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March 2015

## Legislation

There was no new legislation introduced.



## Litigation

[Lyden v. Adidas America, Inc. et al](#), 2015 U.S. Dist. LEXIS 21004 (D. Ore. Feb. 20, 2015). Synopsis: A federal court denies a preliminary injunction against Adidas' use of the Adidas Springblade shoes, which Lyden claimed violate his patent and trademark rights.

[New Balance Athletic Shoe, Inc. v. Converse, Inc.](#), 2015 U.S. Dist. LEXIS 19244 (D. Mass. Feb. 18, 2015). Synopsis: A federal court denies New Balance's motion to expedite proceedings in the International Trade Commission (ITC) to the District Court and allows Converse's cross motion to stay litigation pending the resolution of the ITC action, in connection with the trademark infringement claim involving New Balance's PF Flyers shoes and Converse's Chuck Taylor All Star shoes.

[Lyden v. Adidas America, Inc. et al](#), 2015 U.S. Dist. LEXIS 15867 (D. Ore. Feb. 10, 2015). Synopsis: A federal court grants Adidas' motion to dismiss trademark infringement claims without prejudice and grants Adidas' request for a stay in answering patent infringement claims brought by Lyden against Adidas with respect to Lyden's Springshoe marks and patents



## USPTO

*Utility patents issued in the month of February:*



Pat. No.	Title	Assignee
<a href="#">8,960,711</a>	<a href="#">Ski Boot</a>	K-2 Corporation
<a href="#">8,959,959</a>	<a href="#">Knitted Component w/ Monofilament Upper</a>	NIKE, Inc.
<a href="#">8,959,804</a>	<a href="#">Footwear Sole Sections w/ Bladders</a>	None
<a href="#">8,959,803</a>	<a href="#">Footwear w/ Two Tongues</a>	NIKE, Inc.
<a href="#">8,959,802</a>	<a href="#">Footwear, Stretchable &amp; Articulated Sole</a>	NIKE, Inc.
<a href="#">8,959,801</a>	<a href="#">Impact Force Ankle and Foot Protector</a>	None
<a href="#">8,959,800</a>	<a href="#">Footwear w/ Flat Knit Upper Construction</a>	NIKE, Inc.
<a href="#">8,959,799</a>	<a href="#">Shoe Having Lace Fitting Structure</a>	Asics Corporation
<a href="#">8,959,798</a>	<a href="#">Shoe Sole Element</a>	Zurinvest AG
<a href="#">8,959,797</a>	<a href="#">Custom Article of Footwear and Method</a>	None
<a href="#">8,959,796</a>	<a href="#">Footwear</a>	None
<a href="#">8,959,795</a>	<a href="#">Flip Flop and Slipper in One/Convertible</a>	None
<a href="#">8,959,723</a>	<a href="#">Adjustable and Vented Apparel Closure</a>	Trek Bicycle Corporation
<a href="#">8,958,901</a>	<a href="#">Automated Manufacturing of Shoe Parts</a>	NIKE, Inc.
<a href="#">8,955,237</a>	<a href="#">Detachable PostOperative Protective Device</a>	None
<a href="#">8,950,090</a>	<a href="#">Article of Footwear w/ Adjustable Cleats</a>	NIKE, Inc.
<a href="#">8,950,089</a>	<a href="#">Heat Retention and Insulation System</a>	Keen, Inc.
<a href="#">8,950,088</a>	<a href="#">Footwear w/ Tongue Having Holes</a>	NIKE, Inc.
<a href="#">8,950,087</a>	<a href="#">Footwear w/ a Customizable Upper</a>	NIKE, Inc.
<a href="#">8,950,086</a>	<a href="#">Foot Platform</a>	BOT of LeLand Stanford Jr Univ.
<a href="#">8,950,085</a>	<a href="#">Shoe Sole, Allows Breathability of the Foot</a>	Bibo S.p.A.
<a href="#">8,943,713</a>	<a href="#">Shoe w/ Concealed Heel Compartment</a>	None
<a href="#">8,943,712</a>	<a href="#">Removable Attachment for Footwear</a>	None
<a href="#">8,943,711</a>	<a href="#">Footwear w/ a Water Repelling Member</a>	NIKE, Inc.
<a href="#">8,943,710</a>	<a href="#">Pedicure Protection Device and System</a>	BvonM, LLC
<a href="#">8,943,709</a>	<a href="#">Footwear w/ Columns, Fluid-Filled Bladders</a>	NIKE, Inc.
<a href="#">8,943,708</a>	<a href="#">Anti-Fatigue Ply Rib Construction</a>	TBL Licensing LLC
<a href="#">8,943,707</a>	<a href="#">Waterproof and Vapor-Permeable Insole</a>	GEOX S.p.A.

