GARRIGUES

Business of Fashion Law

Issue 2- April 2014

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Advertising on "Adwords": The case and LOUIS VUITTON the Spanish courts

Carolina Pina

AdWords is a service offered to anyone looking to advertise on Google's search engine. AdWords' aim is to ensure that ads appear on screen when users perform searches using certain keywords related to the ad. These keywords are the words or phrases chosen by the advertiser to determine when their ad should appear and are linked to the search terms typed in by users. By selecting keywords relating to their ad, advertisers will find it easier to reach customers on the lookout for what their business has to offer.

A host of companies in the fashion business have chosen the top industry brands among their keywords to ensure their ad appears among the sponsored links whenever users type in the name of these brands as their Google search term.

Can companies be prevented from acquiring a competitor's brand name as a keyword to plug their services on Google? The Court of Justice of the European Union, in its famous judgment of March 23, 2010 (C 236/08 to C 238/08, Louis Vuitton, Viaticum and CNRRH vs. Google France and Google Inc.), had this to say:

(i) Google is not responsible for the acquisition of keywords that coincide with competitors' brand names on the Adwords service;

(ii) It is not Google, but rather the advertisers, that bear responsibility for the use of such brand names in the wording of the ads; and

(iii) Google is an intermediary information society service provider and, as such, benefits from the liability exemption regime provided for in Law 34/2002, of July 11, 2002, on information society services and electronic commerce. ("LSSICE"). This means that Google cannot be held liable unless it has "actual knowledge" that the information in question is unlawful or detrimental to third party rights and fails to duly disable it. "Actual knowledge" must be interpreted in line with the Supreme Court judgment of March 4, 2013 (Graciano Palomo vs. Google), whereby, unless the unlawful nature of the content is manifestly clear from the circumstances of the case, actual knowledge will only arise once notice of the relevant court decision has been served.

The CJEU has therefore taken a very clear stand. There is nothing trademark owners can do to prevent search engines from making keywords that reproduce or imitate registered marks available to advertisers. The Commercial Court ruled along similar lines in its Judgment no. 625/2012 of September 23, 2013 (La Tienda del Espía vs. GOOGLE IRELAND, LTD), not to mention an array of judgments in neighboring countries, which have held that Google is not responsible for advertisers' use of keywords in their ads on AdWords.

The judgments handed down in Spain and its continental neighbors have found that only advertisers can be held responsible for any confusion brought about by the use of keywords on Adwords. The mere acquisition of a competitor's keyword is not unlawful in and of itself; this depends rather on how the keyword is used in the text of the ad. This is borne out by examples such as the Madrid Commercial Court no. 7 Judgment of December 22, 2011 (the "Masaltos" case), the Granada Provincial Appellate Court judgment of March 16, 2012 (the "Barrisol" case) or the ruling by Alicante Commercial Court no. 1 of October 31, 2013 (Orona vs. Citylift).

The Alicante Commercial Court judgment referred to above went so far as to state that the AdWords service, far from competing unfairly on the market, "represents an exercise in healthy, fair competition" and "offers an alternative to the products or services of the mark owner."

The main takeaway from all of this is that competitors can only be stopped from using brand names as keywords when the wording of the Adwords advertising may cause confusion among consumers. In other words, unlawful conduct is not determined by the mere acquisition of a competitor's mark as a keyword, but rather by how it is used in the ad.

Minors On The Catwalk

Ana Morales

How often have those of us who are not particularly well-versed on the subject wondered how our country's legal system regulates the work of those models who, while their dolled-up faces and confident stride may suggest otherwise, cannot wholly conceal their tender years.

Now seems as good a time as any to tackle the subject given the recent passing of a labor law in the State of New York aimed at protecting underage workers, which bloggers in the fashion community have not been slow to pick up on.

For reasons that need little in the way of explanation, if minors need special protection in general, the same applies doubly in the world of work in particular.

In our country, we can point to the following three legal mechanisms used to ensure the labor rights of minors are protected: first of all, by setting a minimum working age; second, by banning the performance of certain types of work, and, third, by setting in place special regulations on work and rest time.

