR protections.⁶⁰ For example, Louis

⁵⁷ U.S.C 17§ 101

⁵⁸ The European Patent Organizations is formed by two bodies: the European Patent Office and the Administrative Council. The European Patent Office is the executive body of the organisation, while the other works as its supervisor. EPO has its headquarter in Munich. The main task of EPO is the examination and study of the European Patents applications: eventually, the patent granted is called European Patent.

⁵⁹ The United States Patent and Trademark Office is an agency of the U.S. Department of Commerce. Its Task is to issue patents, trademark registration and intellectual property right identification. It has its headquarters in Alexandria (Virginia) and collaborates with the Japan Patent Office and European Patent Office.

⁶⁰ According to <http://www.thefashionlaw.com/home/currently-trending-in-fashion-design-patents>, accessed on 25th June 2017, trademark and copyright protection cost about \$500, while patent filing

Vitton granted only six design patents, Yves Saint Laurent eight, Bottega Venta three and Balenciaga two.⁶¹

In the next paragraphs, the main issues related to utility patent and design patents will be dealt in relation to US and European legislations.

2.3.2 Regulation of Patents in USA

The US patent law is regulated by the US Patent Act (art. 35 U.S.C. and seq.). According to art. 101§ Patent Act: *"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."*⁶² In other words, the US patent Act provides protection for new processes, machines, compositions of matter and improvements⁶³. Moreover, the invention must be useful, even if the threshold is often low, novel⁶⁴ and non obvious.⁶⁵ The registration of patent to the PTO allows its owner to prevent others from using, making, selling the patented invention and the protection usually lasts twenty years for utility patents and fourteen years for design patents. The count starts from the filing date. The owner of the patent license it or transfer in writing.

2.3.3 Regulation of Patent in Europe

The European patent law is regulated primarily by the European Patent Convention (EPC).⁶⁶ It explained that the European Patent is granted, has the same can cost up to \$10,000.

61 This source has been taken from: <<http://www.thefashionlaw.com/home/currently-trending-in-fashion-design-patents>> accessed on 25th June 2017.

62 art. 101§ Patent Act

63 Art 35 U.S.C. 101§ recites as follows: *"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof may obtain a patent therefor, subject to the conditions and requirements of this title."*

64 Art 35 U.S.C. 102§ states: *"A person shall be entitled to a patent unless—(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention..."*

65 Art. 35 U.S.C. 103§ recites as follows: *"A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains."*

66 The European Patent Convention is a multilateral treaty which institutes the European Patent Organisation and provides an independent legal system according to which the European patents may be granted.

effects and is subject to the same conditions as a national patent.⁶⁷ Moreover, the filing application can be requested for one or more States⁶⁸ and the European patents shall be granted for any inventions susceptible to industrial application that shows novelty and inventive step.⁶⁹ A patent application can be filed at a national or regional patent office, but filing an international application presents more advantages. In fact, it is necessary to file only one application containing the designation of all States and has the effect of being filed in the State in question. The duration of patent protection is defined by the claim including in the filing application.

2.3.4 Utility and design patents in the fashion industry

In fashion industry design patents are more popular than utility patents, as the appearance of a good does not often correspond to the innovation of it. However, sport shoes, eyewear are sectors more likely to develop a utility patent: new material, new mechanisms can be easily inserted in them.

In 2012, in occasion of the Olympic Games, Nike releases its knitted running shoes, called “Flyknit”, while Adidas released “Primeknit”. Nike asserted that after ten years of research and development, the shoes presented had a novel technique that allowed to assemble a shoe's upper by knitting, announcing “that it would be the first kind of running shoes in its genre. Later on, Nike filed a patent infringement lawsuit against Adidas' knitted footwear in a District Court in Nuremberg, Germany. There, not only Adidas has its headquarters but it was also the only place where it was distributing it. In other words, Nike sought to prohibit Adidas to sell Primeknit for all the duration of the lawsuit and In August 2012, the German court granted Nike's

67 Art 2 EPC: “The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless this Convention provides otherwise.”

68 Art 3 EPC recites: “The grant of a European patent may be requested for one or more of the Contracting States”

69 Article 52 EPC: “Patentable inventions (1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application. (2) The following in particular shall not be regarded as inventions within the meaning of paragraph (a) discoveries, scientific theories and mathematical methods; (b) aesthetic creations; (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; (d) presentations of information. (3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject matter or activities as such”

injunction, ordering that Adidas halt the sale and production of its knitted sneaker. In return, Adidas moved to challenge the validity of Nike's European patent a few months later. On Nike's preliminary injunction, the court case in favour of Nike, but later it turned to the interest of Adidas. In fact, the Court stated Adidas held that technology since 1940s and consequently Nike design failed to meet the novelty element, essential requirement for patentability. Therefore the Court permitted Adidas to produce the shoes keeping those features in Germany.

2.3.5 Conclusion

Patents protect the novelty and the invention of a product, both under an aesthetical and functional point of view. Consequently, they are "complete", and they fashion industry is plenty of them.

2.4 Trade secret

2.4.1 Introduction

Companies, because of labourious and costly researches lasted decades, develop information which can help them to develop and perform better, at lower cost and faster. The knowledge that is related to refers to recipes, manufacturing processes or simply information that can be sold. Consequently, inventiveness, creativity and raw materials are important for both, large or small companies in all economic sectors.

In fashion industry trade secret has a huge impact as well, as they operate from sales to distribution methods, advertising strategies, consumer profiles or manufacturing processes. For example, "*Zara, uses a proprietary information technology system to shorten their production cycle – i.e. the time from identifying a new trend to delivering the finished product – to a mere 30 days. Most of their competitors take from 4 to 12 months. The company receives daily streams of e-mail from store managers signaling new trends, fabrics and cuts, from which its designers quickly prepare new styles. The fabric selected is immediately cut in an automated facility, and sent to work shops. A high-tech distribution system, with some 200 kilometers of underground traces and over 400 chutes, ensures that the finished items are shipped and arrive in stores within 48*

hours,”or “Nike's future strategic development plans, products offerings and product launches, which Nike classifies as "extremely confidential and commercially sensitive master plans for the next three to four years," unreleased product design materials for the "next two to three years," unreleased product technology, financial product performance information, including "a non-public financial breakdown of the footwear sales, including past performance data, gross margin expectations, and projected growth for the next 12 to 18 months," marketing campaign materials, virtual testing methodologies, and blueprints for product launches, including "step-by-step instruction manuals for conducting a successful product launch." ”⁷⁰

2.4.2 Innovations in trade secret legislation

Regarding the European legislation, on 8th June 2016 the European Commission, the Council and the European Parliament adopted a new Directive whose aim is to harmonise the Member States national EU against unlawful use, acquisition and disclosure of trade secrets.⁷¹

On the other hand, the American legislation has adopted a reform in this sector as well. In 2016 the Defend Trade Secret Act⁷² was issued, allowing the owner of a trade secret to sue in the Federal Court when the trade secret in question has been misappropriated.