*Patent applications published in the month of February:*

Pub. App. No.	Title	Applicant
<a href="#">20150052783</a>	<a href="#">Spiraled Heel for a Shoe</a>	Lozell Stiles
<a href="#">20150052782</a>	<a href="#">Sole and Article of Footwear</a>	Reebok International Limited
<a href="#">20150052781</a>	<a href="#">Cleated Footwear w/ Flexible Cleats</a>	NIKE, Inc.
<a href="#">20150052780</a>	<a href="#">Internally Illuminated Footwear Component</a>	Roy Robert Smith, III
<a href="#">20150052779</a>	<a href="#">Disposable Shoe Buddy</a>	Yvonne Alvarez
<a href="#">20150052778</a>	<a href="#">Material for Shoe Upper</a>	adidas AG
<a href="#">20150052777</a>	<a href="#">Cradle Heels</a>	James Edward Jennings
<a href="#">20150047231</a>	<a href="#">Sole Structure Masters, Molds, Indicia</a>	NIKE, Inc.
<a href="#">20150047230</a>	<a href="#">Article w/ Tensioning System</a>	NIKE, Inc.
<a href="#">20150047229</a>	<a href="#">Shoe w/ Elastically Flexible Extension</a>	Quiksilver, Inc.
<a href="#">20150047228</a>	<a href="#">Ankle Strap Footwear for Slipper/Sandal</a>	Patrick Pernia
<a href="#">20150047227</a>	<a href="#">Performance Footwear</a>	Under Armour, Inc.
<a href="#">20150047226</a>	<a href="#">Forefoot Wedge Insert for Footwear</a>	Marie Smirman
<a href="#">20150047225</a>	<a href="#">Footwear w/ Knitted Component for Heel</a>	NIKE, Inc.
<a href="#">20150047224</a>	<a href="#">Shoe w/ Carbon Fiber Composite</a>	Jing Zhao
<a href="#">20150047223</a>	<a href="#">Shoe with Hinged Sole</a>	Buckney Shoes B.V.
<a href="#">20150047222</a>	<a href="#">Article of Footwear w/ Adjustable Sole</a>	NIKE, Inc.
<a href="#">20150047221</a>	<a href="#">Orthotic Insert Device</a>	Jason R. Hanft
<a href="#">20150040440</a>	<a href="#">Toe Protector for Athletic Footwear</a>	ProtecTozz LLC
<a href="#">20150040439</a>	<a href="#">Toe Protector for Athletic Footwear</a>	ProtecTozz, LLC
<a href="#">20150040438</a>	<a href="#">Method for Making Cleated Plate</a>	NIKE, Inc.
<a href="#">20150040437</a>	<a href="#">Easy-On Talking and Detection Shoes, Kids</a>	Joseph Ibetoh
<a href="#">20150040436</a>	<a href="#">Article of Footwear</a>	Wolverine World Wide, Inc.