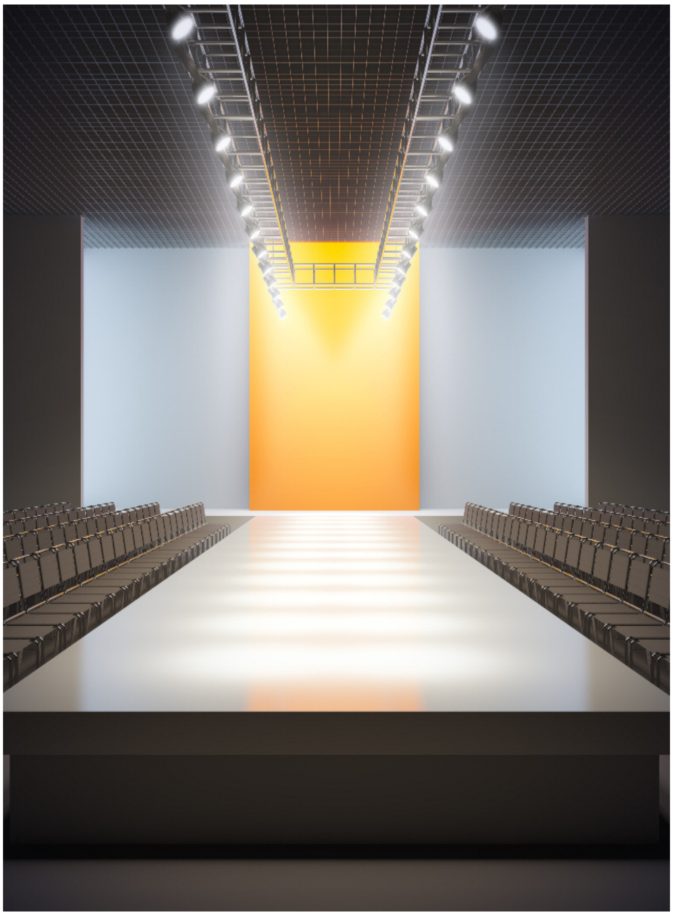
As far as age is concerned, the under-sixteens are not, as a general rule, legally entitled to work. But if so, what to make of those minors we see parading down the catwalk with the poise and swagger of their grown-up counterparts? Are their employers breaking the law? Not necessarily.

For the fact, as is almost always the case, is that there is an exception to the rule: minors are legally allowed to take part in public performances provided the competent authorities have given the go-ahead beforehand and, moreover, as long as it has been proven that the minor's participation in the event in question poses no threat to their physical wellbeing or their professional or personal development.

The administrative authorization referred to above must be sought by the minor's legal representatives (parents, guardians or anyone else given legal custody), and must be accompanied by the consent of the minor him or herself, provided her or she has "sufficient judgment" in the eyes of the law. This authorization must be granted in writing, indicating the specific advertising event or activity for which it has been granted.

And what about those who are sixteen or over but who have not yet turned eighteen? Are there any age-related restrictions in such cases? The answer, as is so often the case, is "it depends". On what exactly? On whether or not they are legally emancipated. Restrictions apply to the unemancipated, for they are deemed to have limited rights to work.

In this case, while there is no need to seek prior administrative clearance, minors will nonetheless need to obtain the consent of their parents or guardians (or the institution charged with their care), quite aside, needless to say, from granting their own consent.



Meanwhile, models who have turned sixteen but who are not yet eighteen and who are emancipated are fully entitled to work and do not therefore need such consent.

Aside from the general ban on working for the under-sixteens, the Spanish legal system has in place a second mechanism to protect minors: classifying certain type of work as off-limits for the underage.

The law prohibits youngsters under the age of eighteen from pursuing any activity that, generally speaking, may be deemed hazardous in view of the specific risks it poses.

Faced with the lack of any recent legislation specifying such prohibited activities, the courts tend to turn to a somewhat antiquated Decree from the year 1957, which sets out a list of work from which women (this section has, needless to say, been repealed by 1995's Occupational Risk Prevention Law) and minors are banned.

The prohibited activities for minors listed in the Decree do not include modeling or advertising.

Lastly, as a third mechanism to protect minors (in this case applied across the board), the lawmakers have set in place special rules as regards working time and rest periods.