⁷⁰ Source provided by <<http://www.thefashionlaw.com/home/what-is-the-defend-trade-secrets-act-and-how-does-it-affect-fashion>>accessed 26th May 2017

⁷¹ It is the Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. According to <https://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_de>accessed on 26th June 2017: “The Directive harmonises the definition of trade secrets in accordance with existing internationally binding standards. It also defines the relevant forms of misappropriation and clarifies that reverse engineering and parallel innovation must be guaranteed, given that trade secrets are not a form of exclusive intellectual property right. Without establishing criminal sanctions, the proposal harmonises the civil means through which victims of trade secret misappropriation can seek protection, such as: stopping the unlawful use and further disclosure of misappropriated trade secrets, the removal from the market of goods that have been manufactured on the basis of a trade secret that has been illegally acquired, the right to compensation for the damages caused by the unlawful use or disclosure of the misappropriated trade secret. EU countries must bring into force the laws and administrative provisions necessary to comply with the Directive by 9 June 2018.”

⁷² The Defend Trade Secrets Act of 2016 (DTSA) enacted May 11, 2016, codified at 18 U.S.C. § 1836, et seq

2.4.3 Conclusion

The protection of trade secret is potentially unlimited, but proper precautions against disclosure should be maintained. One may think about the Coca Cola formula which is kept secret for more than one hundred year and understand the importance of such intellectual property right.

2.5 Trademarks

2.5.1 Introduction

Trademarks are the most widely recognized forms of IPR in the fashion industry, as they appear on dresses, shoes, shirts, eyewears and other products. Modern markets are focused on consumers, as it can be noticed by the expenditures of marketing, public relations and advertising. Therefore, the development of a “consumer society” needs a great protection for consumers, and a greater economic efficiency. The function of trademarks can be considered as source identifiers, because they reduce the consumer search costs:⁷³ strong trademarks contribute to save consumers time and effort by providing useful abbreviations for information related to a product's characteristics, while confusing trademarks tend to decrease efficiency by impeding the consumers from locating the desired goods. ⁷⁴In fact, if trademarks did not identify the source of goods, producers would have only a little incentive to improve their products there were no trademarks to identify the source of goods, producers would have little incentive to improve their products, which is economically inefficient.⁷⁵

The US law protects the trademark under the United States Code (U.S.C) and the Lanham Act,⁷⁶ while the European legal framework in that field is characterised by the

73 Andrew W. Coleman, “Color as Trademarks: Breaking Down the Barriers of the Mere Color Rule”, 74 (J. PAT & TRADEMARK OFF. SOC’Y 1992)pp.345

74 William M. Landes & Richard A. Posner, “The Economics of Trademark Law,” 78 (TRADEMARK REP. ,1988)pp 265

75 Thomas McCarthy, “McCarthy on trademarks and unfair competition”(4th edition,2004)par.11

76 The definition is provided by <<https://www.techopedia.com/definition/26984/lanham-act>>accessed 23rd June 2017 : “The Lanham Act is a federal trademark law passed by President Harry S. Truman in July 1946. It governs and regulates the use of commercial trademarks and service marks and defines trademark infringement prohibitions and penalties. The ever-evolving nature of IT and the digital world have created increasing challenges to enforcement of the Lanham Act. It is also known as the Trademark Act.”

European Trademark Regulation(EUTMR)⁷⁷ and the European Trademark Directive(EUTMD)⁷⁸.

In the next paragraphs, the main issues related to trademarks will be illustrated.

2.5.2 The definition of trademark and conditions for registration under US Law

Under US law, a trademark is *“any word, name, symbol, or design, or any combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of the goods”*.⁷⁹

The protected products can be corporate and product names, symbols, logos, slogans, pictures, designs, product configurations, colours and smells and have to enable the customers to distinguish goods or products from different companies in the marketplace. A trademark is “strong”, meaning that is unlikely to cause confusion and easy to be enforced when it is arbitrary, fanciful or suggestive. Arbitrary relates to the fact that it has no meaning as to the nature of the product (for example “Apple” for the computer and laptops); fanciful refers to its originality and its little connection to the nature of the product or service (for example “Kodak” for the photography equipment); suggestive recalls the nature of the product (for example “salty” for crackers, but it takes more time than the others). On the contrary, if a trademark is “descriptive”, meaning that it is not suggesting, but it describes the product as such or “merely descriptive”, having almost entirely reference to the product but incapable of becoming distinctive, it is hard to enforce and likely to be confused by the consumers. The person or company which has invented the trademark, in order to prevent competitors from using the same or similar mark, has to register it to the PTO and marked as “TM” for trademark or “SM” for service mark. The protection, against other designations, that are likely to cause mistake, deceive or confusion, lasts as long as the a qualified use continues. Moreover, the registration to the Federal Office is granted for ten years with ten years renewals available. Since the registration day, the owner of the trademark can carry out all

77 (EC) No 207/2009

78 (EU) No 2015/2436

79 15 U.S.C. § 1127

commercial operations related to it, including entering the licensing agreement.⁸⁰

The US system has two peculiarities: the cease or desist letter and the domain name issues. The latter is another way to register the trademark as Internet domain name in case one decides to build a website. The domain names, which correspond to the website, if registered, can prevent others from registering another domain name corresponding to that trademark and trying to profit from it. However, once the trademark is properly registered, the avoidance of third parties to use the same or similar trademark can be acted by sending a notice letter to the competitors. If the owner of the brand does not police that, it may lose its right of trademark, as the delay may be considered as harmful to the competitors.

