

3-13-2013

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### Recommended Citation

Olausen, Brooke. "Design Patents: Fashion's Next Big Thing?" *Intellectual Property Brief* 4, no. 2 (2012): 62-63.

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## Design Patents: Fashion's Next Big Thing?

# DESIGN PATENTS: FASHION'S NEXT BIG THING?

*by Brooke Olausson*

The following blog post was originally published on [www.ipbrief.net](http://www.ipbrief.net) on October 22, 2012.

Design patents have gotten a serious makeover. The once-lame and oft-forgotten design patent is shaping up to be a stealthy and potent tool for intellectual property protection. And they are not just for the tech industry either. Canadian exercise-outfitter Lululemon's recent lawsuit against fashion giant Calvin Klein signals a new trend: design patents have hit fashion, and it looks like they are here to stay.

Lululemon has slapped Calvin Klein (and its manufacturer G-III Apparel Group) with a lawsuit over yoga pants. It appears Calvin Klein was selling a similar version of Lululemon's popular, \$98 "Astro pant" for about two-thirds the price. Yet, isn't knocking-off looks fair game in fashion? What's the big deal? Think of companies like Target and Wal-Mart: underselling is their bread and butter. In this case, though, there is a difference – Lululemon has three design patents on the piece of clothing Calvin Klein knocked-off. Whoopsies, CK.

The focus of the controversy centers on Lululemon's design patent for its pants' swooshy, three-panel waistband. The design offers greater flex and comfort than normal yoga pants. Lululemon has one design patent on its waistband and two on the overall pant design. Based on these patents, Lululemon claims Calvin Klein has illegally infringed on its design patents. Weird, though, because typically clothing design isn't patentable.

Design patents typically have been looked upon as fluffy – weak, probably an afterthought, and possibly not worth the trouble. This is especially true for clothing. Unlike its power-player sibling, the utility patent (for functional, nonobvious and novel inventions), a design patent applies to ornamental designs only. In order to qualify for a design patent, an article or component of clothing has to be both novel and nonobvious. This is the reason why most fashions don't make it to the level of design-patent eligibility; there are only so many ways to make

clothing (i.e., most designs are recycled).

Granted, there are some fashion design patents out there. Nike, Under Armour and Not Your Daughter's Jeans, for example, have all successfully protected the construction of their popular clothing with these types of patents. Lululemon's foray into design patents seems to mark a more expansive phase in fashion-design-patent eligibility. Yet, what Lululemon is claiming to be patentable is a bit suspect. Is a curvy waistband a novel creation? As of now, the Patent and Trade Office says it is, at least for Lululemon's waistband. This could change if Calvin Klein chooses to respond to Lululemon's complaint by contesting the Astro pants' eligibility for design-patent protection. However, it looks like CK decided not to fight back. After Lululemon filed its complaint, CK took down its "infringing" pants from its website, and it hasn't offered a response to Lululemon's complaint. All signs point to victory for Lululemon.

Lululemon's successful protection of its look demonstrates the attractiveness of design patents for fashion companies. Instead of competing on price with other companies, Lululemon can secure its market through the law. Should consumers be wary? If Lululemon's wavy waistband is patentable, what's next? Of course, there is a place for design patents in fashion, but the entry bar should be set higher than it seems to be now, as it is with utility patents, because the resulting protection affords the patent owner a monopoly on its product. No doubt fashion companies will be designing with patentability in mind, but there might also be an upside for the consumer in this new era as well. Fashion could well be pricier, but hopefully the chase for the design patent will also result in new, more innovative looks.

FIG. 1