<a href="#">20150040435</a>	<a href="#">Sole Structure for Article of Footwear</a>	NIKE, Inc.
<a href="#">20150040434</a>	<a href="#">Shoe w/ Magnetic Attachment Mechanism</a>	Cat Perkins LLC
<a href="#">20150040433</a>	<a href="#">Orthopedic Shoe to Prevent Excess Pressure</a>	OPED AG
<a href="#">20150040432</a>	<a href="#">Footwear w/ a Midsole Structure</a>	NIKE, Inc.
<a href="#">20150040431</a>	<a href="#">Footwear w/ a Knitted Component</a>	NIKE, Inc.
<a href="#">20150040430</a>	<a href="#">Footwear Lacing System</a>	NIKE, Inc.
<a href="#">20150040429</a>	<a href="#">Article w/ Tensioning System</a>	NIKE, Inc.
<a href="#">20150040428</a>	<a href="#">Footwear w/ Extruded Components</a>	Reebok International Limited
<a href="#">20150040427</a>	<a href="#">Sock Covering</a>	Kenneth B. Sanders
<a href="#">20150040426</a>	<a href="#">Footwear w/ Bladder and Method</a>	NIKE, Inc.
<a href="#">20150040425</a>	<a href="#">Air Exhaust Outsole for Safety Footwear</a>	Linear International Footwear Inc.
<a href="#">20150040424</a>	<a href="#">Sole Device w/ Air Cushion Function</a>	Chih-Fang Lo
<a href="#">20150033588</a>	<a href="#">Footwear w/ Responsive Element - Kicking</a>	William Lai
<a href="#">20150033587</a>	<a href="#">Footwear w/ a Ball Contacting Surface</a>	NIKE, Inc.
<a href="#">20150033586</a>	<a href="#">Ski Boot</a>	Calzaturificio S.C.A.R.P.A. S.p.A.
<a href="#">20150033585</a>	<a href="#">Soccer Cleat w/ Leg Protective Structure</a>	Tracy C. Otus
<a href="#">20150033584</a>	<a href="#">Accessorizable Shoe and Accessories</a>	Beverly Ferguson
<a href="#">20150033583</a>	<a href="#">Articles of Footwear</a>	Wolverine World Wide, Inc.
<a href="#">20150033582</a>	<a href="#">Polymer Shoe</a>	Arthur J. Colpack
<a href="#">20150033581</a>	<a href="#">Footwear w/ Support Assembly</a>	NIKE, Inc.
<a href="#">20150033580</a>	<a href="#">Shoe w/ Fibers in Outsole Surface</a>	Dynasty Footwear, Ltd.
<a href="#">20150033579</a>	<a href="#">Footwear w/ Support Assembly</a>	NIKE, Inc.
<a href="#">20150033578</a>	<a href="#">Educational Method for Identifying R/L</a>	Lisa Ann Hodson
<a href="#">20150033577</a>	<a href="#">Differing Void Cell Matrices - Sole Support</a>	Skydex Technologies, Inc.

*Design patents issued in the month of February:*

Pub. App. No.	Title	Applicant
<a href="#">D722,761</a>	<a href="#">Footwear Upper</a>	Ariat International, Inc.
<a href="#">D722,760</a>	<a href="#">Golf Shoe Upper</a>	Acushnet Company
<a href="#">D722,759</a>	<a href="#">Golf Shoe Upper</a>	Acushnet Company
<a href="#">D722,758</a>	<a href="#">Golf Shoe Upper</a>	Acushnet Company
<a href="#">D722,757</a>	<a href="#">Footwear Insole</a>	VCG Holdings Ltd.
<a href="#">D722,756</a>	<a href="#">Footwear Insole</a>	VCG Holdings Ltd.
<a href="#">D722,755</a>	<a href="#">Insole Bottom</a>	VCG Holdings Ltd.
<a href="#">D722,754</a>	<a href="#">Shoe Midsole</a>	VCG Holdings Ltd.
<a href="#">D722,753</a>	<a href="#">Shoe Outsole</a>	NIKE, Inc.
<a href="#">D722,752</a>	<a href="#">Sole and Outsole Assembly for Ski Boot</a>	K-2 Corporation
<a href="#">D722,751</a>	<a href="#">Toe End Outsole Element for Ski Boot</a>	K-2 Corporation
<a href="#">D722,750</a>	<a href="#">Shoe</a>	Reebok International Limited
<a href="#">D722,749</a>	<a href="#">Sole for Ski Boot</a>	K-2 Corporation
<a href="#">D722,748</a>	<a href="#">Shoe Sole</a>	Dynasty Footwear, Ltd.
<a href="#">D722,747</a>	<a href="#">Footwear</a>	Crocs, Inc.
<a href="#">D722,746</a>	<a href="#">Sandal</a>	Edkami Inc.
<a href="#">D722,429</a>	<a href="#">Upper of a Footwear Article</a>	Salomon S.A.S.
<a href="#">D722,428</a>	<a href="#">Shoe Sole</a>	NIKE, Inc.
<a href="#">D722,427</a>	<a href="#">Shoe Bottom</a>	Under Armour, Inc.
<a href="#">D722,426</a>	<a href="#">Shoe</a>	Reebok International Limited
<a href="#">D722,425</a>	<a href="#">Shoe</a>	NIKE, Inc.
<a href="#">D722,424</a>	<a href="#">Post-Operative Shoe</a>	Propet Global Limited
<a href="#">D722,423</a>	<a href="#">Orthotic Footwear</a>	None
<a href="#">D722,422</a>	<a href="#">Boot</a>	None
<a href="#">D722,226</a>	<a href="#">Shoe Upper</a>	NIKE, Inc.
<a href="#">D722,225</a>	<a href="#">Shoe Upper</a>	NIKE, Inc.
<a href="#">D722,224</a>	<a href="#">Shoe Upper</a>	NIKE, Inc.
<a href="#">D722,223</a>	<a href="#">Shoe Upper</a>	NIKE, Inc.
<a href="#">D722,222</a>	<a href="#">Insole</a>	Schawbel Technologies LLC