2.5.3 The definition of trademark and conditions for registration under European Law

Under European law, a trademark “*may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings*”⁸¹ In other words, the principal trademark function consists in the designation of origin. The consumer has to be enabled to repeat the experience of purchasing the product or service if it proves to be positive or if it is negative, to avoid it on the occasion of the subsequent acquisition. Additionally, the consumer does not have to know from whom the product or service originates.

The owner of a trademark, in order to prevent others from using it, must file an application of registration. A trademark can enjoy national, European or International protection. In the first case, the trademark has to be filed to the competent national authority; in the second case to the European Union Intellectual Property Office (EUIPO)⁸² and in the later to the World Intellectual Property Organization (WIPO)⁸³

80 It is very common in the fashion world, as it allows the licensor(the brand designer) to permit the licensee(the other party) to manufacture or market the products bearing the licensor's trademark. More details will be shown in the next chapter.

81 Art.4 EUTMR (EC) No 207/2009

82 Established in 1994,the European Union Intellectual Property Office is set in Alicante and it is responsible for the management of the EU trademark and the registered Community design. It collaborates with the IP offices of the EU Member States and international partners to offer registration.

83 Established in 1969, the World Intellectual Property Office is a global forum for the IP services,

but this one is permissible only if the trademark registration has not be refused nationally. The registration usually lasts for ten years.

The registration of a trademarks is regulated as follows: *“A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of....being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.”*⁸⁴ From the definition provided by the European Trademark Directive, while the smells enjoy trademark protection under US law, the European legal framework does not allow their registration because they are not a sign,are not capable of graphic representation and are not distinctive. On the contrary, colours may be registrable under Eu law only whether they constitutes a sign,⁸⁵ in opposition to the US legislation which does not present restrictions.

Once the trademark has been filed, its owner may grant license over it but if it is not used or it becomes “generic”,meaning that the consumers recognize the trademark as the product itself, the trademark looses its strength.⁸⁶ For example, “Aspirin”,“Jacuzzi” or “Kleenex”,are not trademarks anymore because the end users link the trademark directly to the good itself. The same happens also in the US

information, cooperation and policy and its scope is to the development of IP system enabling creativity and WIPO. It has its headquarters in Geneva.

84 Art. 3 Directive(EU) 2015/2436

85 According to the case law Libertel (CJEU 6.5.2003, C-104/01.): *“Colours or combinations of colour have been used for many years to distinguish the goods of one trader from the goods of another. The distinctive blue used by the jeweller Tiffany, for example, indicates to many the origin of Tiffany's goods, without additional words or pictures. The ECJ has recognized the power of colours as trademarks by allowing their registration in Europe. On a practical level, trademark applicants will easily be able to provide colour chart references for the colour claimed, meeting the requirement for graphical representation. Proving that the colour has the capacity for distinctive character will be more difficult: evidence of acquired distinctiveness is likely to be required. Applicants should also be realistic in the range of goods and services specified in the application, in order to increase their prospects of registrability. A distinctive colour claimed for a narrow range of goods or services should be easier to register.”*

86 Art.20 European Trademark directive recites as follows: *“Trade mark having become generic or misleading indication as grounds for revocation. A trade mark shall be liable to revocation if, after the date on which it was registered: (a) as a result of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service in respect of which it is registered; (b) as a result of the use made of it by the proprietor of the trade mark or with the proprietor's consent in respect of the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.*

legislation.⁸⁷

2.5.4 Conclusion

As mention above, trademarks are the most particular strong form of protection in fashion business. It is common that a designer decides to use her or his name in order to identify a product line such as Calvin Klein, Ralph Lauren or Tommy Hilfilger. Legally speaking, personal names can carry out such function only when the consumers recognize the name to the product itself. This recognition generally belongs to the advertising and promotional tasks. Moreover, designers often create a collection for only one season, and each product from it has a name or designation that has to be searched to avoid that a confusing or similar name has been used by a competitor.

To conclude, trademark are “strong” until they do not make confusion to the public, guaranteeing the quality of the products sold.

2.6 Trade dress

2.6.1 Introduction

Trade dress is a subcategory of trademarks, covering the size, colours, colours combination, graphics or sales techniques.⁸⁸ They entirely build the look of the product and serve as identifiers as the trademarks.

In the USA, trade dress is expressively regulated by the Lanham Act, while in Europe it enjoys protection from trademark law.

In order to explain better the IPR in question, the main aspects of trade dress and in partilar the single colour trade mark will be shown.

2.6.2 The protection provided by the trade dress and colour trade mark

Trade dress regards the “look” or a packaging of an article. Popular examples of

⁸⁷ According to 15 U.S.C. 1127: “A mark shall be deemed to be “abandoned” if either of the following occurs:(1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances .Non use for 3 consecutive years shall be prima facie evidence of abandonment. “Use” of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.(2) When any course of conduct of the owner,including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.”

⁸⁸ Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd., 40 F.3d 1431, 1439 (3d Cir. 1994)

this IP are the Tiffany Blue, the bottle of the scene Chanel n.5 and the Coca Cola glass bottle. Moreover, trade dress protects only non functional elements, or those elements from the design which are aesthetic. The protection is issued as for the trademarks: the trade dress must be registered to the PTO, and it is covered almost forever. However, the acquisition of trade dress protection requires many years of sales, advertising and promotion.

An interesting topic regards the colour trade mark. In 1995 the Supreme US Court held that: “[t]here is no rule absolutely barring the use of color alone as a trademark....So long as the color mark meets the ordinary requirements of trademark law, including use in commerce, acquired distinctiveness, indication of source, and non functionality, there is no per se bar to registration.”⁸⁹ In other words, the colour trade mark does not constitute a bar for trademark protection. Since that ruling, many fashion firms registered the colour trade mark, such as Tiffany & CO.