In particular, the under-eighteens are banned from working night shifts (in other words, between 10 p.m. and 6 a.m.) or working more than eight hours a day.

Moreover, breaks of at least thirty minutes are mandatory when working more than four hours and a half without interruption. As far as minimum rest time between working days is concerned, at least twelve hours must elapse between the end of one working day and the beginning of the next. In terms of weekly rest, the under-eighteens are entitled to at least two complete rest days per week.

With all this in mind, the Spanish legal system can be said to have in place mechanisms to grant special protection to minors in the world of work. Nonetheless, as is almost always the case, making sure that such protection is effective will depend, without wishing to state the obvious, on all of the parties involved in the event in question complying in practice with each and every one of the rules referred to above.

Franchising in the U.S.: the problems of imprecise drafting

Claudio Doria / Beatriz Rosell

These days, few would question the fact that internationalization is essential for companies in the fashion and luxury industry looking to expand their business based on sustained economic growth.

When venturing overseas, companies must pay special attention to the factors that help ensure a successful outcome. Among these is the need to have in place the proper legal backing, something that takes on even greater importance (were such a thing possible) when playing away from home. There follows a case in point.

In a recent decision, a U.S. Court ruled on the post-contractual effects of the non-compete, non-disclosure and non-solicitation of clientele-related provisions included in a franchising agreement [Devin Hamden v. Total Car Franchising Corporation No 12-2085 (Court of Appeals 4th Cir. 2013)]. The striking aspect of this case is that the Court based its judgment on the substandard drafting of the agreement, drawing a distinction between the effects of such provisions depending on whether the agreement was terminated on expiry of its term or was subject to early termination. Above all, since the franchisor seemingly had no such intention.

The above decision clearly shows that a more precise drafting and thorough knowledge of contractual interpretation in the U.S. would have avoided the problem. Thus, in the case at hand, the non-compete, non-disclosure and non-solicitation of clientele-related obligations foreseen in the agreement would have been enforceable in the event of the early termination of the agreement, while the opposite would apply in the event of the expiry of the term.

Notwithstanding the fact that the concept of "termination" covers both of the scenarios described above in general terms (termination for any reason), a careful reading of the agreement leads to the conclusion that the general events of termination do not include termination on expiry of the agreement term, an outcome seemingly opposed to the wishes of the franchisor when drafting and negotiating the agreement. Thus, the agreement having run its natural course, the franchisee was exempt from the post-contractual obligations foreseen in the agreement, with the resulting detriment to the franchisor.

All of which goes to show that when companies expand into countries ruled by the common law system, above all the U.S., it is essential to bear in mind that agreements must be carefully drafted, avoiding non-specialist legal translations or drafting by individuals with little knowledge of international and national contractual dealings, thereby avoiding any ambiguities, inconsistencies or discrepancies with the legal culture of the country in question.

Hybrid Arbitration Clauses

Mª Teresa Cuberta / Anna Arnalte

When drafting an agreement, the parties always have to decide on a dispute resolution system: the courts of justice or arbitration, and, in making that choice[1], often major doubts arise over which resolution method is best for any disputes that may arise in the future.

It may not be easy at the start to predict all the potential disputes that could occur as the contractual relationship takes its course. Just consider how agreements are becoming increasingly complex and how the range of different types of disputes and breaches that may occur is constantly widening and they are becoming ever more difficult to predict. Similarly, it is no easy task to determine in advance which dispute resolution mechanism will be the best-suited to resolving those potential disputes, bearing in mind that clearly not all disputes can be dealt with in the same way.

Thus, the same contractual relationship can give rise to complex disputes which may need to be submitted to an expert arbitrator on the subject, and to more straightforward disputes or strictly legal disputes, which would be best resolved by the courts of justice.

This is the scenario where "hybrid clauses" can become a very important and useful tool. In these types of clauses, the contractual parties agree that any disputes that may arise in the future may be submitted both to arbitration and to the courts of justice in one or more countries and that the choice of the specific forum will be made when the dispute or discrepancy arises.

The big advantages of "hybrid clauses" are that (i) different dispute resolution methods can be allowed and (ii) the specific dispute resolution method can be chosen when the dispute occurs, which generally means that the best method can be chosen to resolve the specific dispute concerned.