<a href="#">D722,221</a>	<a href="#">Shoe Bottom</a>	<b>Under Armour, Inc.</b>
<a href="#">D722,220</a>	<a href="#">Shoe Midsole</a>	<b>NIKE, Inc.</b>
<a href="#">D722,219</a>	<a href="#">Footwear</a>	<b>None</b>
<a href="#">D722,218</a>	<a href="#">Cover for Footwear</a>	<b>None</b>
<a href="#">D721,923</a>	<a href="#">Beverage Mug</a>	<b>Target Brands, Inc.</b>
<a href="#">D721,884</a>	<a href="#">Shoe</a>	<b>NIKE, Inc.</b>
<a href="#">D721,883</a>	<a href="#">Footwear Cleat</a>	<b>Pride Manufacturing Company, LLC</b>
<a href="#">D721,882</a>	<a href="#">Footwear Insole</a>	<b>VCG Holdings Ltd.</b>
<a href="#">D721,881</a>	<a href="#">Insole</a>	<b>MSD Consumer Care, Inc.</b>
<a href="#">D721,880</a>	<a href="#">Footwear Insole</a>	<b>Horizon Footwear LLC</b>
<a href="#">D721,879</a>	<a href="#">Shoe Sole</a>	<b>NIKE, Inc.</b>
<a href="#">D721,878</a>	<a href="#">Shoe Sole</a>	<b>None</b>
<a href="#">D721,877</a>	<a href="#">Outsole Bottom w/ Foot Measuring System</a>	<b>Munro &amp; Company, Inc.</b>
<a href="#">D721,876</a>	<a href="#">Pair of Golf Boots</a>	<b>None</b>

*Trademarks published in the month of February:*

*(Note: 0 = design mark only)*

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## General News

### **"ArchPort® Under" Powers Personal Electronics** **The Herald** **March 4, 2015**



SlotFlop Ventures plans to launch new wearable solutions in 2016. The Company will introduce innovative hands-free wearable solutions, powered by ArchPort.

The footwear will enable wireless and ubiquitous technologies, by providing personal electronics with power, in a convenient hands-free format.

ArchPort® is the first footwear brand to integrate compartments in the sole which are accessible without removing one's shoes. Consumers can purchase the SlotFlops® style sandals today (launched in April 2013), with new models to launch by summer. The sandal product was recently featured in German, English and Italian media, where the London Daily Mail referred to them as the product James Bond would wear if he was a surfer, and as a "flipping good idea."

Founder and inventor Matt Potts has suggested the use of GPS and other electronics in footwear for over 10 years as the first "footwear technology integrator." ArchPort® continues to explore and implement wearable solutions, integrating the latest technologies as they are ready for market. Today you can purchase their products on the web sites Archport.com and SlotFlops.com and through select worldwide retailers.