A complicate and congenit dispute about colour trade mark arose from the case *Louboutin v Yves Saint Laurent*.⁹⁰ Since 1992 the designer Christian Louboutin has coloured the outsoles of his fashion shoes of vivid red, reaching in that way the brand's fame. In 2008 the PTO approved the registration of Louboutin's “Red Sole Trademark”. Three years later, Christian Louboutin sued the competitor Yves Saint Laurent, affirming the violation of Lanham Act for the use of its red colour on the monochromatic Cruise 2011 Collection. The Court held that the red colour on its shoes did not warrant trade mark protection under Lanham Act and that the plaintiff's red outsole had acquired secondary meaning because of its public recognition and, as a result, it denied the protection as trademark under the ground of functionality. In fact it applied a narrow interpretation to *Qualitex*, making a distinction between the industry use of colour as aesthetic, that is serving a non trademark function and the colour's marks used to recognize industrial products. As a consequence, the Court found that the use of the red on the shoes' soles had an aesthetic function, hindering the competition in

⁸⁹ *Qualitex v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

⁹⁰ *Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445, 451 (S.D.N.Y. 2011),

the market, resulting from colour depletion⁹¹ and shade confusion.⁹² Christian Louboutin decided to appeal to the Second Circuit, attracting the attention from the media and filing amicus curiae such as Tiffany & Co.⁹³ and winning the lawsuit. The Second Circuit stated that the Red Sole Mark from Louboutin constituted a valid trademark only if used to that particular shoe only on that side of the shoe⁹⁴ and, as Yves Saint Laurent monochromatic shoe lacked of such a contrast, it did not constitute an infringing use of Louboutin's trademark.⁹⁵ Other fashion industries had the possibility to benefit from the Louboutin's final judgement. A clearer guideline to determine if trademark colours are too similar and likelihood of confusion was established.

2.6.3 Conclusion

Trade dress is an important trade mark belonging to the categories of trade marks, based on distinctiveness not likelihood confusion by the consumers. Moreover, the Christian Louboutin vs Yves Saint Laurent constituted an important precedent after Qualitex. In particular, since then it was established the sole colour mark constitutes a trademark according to the strength of its secondary meaning; its use as a trademark and as a source identifier recognized by the public; its aesthetic functionality, based on the material ramifications for competition within the same market, including consideration about the existence of adequate alternative designs; its utilitarian functionality, limited on the fact whether the element in question reduces the cost of the product or higher

91 Jeffrey M. Samuels and Linda B. Samuels, *Color Trademarks: Shades of Confusion*, TRADEMARK REP. (1993), pp 554, 555: “The color depletion theory reflects the concern that since the number of colors is limited, to grant exclusive rights in colors would soon deplete the available stock and, thus, be anticompetitive.”

92 Stephen J. Newman, “Kill the ‘Mere Color’ Rule: Equal Protection for Color Under the Lanham Act,” (1994) 61 U.CHI.L.REV.1595,1598: “The shade confusion theory is based upon the belief that differences in individual shades of color would be too difficult to discern by triers of fact and that actions for infringement could denigrate into issues of shade confusion”

93 Brief for Tiffany & Co. as Amicus Curiae Supporting Appellants at 3-4, Louboutin S.A. v. Yves Saint Laurent Am., Inc., No. 11-cv-3 303 (2d Cir. Oct. 24, 2011), ECF. No. 63 “[i]f the use of a trademarked feature makes a product more expensive to produce, this demonstrates that the feature is not a functional element that competitors need in order to compete”

94 § 1119 of Title 15 of the U.S. Code.105

95 Louboutin's trademark application only claim to a “lacquered red sole,” meaning that it left the competitors without notice of which red exactly it referred to. The possible solution fell under the classification of the colours in accordance with the “Pantone shades”, which is an international system that standardizes the shades of colour. Therefore the designers could find in advance clearance from the mark owner, and keep “shades away” from the colours in question. The Second Circuit, in reason of that, discharged the plaintiff.

quality; the novelty of the mark.

2.7 Conclusion

As one may notice, the intellectual property rights play a fundamental role in the business sector even if not all have the same ray of application. Many disputes arose out from them and they often attract the attention from the public, as their are well known among the customers. Another observation may be relevant: Europe adopts a naturalistic approach, while the American legislation prefers an utilitarian and economic perspective. In fact the US Constitution: *“Congress shall have Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”*⁹⁶. The difference is clear in copyright: from a “European” point of view, moral rights are predominant, the appropriation of an artistic work belongs always to its author. On the other side, the American perspective is entirely focused on the progress and innovation of a human work: the promotion and the improvement of the goods are the essence of the economy. A monopoly of an idea would keep steps aside from the innovation and collective sharing. The IPR have been projected to incentive people to make innovation, to create and receive profits from them.

To conclude, Intellectual Property Rights, under both perspectives will always be parts of business, economy and human creativity.

⁹⁶ US Constitution art. I Section 8, clause 8

3.Chapter: Contracts related to the fashion business world

3.1 Introduction

The first chapter dealt with the bricks of the establishment of a fashion international company. Moreover, the issues of the expansion of the brand have been treated in relation to the actual market changes. From that point, it is crucial to reach a comprehensive understanding of other kinds of relationships and tools of expansion that may arise out the fashion industry. Traditionally, a brand has reached the peaks of success not only with the so called “image”,but also with different deals between the owner and potential business partners in many sectors. Nowadays, other factors are remarkable, such as the investments that private companies have to opportunity to make and the acquisition of smaller companies into biggest ones.

This chapter illustrates the negotiations deals that may help to improve the reputation and profits in the fashion industry, but logically a comparison between the European and American legislation will be not faced, because such tools are recognized and do not present substantial differences among the two legal systems.

In particular, the analysis will proceed with reporting facts that really happened in the last decades, whose subjects are “mature brands”, namely LVHM, Luxottica, Inditex, Tiffany,Adidas, Karl Lagerfeld and others. The following agreements will be clarified in the following order: the license agreement, the distribution agreement,the franchising agreement, the Merger and Acquisition deal and, in brief, the Joint Venture negotiation.