In Spain, the validity of "hybrid clauses" had never been accepted in the past because one law, the Spanish Civil Procedure Law of 1881, laid down that in jurisdiction clauses the parties had to waive "clearly and categorically their own jurisdiction" and that they had to choose "with absolute precision the judge to whom they consented", which was construed as not being fulfilled where they could request arbitration; and a second law, the Arbitration Law of 1998, laid down that the clause had to set out the "unequivocal intention of the parties" to submit their disputes to arbitration, and this is disputed where the clause refers to the judicial bodies.

And so, because of these requirements, "hybrid clauses" were considered invalid in that the parties did not give their consent to one forum only.

Now, however, seeing as how the current Spanish Civil Procedure Law of 2000 and Arbitration Law 2003 have relaxed those requirements, by eliminating the need for a waiver of the party's own jurisdiction and for the parties to express their unequivocal intention to submit any dispute to arbitration, the Spanish courts have gradually been moving towards respecting the parties' freedom.

Although, despite the changes in statutory and case law, it was not until October 2013 that the Spanish courts, namely the Madrid Provincial Appellate Court, openly ruled in favor of the validity of "hybrid clauses".

The Madrid Provincial Appellate Court's decision is a landmark in that it confirms the principle that the parties' freedom of contract must prevail in determining the applicable forum. Nevertheless, because there are currently no other similar rulings, these clauses must be considered with caution and we must wait and see whether this view will be implemented by the Spanish courts or whether, conversely, we will come up against rulings to the opposite effect which will have to be clarified at a future date by the Spanish Supreme Court.

1.- We have left aside "mediation" because it has not taken root as yet in our closest environment, although this dispute resolution mechanism is most probably set to become more important in the not too distant future and to become more widespread as a commonly used dispute resolution mechanism.

The new "Patent Box"

Mónica Rendé

In a globalized economy, investing in R&D&I is the only way to boost the development of businesses, reduce dependence on outside technology and further their international expansion.

Targeted in this direction, the Patent Box, a completely new tax incentive was introduced in 2007 which allowed companies to reduce their corporate income tax bases considerably. Whereas the R&D&I tax credit is designed to encourage the creation of new products, the Patent Box is designed to encourage the placing on the market of the products obtained from R&D&I activities and both tax incentives are compatible.

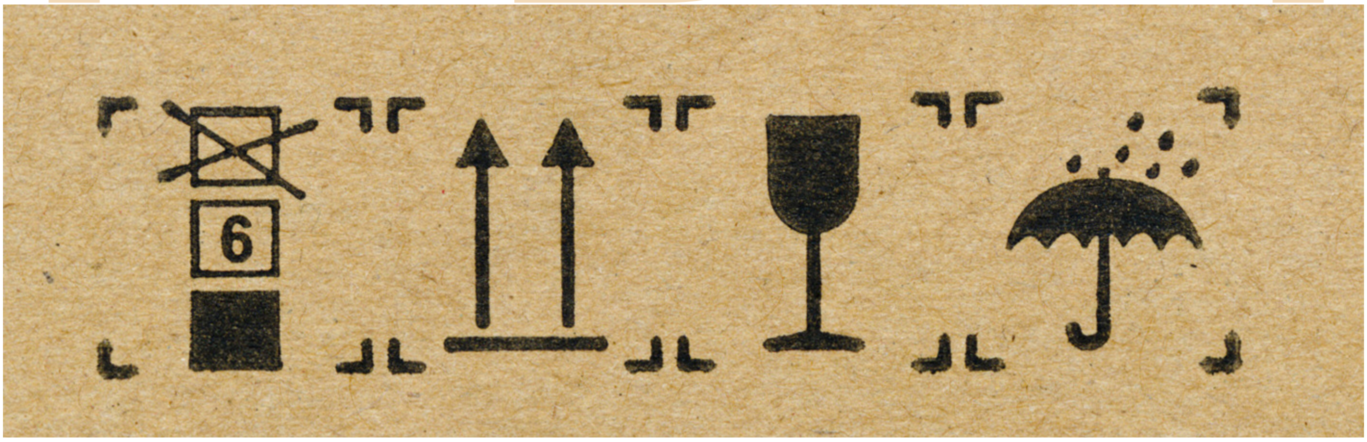
The Spanish Entrepreneurs Law has made amendments to the provisions on the Patent Box. Although it left untouched the host of intangible assets (recorded or not in the accounts) currently qualifying for the regime (they continue to be patents, drawings or models, diagrams, secret formulas or procedures, rights in information relating to industrial, commercial or scientific experiments), it has amended all the other essential elements such as: who can apply it, the transactions qualifying for the regime, the quantification of income for tax purposes and how to achieve legal certainty in relation to the regime.