SlotFlop Ventures products are patented (2 issued patents) and trademarked. Athletic footwear and sandal products under its patents were featured on Good Morning America, were a winner of Invent Now America®, and have appeared in many other news and magazine articles over the years.

### **Can GTX Corp (GTXO) be the Next Big Step in Wearable Technology?** **Equities.com** **February 26, 2015**

The wearable technology market is one that's been a fixation for the tech sector of late. Efforts to carry forward the spread of technology integration into things like glasses, watches, or footwear are transitioning into the mainstream, and it's a play that most market watchers see as the next big step.

One intriguing avenue of that wearable tech revolution is coming from GTX Corp (GTXO). The company specializes in GPS devices for shoes that help track people with cognitive disorders among a broad set of applications.

On Tuesday, John Ford, a writer and 30-year veteran of the investing world, produced a lengthy research piece on the company that took a decidedly bullish stance on GTX Corp. Equities.com got a chance to talk with GTX Corp's CEO, Patrick Bertagna, about the piece and his company's future in the wearable tech market.

EQ: The piece by John Ford describes him doing about 300 hours of due diligence and sitting down to talk with you at length. What can you tell us about the research process that Mr. Ford went through and how you were involved?

Patrick Bertagna: It was extensive. I started with a general overview of the company; that was

probably a good two- to three-hour conversation. We subsequently had about a dozen very lengthy conversation, several hours each, and then probably another dozen or so shorter conversations.

In addition to that, we gave him a list of customers, vendors, and advisers which he was able to schedule calls with. He conducted, from what I gather, anywhere between 30- to 45-minute interviews with each of them.

Collectively he spent a tremendous amount of time and really dug deep into the whole business, the market size, the product, the efficacy of the product, and so forth. I give him a lot of credit. He put a lot of man hours into this.

EQ: No stone left unturned.

Patrick Bertagna: Absolutely not.

EQ: He also talks about the portfolio of patents that GTX Corp currently holds and the value of that portfolio. Could you talk a little bit about what portions of the technology specifically have been patented and how these patents protect the company?

Patrick Bertagna: The IP was a big focal point for Mr. Ford and rightfully so. Small companies typically don't have an extensive IP portfolio. Most of them don't even have a portfolio. They may have a patent or patent pending or trademark. We have amassed a large quantity of patents, between licensed and what we've invented on our own, we're over 80. It's certainly an extensive or comprehensive part of our overall value.

As more people or companies want to get into the wearable tech space, our IP portfolio gives us certain competitive advantages, especially if younger smaller players want to come in. And it makes us quite an attractive proposition for the larger companies. The Apples (AAPL) , Googles (GOOG) , Adidas (ADDDF) , and Under Armors (UA) of the world that are already well entrenched in the wearable technology space. By having such an extensive portfolio, having specialized both on our footwear platform and on the core location-based technology, really gives us some significant protection and value.

EQ: As you mentioned, wearable technology has been a real buzz phrase in the tech sector of late. There's a lot of major players in the space, including, like you said, Apple and Google. How do you see the wearable technology market growing in the next 5 to 10 years?

Patrick Bertagna: I see it being explosive. Most of the analysts out there are projecting multibillion dollar year over year growth. Some people are talking about this reaching \$100 billion, even \$200 billion in the next five years.

The analysts can pontificate on the validity of those numbers all day long, but, at the end of the day, we can just break it down and distill it down to the simple notion of empowering human beings with technology. We've already seen that paradigm shift when everything went to our smartphones over the last 10 years. I think this is just the next evolutionary step, to meld a lot of that technology inside of your everyday wearables whether it's shoes, jackets, hats, or T-shirts. The bottom line is: why not incorporate all of this great technology and meld it seamlessly into your lifestyle. I see it doing nothing but growing over the next decade.

EQ: The last time we talked was in mid-December when we did an interview that discussed the commercial launch of Smart Soles®. What can you tell us about that launch and how it has gone in the first two and a half months?