3.2 The Licensing agreement in the fashion business

In the fashion industry,the licensing deal allows a party to receive and use Intellectual Property rights in exchange of a fee or royalty. In other words, in a licensing agreement the licensor, who is typically the trademark owner, permits the licensee to use its trademark in business. This kind of agreement is opted by the parties when the owner desires to keep the ownership and control of the brand, but anyway, it allows another party to develop and therefore exploit the brand in its entirety or in reference to a specific product line. For example, the eyewear company Luxottica⁹⁷ acquired the

⁹⁷ According to<<https://www.forbes.com/companies/luxottica-group/>> accessed 9th June 2017:

rights to manufacture and distribute Tom Ford, Chanel, Prada, Burberry sunglasses. However, the owner of each fashion brand still has the right to use its name on such products, even if the eyewear company does it for him/her. In fact, without the authorization included in the licensing agreement Luxottica would receive a lawsuit for trademark infringement. A licensing relationship may arise because the owner of the brand intends to expand it in a particular jurisdiction or in a particular geographic market. In fact, the licensor might be not able to penetrate new markets by himself, as only the licensee may know the language, laws or adjustment of that particular geographical area.

3.2.1 The structure of a fashion licensing agreement

A licensing agreement is properly designed if the licensor ensures that it owns the trademark rights covering the goods in question not only for their expansion, but also for retaining sufficient control over the good over which the trademark is applied. Generally, a licensing may be structured as time limit or perpetual; worldwide or limited to a certain jurisdictions or exclusive and non exclusive. However, a good fashion licensing agreement should include the following key points: the confirmation of the registration of the trademark in jurisdictions relevant for the brand covering the goods offered to the licensee; the consideration on whether the licensee is responsible for the costs related to the trademark applications, advertising and domain names; the identification of the goods which can be considered as complementary to the fashion brand; the clauses referring to the responsibility of the distribution, sales, marketing of the licensed goods and lastly, but not less important, the clarification of the licensor control over the quality of the products distributed by the licensee.

“Luxottica Group SpA engages in the design, manufacture, and distribution of fashion, luxury, sport, and performance eyewear. It operates through the Manufacturing and Wholesale Distribution and Retail Distribution business segments. The Manufacturing and Wholesale distribution segment specializes in the production and sale of its house brands and designer lines of mid to premium-priced prescription frames, sunglasses, and sports eyewear. The Retail Distribution segment operates through the marketing of its retail brands which include LensCrafters, Sunglass Hut, OPSM, Laubman & Pank, Oakley O Stores and Vaults, David Chulow, GMO, and its licensed brands Sears Optical and Target Optical. The company was founded by Leonardo del Vecchio in 1961 and is headquartered in Milan, Italy.”

3.3 The distribution agreement in the fashion business

The distribution agreement involves the manufacturer, who is the supplier, and the distributor of goods. Generally, it is categorised as exclusive or not exclusive deal. In the first case, the supplier grants the exclusivity over a certain territory or sales channel only to one distributor, while in a not exclusive distribution agreement the vendor may supply more than one distributor. In contrast to a licensing agreement, such a legal negotiation typically does not confer manufacturing rights on the foreign business distributor. A distribution agreement may contain the following features: the geographical market covered by the deal, the trademark licensing, the designation of the marketing rights, the terms and conditions of sales, the set of time and the circumstances under which the contract may be terminated.

3.4 The franchising agreement in the fashion business

The franchising deal⁹⁸ is a transaction structure between the franchisor, that is the brand's owner, and the franchisee or the selected partner relying on licensing and distributing agreements.⁹⁹ In fact, such a negotiation deal is legally similar to licensing agreement, but are similar in structure to distribution agreement. Typically, a franchising agreement is drafted when a brand already has reached its popularity in a certain jurisdiction or geographical area, but the brand owner desires to exploit more or expand its business to a new market. Therefore, as in a licensing agreement the brand owner grants Intellectual Property Rights to a foreign partner, but as in a distribution agreement, the franchisee has not the right to manufacture or design by itself. In other words, the franchisor licenses the rights to use its Intellectual Property Right and distribute the products to the franchisee. A franchising deal should provide an

98 According to Business Dictionary, <<http://www.businessdictionary.com/definition/franchise-agreement.html>> accessed 9th June 2017: “A franchising agreement is a legal contract in which a well established business consents to provide its brand, operational model and required support to another party for them to set up and run a similar business in exchange for a fee and some share of the income generated. The franchise agreement lays out the details of what duties each party needs to perform and what compensation they can expect.”

99 The franchising deal has developed in Europe only in the last years. In fact the European institutions have not developed a harmonization program among the Member States yet. Consequently, each Member State has its own legislation related to franchising model. On the contrary, in the USA such a legal transaction has developed in the food business activity since the beginning of XX century. The Federal Trade Commission has the control and regulates over the franchising sector.

indication of the time, which can be limit or unlimited, the exclusivity or non exclusivity(as in the distribution agreement), the definition of royalty arrangement for the adoption of the Intellectual Property Right and the franchise fee, which is the payment that the franchisee made to the franchisor to join the franchising business.

3.5 The merger and acquisition agreement in the fashion business

3.5.1 Introduction

The Merger and Acquisition deal (M&A) refers to the area of strategy,management and corporate financing which deals with the purchasing and (or) joining with different companies. Broadly speaking the two terms are used jointly, however it is more appropriate to provide a separate definition for both of them. On one hand, in a merger transaction, two separate entities join efforts to become a new unique business, generally with a new name. On the other hand, in an acquisition operation one entity buys a second business (usually smaller) which is therefore absorbed into a parent structure or runs as a subsidiary. Moreover, it is relevant to take under consideration that in a merger or acquisition deal, the company recipient of such a transaction is named as target.

The M&A field is particularly relevant in the global luxury market, as the latter notices a high level of activities among luxury conglomerates, family offices, emerging markets and financial institutions.¹⁰⁰ Additionally, a globalise market in that sector is in continuous expansion, driving the companies to face new challenges in M&A deals. In fact, emerging markets, such as Asia and the Middle East, are becoming not only more

¹⁰⁰According to an article written by Marta Casadei, 10th March 2017, <<http://www.italy24.ilsole24ore.com/art/business-and-economy/2017-03-09/italian-ma-fashion-133457.php?uuid=AEsCPuk>>, accessed 19th June 2017:“ the amount of mergers and acquisitions in the international fashion industry rose about from 30% to 96% in 2016, in comparison to 75% in 2015, and 89% in 2014. Many factors played a fundamental role in the increasing activity. Alessio Candi, the Head of Consulting and Marketing research from Panbianco, the major Italian consulting company for Fashion,Luxury and Design sectors operating worldwide, states: “*On one hand, there are the accounts of the companies, which are improving, on the other, the substantial liquidity that big groups are dealing with. Investing in companies with high potential, which can grow significantly with new capital injections and strategies, is an excellent way to use capital and to obtain advantageous returns in a moment in which the stock market is subject to volatility and alternative financial instruments, such as bonds, are not profitable.*” Even if the greatest number of companies in the fashion sector takes place in Italy, the M&A deals are concluded in other countries. This phenomenon is revealed by economic statistics: 25% of worldwide M&A transactions concluded in that field relates to Italian business, but more than 7% of Italian firms are bought by foreign companies.

and more attractive for investors, but investors themselves.¹⁰¹

Before going forward the analysis of particular aspects of an M&A deal and its structure, it is remarkable to underline the three common motivations in the luxury sector that have never been forgotten in that kind of transaction: building and strengthening the product; reaching the equipment and tools necessary for expanding the consumer base; competing in a consolidated or increasing market.