Firstly, the companies qualifying for the regime have been extended to take in those that have created at least 25% of the intangible assets, instead of the 100% required in the former legislation. One of the things this amendment will allow is the acquisition of intangible assets in progress and for the income for tax purposes to be used later by the acquirer that has added at least 25% of the cost for their termination.

The transactions that can benefit from the regime are no longer only the licensing of the right to use or operate the intangible assets but have been broadened to take in transfers of intangible assets where the transferor is not considered to be commercially related to the acquirer.

The income for tax purposes is no longer quantified as a reduction in the tax base by 50% of the gross revenues, the incentive now refers to 60% of the income from the assignment or transfer of the license to use or operate the assets that is included in the tax base. Income for these purposes is regarded as the positive difference between the revenues obtained in the period from the license to use or operate the assets and any amounts that may be subtracted in respect of amortization charges, impairment and expenses in the period, directly related to the intangible asset.

i+D+i



Additionally, the current limit under which the incentive concerned could only be applied until the first period in which revenues go above six times the cost of the asset has been removed.

It has kept the requirement (not a new one) for the agreement to state separately the consideration in respect of the provision of accessory services in cases where these are also set out in the agreement. It is common practice for licensing agreements for the use or operation of intangible assets of this type to include other services, whereby alongside the sharing of knowhow, the licensor agrees to provide certain types of technical support. Thus, whereas in a license, the licensor conveys information that the licensee will use for itself, in the provision of services, what is offered is the provision of specialized assistance to help the recipient of that service to carry out the activity in the best way possible. The license of the right to use or transfer the ownership of the intangible asset may benefit from this tax incentive, but not the provision of a service, and the agreement must set out separately the consideration relating to each.

The Directorate-General of Taxes has now repeated its view several times by categorically affirming that where the same agreement includes the provision of accessory services and does not set out the related consideration separately, the company will not be able to benefit from the reduction, even where both items of consideration can be identified in its analytical accounts.

Another new addition in relation to legal certainty is the option to request from the tax authorities before the transactions are performed, the adoption, together with the pricing agreement, of a classification agreement for the intangible assets.

The pricing agreement, which already existed in the law, relates to the revenues obtained from the license, the expenses and the income generated with the transfer, whereas the purpose of the classification agreement will be to classify the intangible assets in any of the categories included in the legislation.

Lastly, for companies in consolidated tax groups, the requirement not to eliminate the revenues and expenses relating to the license when determining the tax base for the consolidated tax group has been removed (in the previous provisions on the Patent Box regime the revenues and expenses relating to the license were not eliminated). Additionally, under the new wording, even if that consolidated tax regime is applied, these transactions have to be priced and documented as required by the transfer pricing legislation.

The Entrepreneurs Law has therefore extensively overhauled the Patent Box tax regime, an incentive that is currently providing one of the biggest tax breaks for companies that apply it in the right way.

General consumer and user protection law

In our article "Consumer Law reform underway", published in the previous issue of the Newsletter Business of Fashion Law, we analyzed the bill for the reform of the General Consumer and User Protection Law, passed by the Council of Ministers on October, 2013. In this connection, last Friday, March 28, 2014, it was published in the Official State Gazette 3/2014 of 27 March, the revised text of the General Consumer and User Protection Law and other complementary laws. This law is in force since last Saturday, March 29, 2014, although its provisions shall apply to contracts signed from June 13, 2014.

https://www.boe.es/boe/dias/2014/03/28/pdfs/BOE-S-2014-76.pdf

What makes a cake especially appealing for fashion brands?

