



Fashion Companies: A Step-By-Step Guide to Protection

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Protecting the Brand

In fashion, a company's brand, or its trademark, is the most important part of the company's image. Companies need to take branding very seriously because the clothing itself doesn't have as much meaning without the brand that is attached to it. This protection is the easiest, and often the only, intellectual property protection available for clothing companies.

Protecting the Copyright

Copyright protection is often not available for apparel companies' primary products—clothing. The design of clothing is considered functional and generally does not fall under the copyright protection laws. The copyright laws protect the way that an idea is put into a tangible form, which means that apparel companies can sometimes protect drawings or other physical representations of their designs, but they cannot get protection solely for the actual design of the garment.

A graphic or logo used on a t-shirt is often considered separable from the garment, which means that the design or logo on the shirt is protectable. Similarly, the design used on fabrics—florals, plaids or other designs—are protectable. Jewelry can be protected, but it has to be unique and nonfunctional for protection to apply. A belt buckle that can be removed from the belt with the belt still working may be considered ornamental and nonfunctional, and therefore, protectable.

Patent Options for Apparel Companies

- Utility
- Business Method
- Design

Utility Utility patents may be available to apparel companies. Utility patents cover items that are functional, and in some cases, clothing designs may be functional. For example, creating a nontear material for motorcycle jackets so that the fabric does not tear when someone falls may be eligible for utility patent protection for the way the fabric is woven or made.

Business Method A business method patent is an option for some apparel companies. For instance, if a company comes up with a new way to sell a product online, that process may be eligible for a business method patent. While business method patents may prove to be worthwhile, recent court cases have muddied the waters with regard to the strength of the protection, and the patent that issues may not be enforceable against third parties.

Design Patent Another option is a design patent. For example, Crocs has a patent on the look of its shoes, which is fairly common among shoe companies. However, since it can take a very long time for a patent to issue, obtaining a design patent for a design that is not on the market for more than one season, may be useless, as the style may be off the market before a patent ever issues.

Nonetheless, patents are very useful for companies such as shoe wear and accessory companies that do not anticipate a major change to the design of their product over a three- to five-year, or even longer, period of time. This tool is useful against third parties that may be using something that is colorably similar to a product that has already been patented.



Trade Dress

Another type of protection is trade dress. Trade dress can protect the look of a retail store or boutique that a company may be setting up. There is also protection available for product packaging or configuration. A perfume bottle may be protectable if the look of the bottle is unique, for example. More and more, clothing companies are relying on trade dress to protect innovative designs, from the shape of a shoe heel to the design of a hand bag.

Selecting A Brand

Companies need to create a brand that is unique to the company and will identify the source of products. It's also important to select a trademark that will leave a positive impression with the consumer, rather than something that people will view negatively or that leaves them unsure of the nature of the product.

Another important element in creating a brand is ensuring that the new mark won't infringe on someone else's rights. The mark cannot be identical, obviously, but it also cannot be similar enough that it will be confusing to consumers with regard to an existing mark. If a company elects not to proceed with a trademark-availability search, it can end up with a cease-and-desist order after the products have entered the marketplace. It's possible to end up with a large amount of inventory that would have to be re-labeled in order to be sold. In some cases, there may also be liability for damages if substantial sales of the products bearing the infringing mark were already sold.

Biggest Hurdles

Fashion companies often have one primary brand that they use on everything they produce, but they may create an item with a seasonal or temporary name or brand. Sometimes it's not clear how long that name or brand will be used, especially if the trademark is not the primary brand. The biggest

decision here is how to know whether a brand or line name should be protected when the time frame for use is unknown. For company owners who imagine a product being one that can return for several years, a trademark filing can be useful, but for something that the company envisions marketing for a single season, a trademark filing may not be worth pursuing given the cost and length of time it takes to register a mark.

Securing trademark protection is not enough to protect a brand. A brand owner bears the burden of policing its mark and searching for people who are infringing the mark. Not being proactive in checking for infringers will give the false impression that the trademark owner is not all that interested in protecting its mark. In some cases, the trademark owner can lose its mark if it never pursues enforcement against third-party uses of the mark.



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