3.5.2 Vertical and horizontal integration and private equity in an M&A deal

The strategies for the acquisition and development of companies in the fashion sector relate to the vertical and the horizontal integration.

On one hand, the vertical integration is typical of mature brands because it carries the opportunity to have more control over all stages of the supply chain, manufacturing costs and quality of final products.¹⁰² In fact, the brand integrity can be maintained by the acquisition of the distribution or supplier channel. For example, in 2013 LVMH purchased a crocodile firm in order to ensure the quality of its products and in 2012 the jewelry brand Tiffany launched a vertical integration in order to ensure the sustainability of the environment and a major control over the raw material extraction.¹⁰³

On the other hand, development of “horizontal integration”¹⁰⁴ are typical kinds of

101 Some examples of the importance of Asia and Middle East Countries in M&A transactions are reported by the article written by Yiling Pan, “10 M&A Deals Aiding China’s Ambitions in Luxury” (17th March 2017) <<http://luxurysociety.com/en/articles/2017/03/top-10-outbound-m-deals-aiding-chinas-ambitions-luxury/>> accessed 19th June 2017: “Ruyi Group, a Shandong-based textile firm unknown to foreign dealers, purchased a controlling stake of French SMCP Group, which owns accessible luxury brands Maje, Sandro, and Claudie Pierlot. The amount of the transaction is estimated about 1.3 billion euros. In December 2016, the Italian premium jewelry brand Buccellati sold an 85% stake to Gangtai Group, a Chinese corporation. In May 2011, Fosun International acquired about a 9.5% stake in Folli Follie group, which owns luxury clothing and leather brands from Folli Follie and the jewelry brand Links of London.”

102 The definition is provided by: <<http://www.investopedia.com/terms/v/verticalintegration.asp>> accessed 10th June 2017: “Vertical integration is a strategy where a company expands its business operations into different steps on the same production path, such as when a manufacturer owns its supplier and/or distributor. Vertical integration can help companies reduce costs and improve efficiencies by decreasing transportation expenses and reducing turnaround time, among other advantages. However, sometimes it is more effective for a company to rely on the established expertise and economies of scale of other vendors rather than trying to become vertically integrated.”

103 From the official Tiffany website, <<http://www.tiffany.com/sustainability>> accessed 19th June 2017

104 The definition of horizontal integration deal is provided by <<http://www.investopedia.com/terms/h/horizontalintegration.asp>> accessed 19th June 2017: “Horizontal integration is the acquisition of additional business activities at the same level of the value chain in

financial operation related to luxury goods as well. Such an operation allows the brand to grow in size, increase the differentiation of products, reduce the competition and access new markets. In other words, it drives to industry consolidation. For instance, again, in 2011 LVMH acquired Bulgari for \$ 5.4 billion, in order to strengthen its watch.¹⁰⁵ This was one of the biggest transactions that occurred in the last ten years. Another example of horizontal integration is provided by the purchase of Reebok by Adidas in 2006. In this case, the two brands are competitors in the same market, as they both produce sport apparel and equipment, but since then Adidas had the opportunity to strengthen its reputation in North America.¹⁰⁶

Private equity¹⁰⁷ is another essential key in M&A transactions, as it represents the main source of investment. As a matter of fact, once the fashion firm acquires its reputation, it may attract private investors, who generally are enterprises specialized in this sector. Despite the global economic crisis, statistics show that 68% of investors are strategic buyers, mainly active in apparel and accessories, watches and jewellery and hotels.¹⁰⁸ On the contrary, it may happen that in an acquisition deal the fashion firm, in order to expand the business, becomes an investor itself. Usually fashion brands acquire Luxury hotels to ensure key location and attract customers. For instance, in 2014 Chopard acquired Hôtel de Vendôme in Paris.¹⁰⁹

similar or different industries. This can be achieved by internal expansion through a reinvestment of operating profits or by external expansion through a merger or acquisition. Since the different firms integrated are involved in the same stage of production, horizontal integration permits them to share resources at the same level."

105 Hannah Elliott, "LVMH Acquires Majority Stake in Bulgari, Forbes (7th March 2011) <<https://www.forbes.com/sites/hannahelliott/2011/03/07/lvmh-acquires-majority-stake-in-bulgari/#1430567b7c10>> accessed 20th June 2017

106 Andrew Ross Sorking and Barnaby J. Feder, "Adidas Is Said to Be Close to Deal to Acquire Reebok", the New York Times (3rd August 2005) <<http://www.nytimes.com/2005/08/03/business/adidas-is-said-to-be-close-to-deal-to-acquire-reebok.html>> accessed 20th June 2017

107 The definition is provided by <<http://www.investopedia.com/terms/p/privateequity.asp>> accessed 20th June 2017: "Private equity is capital that is not noted on a public exchange. Private equity is composed of funds and investors that directly invest in private companies, or that engage in buyouts of public companies, resulting in the delisting of public equity. Institutional and retail investors provide the capital for private equity, and the capital can be utilized to fund new technology, make acquisitions, expand working capital, and to bolster and solidify a balance sheet. Private equity comes primarily from institutional investors and accredited investors, who can dedicate substantial sums of money for extended time periods. In most cases, considerably long holding periods are often required for private equity investments, in order to ensure a turnaround for distressed companies or to enable liquidity events such as an initial public offering or a sale to a public company."