Cristina del Río

In March Prada announced the opening of its first café, the "*Pradasphere*", located in one of the world's most famous department stores, Harrods. A few days later, it acquired the oldest and most exquisite pastry from Milan, the famous "*Marchesi*". In a press release, Prada explained that the acquisition was intended to "enhance and strengthen the brand strategically in the context of future expansion projects". In the same vein, in June the LVMH group acquired the historic pastry "*Cova*" located in one of the most luxurious streets in Europe, the Via Montenapoleone in Milan. At this point, it is fair to ask ourselves: What makes a cake especially appealing for fashion brands?

In fact, introducing a new product under an established brand has become a popular strategy in the fashion and luxury goods industry. There are many examples: the *Bvlgari Hotel in Bali*, the *Cavalli Club in Miami*, the *Armani Ristorante in Milan*, or the *Missoni Home* collection, to name but a few. Specifically, the "rarity principle", is the idea that if a company wants to grow and increase its sales, it must avoid selling large quantities of a product and focus on diversification. This is because the prestige of a luxury brand is inversely proportional to the number of people that own the products. In this sense, the so-called "snob effect" reflects conspicuous consumption, the guiding principle of which is to acquire limited edition and exclusive products, and why deny it, the more expensive the better.

However, in order to enter into a new market category and become a "lifestyle brand" it is necessary to have resources (especially economic and financial back-up), skills and experience. Many companies therefore take the strategic decision to join forces with an expert partner in the field, by signing a license agreement, with a view to curbing the structural costs necessary to produce and distribute the new product. In addition, the royalties earned through the licensing agreement will allow the maison to finance the project, without necessarily losing control of its products.

But trusting the extension of the brand to a third party can harm the goodwill of the trademark if the licensee does not have a certain amount of credit and experience in the sector. Indeed, entering into a license agreement entails the birth of a long-term relationship, so the principle that should prevail between the parties is mutual trust. In addition, it is important to balance the interests of both parties. While the fashion brand will make every effort to maintain its pristine and exclusive image in order to avoid the dilution of its brand, the licensee will focus its efforts on the commercial distribution of the product in order to increase sales and guarantee a return on its investment, taking advantage of the economies of scale. Therefore, the effort must lie in meeting halfway, the coveted win-win situation, where no party has an incentive to break the equilibrium from which they both benefit.

Consequently, the obsession of every fashion company that decides to extend its brand to a new product category should be to avoid its dilution. There are many related cases in the history of fashion, but perhaps the most famous is the one involving the French designer Pierre Cardin. The stylist pioneered the mass distribution of luxury through licensing agreements. He stated: "It is true; I have used the system of licenses without limit, to the point of surprise, especially with the *cans of sardines Maxim's*". Thus, despite having its origins in haute couture, the strategy of diversification he followed caused the exit of the brand from the luxury market. Why? Due to the loss of values inherent in the brand in its origins.

If the value of a brand is related to the quality of the products it identifies, it is essential to keep it under control in order to maintain its good reputation in the market. Such control can be exercised through the clauses of the license agreement by establishing a set of obligations to be met during the production process, or by specifying that the fabrics must be acquired directly from the licensor or from the parties it specifically designates, and even that the items may only be manufactured in the facilities capable of ensuring product quality. In some cases, the licensor may even oppose the change of manufacturing site if the quality of the products could be jeopardized. It is also crucial to control the aura of luxury that surrounds the products, avoiding labor or environmental practices that can harm the brand's reputation. If we have not considered these issues when licensing our brand, now is the time to do so.

If our licensees do not observe their contractual obligations, we have tools to repair the damage caused (as long as our license agreements are well drafted). The measures imposed by the Spanish and European courts are cease and desists orders in relation to the use of the trademarks in question and the destruction and removal of the product from the market, all with the corresponding indemnification for damages. Indeed, in the "Pirelli Case", the company "Licensing Projects, S.L." signed a license agreement with the famous Italian company "Pirelli & Co, Spa" for the production and distribution of a successful and famous range of shoes, known as *PZERO*. What happened? The licensee breached the quality obligation imposed by the licensor to ensure the quality of the manufactured products. The Italian company filed an application with the Community Trademark Court that ended with the withdrawal from the market of all the products manufactured under the license agreement and the destruction of 600 pairs of shoes incorporating the referred brand.

