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Smarten *up*

K&L Gates' Alex Dunlop takes you through wearable technology and the importance of patents.

THE FOCUS ON intellectual property in the clothing and footwear industries has traditionally been on trade marks, designs and copyright. However, this is changing, especially when it comes to wearable technology. It is critical that patents are not forgotten, especially when technology is a big part of your products.

Businesses in the fashion industry invest considerable time and resources in developing new products and processes, and that investment is often magnified when technology is involved. Patents can be used to protect your inventions from unauthorised use and maintain the competitive edge your inventions give you in the market. Patent protection in certain aspects of shoe construction has been used by shoe manufacturers for a number of years. Developed appropriately, patents can outlast the fashion life cycle and be valuable assets that can be sold, encourage investment in your business or generate an income stream through licensing.

On the flip side, businesses need to be careful not to infringe the patent rights of third parties, as the consequences for doing so can be crippling.

What do patents protect?

Broadly speaking, patents protect how something works or is manufactured, rather than how a product looks. In the fashion industry, patents provide the advantage of protecting the technology underlying a product, rather than its visual appearance. In an industry where so much else is subject to changes in seasons and trends, this can be of significant long term value.

Patents can be granted for textiles, such as “smart” fabrics which provide improved performance over traditional fabrics (although it is worth noting that Nylon was patented in the 1930s!). Compression garments are another example. While the visual appearance of compression tights may change from season to season, the underlying technology (such as the way in which a garment is manufactured, for example using 3D knitting techniques) can be pro-

tected. The integration of “wearables” into clothing and footwear is sure to provide the world with new, useful inventions for years to come.

What makes a patent valid?

The three major requirements for patentability are usefulness, newness and inventiveness. Put simply, patents will only be granted for something that is useful, and is new and inventive when compared to what already exists. In Australia, a second class of patents (which is likely to be phased out in the near future) known as “innovation patents” require a lower standard of inventiveness, and so can be suitable for protecting incremental developments in products which do not meet the standard of “inventiveness”.

The requirement for the invention to be new is particularly important. This means that an inventor must not publicly disclose their invention before a patent application is filed, unless appropriate confidentiality arrangements are put in place beforehand. Consequently, negotiations with potential investors or business partners need to be handled appropriately. An inventor must also not use their invention publicly or sell the subject of the invention. Otherwise, their own use of their invention can prevent them from obtaining patent protection.

How long do patents last?

Standard patents have a maximum life of 20 years provided annual renewal fees are paid, meaning patents can considerably outlive the fashion cycle. Again, this reinforces the suitability for patents to protect underlying technology, rather than physical appearance. Innovation patents have a shorter maximum life of eight years, and so may be more appropriate for shorter-lived products.

What rights does a patent owner have?

Patents are exclusive rights – they allow the patent owner to exploit the patent and prevent others from doing so without the owner’s permis-

sion. That exclusive right can be licensed to third parties or sold, making patents a valuable asset to create revenue and drive investment. In the case of collaboration with third parties (especially common in the case of “wearables”), agreeing on the ownership of patent rights, and whether any licences are required, should be addressed at the outset.

Getting your patent strategy right

Designers should give proper consideration to how the patent system can be used to benefit their business at the outset. A proper patent strategy can then be used to maximise return on investment. ■

For more information about patent applications and enforcement, please contact Alex Dunlop at K&L Gates alex.dunlop@klgates.com. This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