108 From <https://www2.deloitte.com/content/dam/Deloitte/it/Documents/finance/web_F&L-Private%20Equity_.pdf> accessed 20th June 2017

109 The information is provided by <<http://www.telegraph.co.uk/luxury/jewellery/33172/chopard->

To conclude, vertical and horizontal integration and private equity are fundamental plans for a strategic and successful M&A operation.

3.5.3 The structure of an M&A deal in fashion business

3.5.3.1 Merger and control

Merger and control consists in the procedure of reviewing mergers and acquisition under competition and antitrust law. In Europe, the Regulation no 139/2004 refers to the control of concentrations between undertakings while in the USA the subject is mainly governed by section 7 of the Clayton Act¹¹⁰ and section 1 and 2 of the Sherman Act¹¹¹ and section 5 of the Federal Trade Commission Act.¹¹²

In the fashion business mergers and controls generally take place in different countries, resulting in a merger control filing analysis among more markets.

3.5.3.2 Due diligence

Due Diligence is the core step in an M&A deal,¹¹³ as it embodies the review of

acquires-five-star parisianhotel.html>accessed 20th June 2017

110The definition is provided by <<http://www.businessdictionary.com/definition/Clayton-Antitrust-Act.html>>accessed 21th June 2017: “*The Clayton Antitrust Act is an amendment, passed by the U.S. Congress in 1914, meant to further promote competition in U.S. businesses and discourage the formation of monopolies. This act prohibited price discrimination, price fixing, and exclusive sales contracts. The act also legalized peaceful strikes and boycotts against companies.*” In particular, at section 7 it prohibits transactions where “*the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly*”

111The definition is provided by <<http://www.businessdictionary.com/definition/Sherman-Act.html>>accessed prohibiting agreements in restraint of trade and monopolization respectively 21th June 2017: “*The Sherman Act is US federal legislation of 1890 that prohibited the creation of monopolies by outlawing direct or indirect attempts to interfere with the free and competitive nature of the production and distribution of goods. Amended by the Clayton act of 1914. Also called Sherman Antitrust act.*” In particular, at section 1 and 2 it prohibits agreements in restraint of trade and monopolization respectively.

112 The definition is provided by <<https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act>>accessed 21th June 2017: “*The Federal Trade Commission Act is the primary statute of the Commission. Under this Act, as amended, the Commission is empowered, among other things, to (a) prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress and the public. A number of other statutes listed here are enforced under the FTC Act.*”

113It can involve different levels of review, such as general review, related to the major issues of the transaction and detailed review, regarding the pricing profile of a target or relevant document in data room.

all documents, the pricing and the risk of the target and the integration of the new acquired business. In the fashion industry, when the buyer and the seller decide the scope of the due diligence review, the checking areas are the IPR, real estate, supply chain and privacy and data protection.

IPR are the key of success on which the business is built, therefore its protection is crucial in an M&A deal and generally it is acted through licensing agreements and technologies transfers.

The Real Estate is significant for the flagship stores in the major cities and in relation to the acquisition of restaurants or hotels.

Supply chain issue regards the ways in which the target business is run, including relevant aspects such as tax affairs, managing risk, employees treatment, internal control and environmental concerns.

Lastly, the privacy and protection of customer data are crucial for marketing strategies in the fashion industry. Such area of the deal relates to the restriction of disclosure of personal information in relation to privacy law of the countries in question.

3.5.3.3 Price adjustment

The Purchase Price Adjustments are generally mechanisms in favour of buyer contained in a sale and purchase agreement which aims to adjust the purchase price for the target, including working capital, net debt and net assets.

In the fashion industry context, it is crucial to take into consideration the fact that this kind of business is sensitive to seasonal performance. Therefore, the price adjust should be reviewed and eventually anticipated at a certain period of the year in order to obtain a clear marketing view over the target. Moreover, the pricing and distribution channel policies which are adopted may influence the current season, therefore they represent factors to be monitored at the moment of price adjustment negotiations.

3.5.4 Conclusion

As it has been described above, the M&A negotiations play a fundamental role

in the expansion and development of the brand in the market. In fact, investors consider fashion industries as remunerative business, principally the “mature” companies consolidated over the decades. Moreover, nowadays conglomerates and groups of companies are spread worldwide, as they turn into huge profits. These are the reason for which the fashion industry makes use of M&A strategies in order to improve and increase their competitiveness.

3.6 The joint venture agreement in the fashion business

It is clear that M&A deals serve as growth strategies to improve the corporate development activities. However, they are not the only instruments with the same purpose. Indeed, young brands that desire to grow or strengthen their position on global scale, joint ventures(JV),local partnership, license and distribution agreements are essential to pursue their strategies. still fundamental to pursuing their strategy. For instance, in 2015 Karl Lagerfeld a JV agreement with G-III Ltd. apparel group in order to expand the business in North America¹¹⁴ and earlier, in 2005, Armani agreed a distribution license for A/X Armani Exchange in Asia Pacific, the United States, Canada, Central and South America.¹¹⁵

Therefore, a JV deal can be defined as a legal organization characterized by short term partnership in which the partners jointly contribute to assets and share risks. It generally adopted to enter new markets and bring technologies and business practices. Consequently many benefits occur when a JV is established. In fact, it provides great opportunities and huge profit; it enters the market fast and at low market cost; it establishes a strong relationship with local players. However, in the fashion sector two principal issues may be taken into consideration: the ownership and control of the brand and the exit. In fact, it is common that the brand owner wishes authorize licenses in order to have control over the brand trends and quality and have the right to terminate it.

114Associate Press, “G-III in Joint Venture with Karl Lagerfeld's Parent Company”(8th June 2015)<<https://www.businessoffashion.com/articles/news-analysis/g-iii-in-joint-venture-with-karl-lagerfelds-parent-company>>accessed 21st June 2016

115Dominique Muret,“Giorgio Armani takes control of A/X Armani Exchange”(May 16, 2014) <<http://us.fashionnetwork.com/news/Giorgio-Armani-takes-control-of-A-X-Armani-Exchange,406114.html#.WUq4j-mxXIU>> accessed 21th June 2017

3.7 Conclusion

The deals related to the fashion industry can be considered as linked to each other. Indeed, if one thinks about the process that a product is subject to, one may realize that the “different steps,” recognizable in the contracts, belong to a “life circle” that characterizes not only the fashion world, but also the whole business and economy themselves.