Therefore, although it is crucial for fashion brands to launch into new product categories, it is also essential not to lose control over the whole process, since the lack of quality of the licensed products could cause a substantial change in the brand's value, and lead it to lose its competitive edge.

GARRIGUES Fashion Events

"BUSINESS OF FASHION LAW"

Madrid, May 23, 2014

PROGRAM

Language: The session will be held in Spanish

09:30 a 09:45 **Opening**

Joao Miranda de Sousa. Garrigues

09:45 a10:45 **Knockoffs: Inspiration or copy?**

Modesto Lomba. Fashion Designer. Chairman of the "Asociación de Creadores de Moda de España" (ACME)

Helena Rohner. Jewellery designer

Marisa Santamaría. Communications director of "Istituto Europeo di Design" (IED). Trends analyst, El País.

Cristina Mesa. Garrigues

10:45 a 11:45 **Creating a global brand**

Borja Oria. Director. Head of Retail&Consumer. Arcano Investment Banking. Chairman ACOTEX

Rosa Tous. Institutional relations manager at TOUS

Celia Sueiras. Garrigues

11:45 a 12:15: **Coffee break**

12:15 a 13:15: **Fashion in the social media and in the blogosphere**

Adolfo Corujo. Partner and Managing Director of Llorente y Cuenca

Beatriz Moreno de la Cova. Blogger, El País

Teresa Sádaba. . Director of Universidad de Navarra- ISEM Fashion Business School

Carolina Pina. Garrigues

13:15 a 14:15: **Parallel trade/ Counterfeits 2.0**

José Carlos Cano. Chairman of Foro Europa Ciudadana

Mónica Dopico. Chief Inspector of the Intellectual Property Crimes section of the National Police

José Antonio Moreno. General Director of the "Asociación Nacional para la Defensa de la Marca" (ANDEMA)

Dulce Miranda. Garrigues

Isabel Pascual de Quinto. Garrigues

14:15 a 14:20: **Closing**

Joao Miranda de Sousa. Garrigues

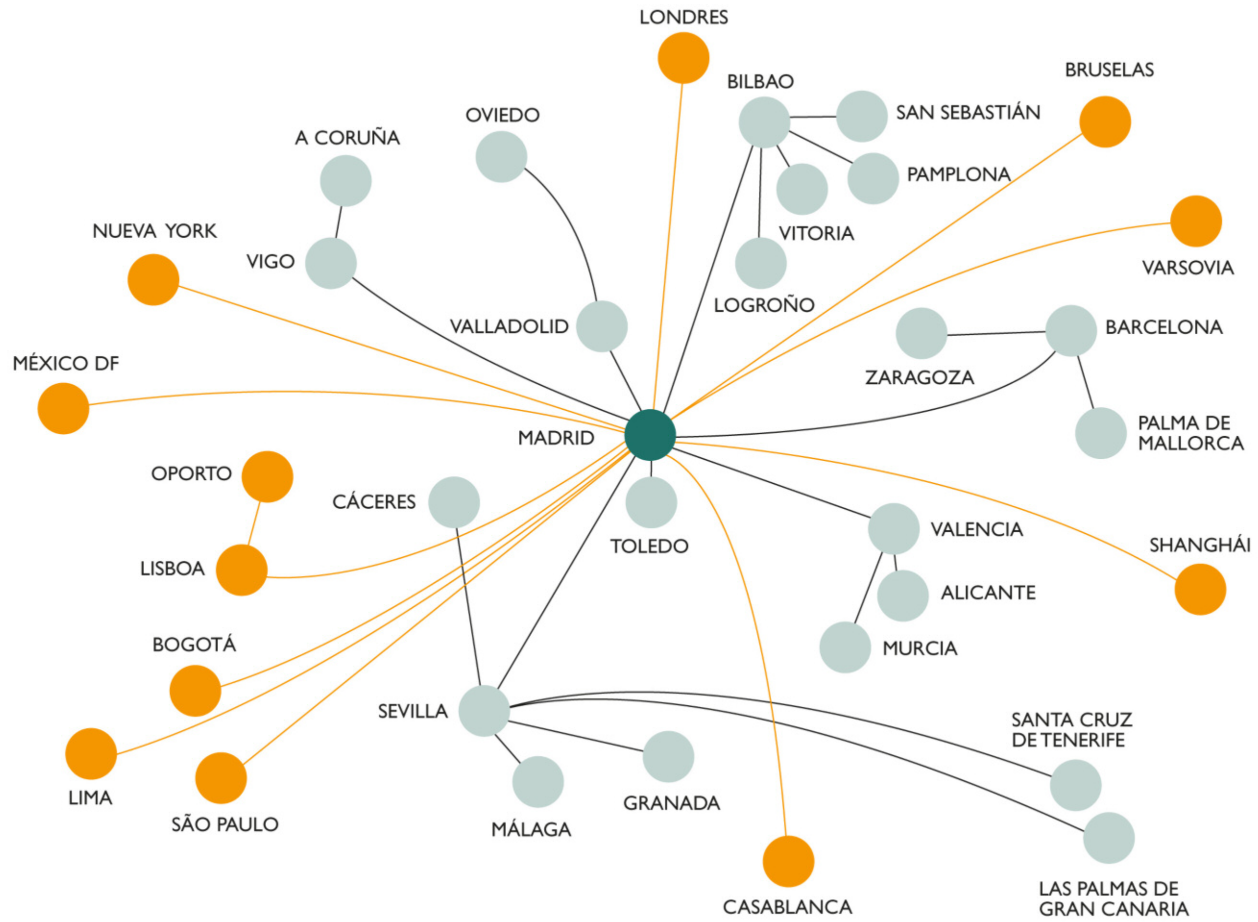
Friday, May 23, 2014. From 9:30 to 14:20 CTM