The realization of a fashion good is the “easiest” matter, as it is the result of creativity, design and market research and ends to the purchase by the consumers. The owner of a brand should stipulate a licensing agreement in order to sell more and distribute the product to reach popularity and protect the prestige he or she has reached. Subsequently, through the franchising agreement the management of the stores set in many countries and all operations related to it can be controlled easily and gain a high level of profits. Lastly, in broader terms, fashion companies can “play” and transformed themselves in a different entity, shaping themselves in something new. However, the contents of the M&A deals and JV agreements come back to the single goods. In other words, from a macro level, the business refers to the “atom”, the essence of this world: again, the seasonality on which the fashion industry is dependent and highly influenced, the issues related to the IPR, the distribution and supply chains, which are always on the same frequency of a sustainable environment.

To conclude, all those agreements describe how the fashion market works in a technological and fast era.

Conclusion

The fashion world is not a pure academic discipline, but it embraces different fields of law, such as Intellectual Property, private law and corporate law. The application of fashion law is even larger, as it consists of labour law, tax law, advertisement law, environmental law and many others. Moreover, the disputes in the fashion law are becoming more and more frequent.

By the analysis of fashion business, I believe that the consumers are highly influenced by it. One may think that all the efforts that the fashion industry puts in succeeding, flow into one's way of observing himself or herself. Nowadays, the advertisement tries to propose a stereotype of life: one product is always more convenient, more attractive than the others. Even colours seem better than others: that particular red or blue reminds that specific product that one should have. The sense of sight is completely involved: not only the colours are perceptible indicators, but also internet plays a crucial role. For example, one singer may wear a particular shoe in a particular way, and the public wants to do the same, or an actor buys that specific accessory and then everybody wants to have it. Nowadays internet is the major tool through which the fashion is developed and known by the public. For instance, smartphone, tablets allow customers to save time and energy and purchase in a place different from the retail shop. New apps have to be realized in conformity with legislation in question. Additionally, the fashion world is a marker of the society. The business studies the behaviour of people, what they like and the trends that they follow. On that basis, the fashion creates new products, new items that are likely to be accepted and, overall, purchased by the audience. As a result, the society is shaped by the fashion world, but on the other side it is the society that has a huge impact on it. There is a reciprocal relationship between the two players.

The way through which this particular sector of the economy influences the society is also mirrored by the conflict that arises out between the competitors and the collaborators. On one hand, competitors are the major players in that world: the Intellectual Property Rights reflect such issue, as they try to prevent others, or competitors, from misusing an aspect of a creation. In fact, behind the creation itself, there are planning, innovation, creativity and much more. Therefore, a brand owner tries

to protect it as much as she or he can. On the other hand, strategic alliances are fundamental in this sector. In order to expand the business and make new profits, brand owners must keep in contact with local distributors or retailers, or think about a realization of franchising in order to increase profits.

In conclusion, the world of fashion and the society are strictly engaged. If there are not offers from the public, that means that the fashion trend of the moment is not satisfying it, the economy does not work. On the other side, fashion always influences the way in which the society behaves and keep monitoring the changes that occurred.

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European Convention on Human Rights

European Trademark Regulation (EUTMR)

Charter of Fundamental Rights of the European Union (CFR)

GmbH-Gesetz, Aktiengesetz.

Lanham Act

Madrid Protocol

Paris Convention

Patent Cooperation Treaty

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The National merger Directive (the Third Directive) 2011/35/EU.

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Annexes

Abstract in English

This dissertation provides a comparative analysis between the European and American legal systems in the fashion sector.

It deals with the major fields that may characterize the foundation of a fashion company in both legislations.

The aim of my legal work is to show the critical issues that may arise out the process that takes place in such circumstances. It is generally known that the worldwide society is subject to changes, therefore, as the economy changes, also the Fashion will probably not be the same.

People can nowadays check out their favourite stores in internet and make on this platform their purchases.

Moreover, one may find the same brand in different retails in almost every country or purchase at less cost a product which is likely to another designed by a remarkable fashion firm.

As a consequence, this topics are examined taking into consideration the diversities which runs in the “Common law” and civil law systems.

This Master Thesis is carried out as follows: the first chapter deals with all potential legal structures to whose an entrepreneur can resort in order to found a fashion company; the second chapter shows the IPR which characterize the fashion business; the last paragraph gives an overview of the deals that helps a fashion company to expand and reach success globally.

Deutsch übersetzung

In diese Arbeit wird eine Vergleichsanalyse europäischer und amerikanischer Rechtssysteme im Fashion Bereich (in der Modeindustrie) präsentiert.

Im besonderen werden dabei die Hauptbereiche beleuchtet, die die Basis einer Modefirma in beiden Gesetzgebungen bilden könnten. Das Ziel dieser Arbeit ist es charakteristische Schwierigkeiten aufzuzeigen, die unter solchen Bedingungen auftreten können.

Es ist grundsätzlich bekannt, dass sich globale Gesellschaften ändern, deswegen wird wahrscheinlich auch die Fashion Welt, als Teil der Weltwirtschaft, nicht die selbe bleiben.

Heutzutage kann jeder direkt im Internet seine Lieblings Fashion Geschäfte besuchen und dort direkt kaufen.

Außerdem ist es möglich in unterschiedlichen Online Stores die selben Marken zu finden oder bekannten Marken ähnliche Produkte mit reduzierten Preisen zu kaufen.

Folglich werden diese Themen unter besonderer Berücksichtigung der Unterschiede zwischen dem „Common law“ und dem zivilen Gesetz analysiert.

Diese Diplomarbeit unterteilt sich wie folgt: im ersten Abschnitt geht es um potenzielle gesetzliche Strukturen, die Unternehmerinnen und Unternehmer beiziehen können um eine Modefirma zu gründen.

Der zweite Abschnitt beschreibt das IPR das das Fashion Business charakterisiert; der dritte Abschnitt gibt einen Überblick der Vereinbarungen, die einer Fashion Firma bei der Expansion helfen, sich gut zu entwickeln und weltweit erfolgreich zu sein.