AUDITORIO GARRIGUES - Hermosilla, 3 - 28001 Madrid

RSVP

Estefanía Ibáñez : e.ibanez.flor@garrigues.com

Garrigues offices network



Some call it **innovation**
We call it **talent**

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Mª Teresa Cuberta is a Partner in the Litigation and Arbitration Department at Garrigues' Barcelona office, where she has worked since 2005, after working at two other firms, having started her professional career back in 1992.

She specializes in legal defense and case management in civil and corporate/commercial litigation both before the courts and in arbitration proceedings conducted by renowned institutions. In particular, she specializes in litigation relating to civil and corporate/commercial contracts (distribution, agency, franchise, banking agreements, etc.), unfair competition, corporate disputes, company sale and purchases, noncontractual liability, enforcement of foreign rulings, etc.

She is also specialized in advising companies in distress, from both creditor and debtor perspectives, taking in both the pre-insolvency phase and the insolvency proceedings themselves.

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Beatriz has over eight years of experience in providing advice on Corporate Law matters within the framework of business acquisitions, structural changes and joint ventures, as well as regards ongoing corporate services and business contracts, with national and international scope. Beatriz is an enthusiast of photography and graphic arts, having a special interest on the advertising sector.

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Ana holds a Bachelor's degree in Law and Master in Bussiness Law from ESADE. Her practice has been always focused on labor law. She provides legal advice from Garrigues Labor Department on hiring employees, dismissals, restructurings, outsourcing of services, social security and occupational risk prevention, among others. She has also occasionally published some articles on labor matters in newspapers and taught classes on labor law.

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Mónica can boast over ten years' experience of providing tax advisory services to not-for-profit entities and of corporate and personal tax planning. A regular speaker at tax forums, she has published widely on tax-related matters. Before joining Garrigues, she worked in the field of communication and public relations.

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Cristina specializes in Intellectual Property law. She has focused her academic studies in the fashion field through a Master in Management of Fashion and Luxury Companies in Milan, and she has also attended a Fashion Law course in the Barcelona Bar Association.

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Anna has just started her professional career at the commercial department. Previously, she has focused her studies in the international area, by cursing a Certificate in International Law, both in Geneva and London. Likewise, she has a strong interest in arbitrage, which motivated her to participate on 2013 at the international competition of arbitrage and commercial law, organized by the Commercial International law Committee of the United Nations jointly with the Carlos III University of Madrid.

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GARRIGUES
Some values
are always
in fashion
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