Patrick Bertagna: It has gone great. The acceptance and the traction have been superb. We simultaneously launched in the US and Canada and parts of Europe, specifically Switzerland, Austria, and parts of Germany. Since then we've opened up several other countries. Our international distributors have already started placing their reorders and annual forecasts. Overall, we are very

pleased with the initial launch, and we're on a solid northbound trajectory.

## **New Nike Patent May Let Consumers Design Their Own Shoes Using Virtual Reality The Drum February 17, 2015**

A Nike patent published on 3 Feb by the United States Patents and Trademark Office shows how the company's design technology would let users design their own shoes through the use of virtual reality. In the patent, images show a person wearing goggles as they draw on a blank shoe with something that looks like a pen. One section of the diagram read; "User designs article using augmented reality design system -> Design is received by proprietor -> Article is manufactured according to user's design."

The shoemaker's NIKEiD website already lets users design their own shoes by choosing different styles and colors, but this would provide a drastic advancement when it comes to the customization of footwear.

It is currently uncertain what the designing software will be used for - it may only be available to Nike designers to create prototypes since the patent does not specify what the technology will be used for in the future.

## **Couture Counsel: 4 Hot Trends in Fashion Law Law 360 February 13, 2015**

With designers showing off the latest trends in fashion in New York this weekend, Law360 takes a look at the latest trends in fashion law: Privacy and patent issues for wearable technology, labor problems for apparel retailers, the pitfalls of social media advertising, and more.

### **Wearable Technology**

Without question, the most discussed issue in the world of fashion law right now is wearable tech - gadget-infused apparel and accessories that blur the line between fashion and mobile computing.

It started out with tech companies offering products like FitBit, Google Glass and the iWatch, but dedicated fashion and apparel brands are now getting in the mix, often by partnering with existing tech firms.

Case in point: Tory Burch launched a branded FitBit this summer, then Ralph Lauren announced it would sell an athletic shirt that measures vital signs by partnering with a Canadian startup called Omsignal. Fossil, which makes watches for designer Michael Kors, signed a deal with Google and Intel this summer to develop wearable tech.

"What you're really seeing now is a true crossroads of fashion and technology, where beautifully designed products are adopting technological advances," said Erica D. Klein, a partner with Kramer Levin Naftalis & Frankel LLP.

But with next-generation apparel comes next-generation legal issues, many of which are set to become major questions for fashion brands as wearable tech continues to enter the mainstream over the next year.

A big one is data security and privacy. Every apparel company with any kind of retail operation knows the dangers of a data breach and the loss of private customer information like credit card numbers, but wearable tech adds all kinds of new information to the rolls - health stats, physical location, and video and audio recordings.

With huge data breaches continually in the headlines these days, a designer or apparel company that throws its name and logo on a third-party tech firm's piece of wearable technology needs to consider what new information the gadgets are grabbing - and who'll be held liable if it leaks.

"In creating these partnerships, parties need to ask exactly who's collecting data, especially when we're talking about the designer's name on the product," said Susan Scafidi, the director of the Fashion Law Institute at Fordham University School of Law. "Is there indemnification? Are they jointly liable? They need to know how do they handle [a breach] if it happens."

They also need to consider patent law.

For better or for worse, fashion has long been lightly covered by intellectual property law: trademarks on brand names and logos, some copyrights on certain fabric designs, a design patent here or there, but not much else. That changes when you throw technology into the mix, and fashion brands doing so are going to be increasingly exposed to utility patent infringement claims if they're not careful.

"There are so many patents in all the varying parts of that space," said Michelle Mancino Marsh, the chair of Kenyon & Kenyon LLP's fashion group. "People are dipping their toes in the water and quickly getting electrocuted. It's a dangerous area to wander into without really experienced patent counsel."

### **Labor Law Violations**

Major apparel brands are also major employers, and the next year likely holds a number of developments for fashion labor law.

For starters, at least seven major fashion companies have been hit with class actions in New York state court in recent months accusing them of cheating interns out of pay for work that doesn't provide any academic benefit.

The latest came against Burberry Ltd. late last month, but it followed suits against Kenneth Cole Productions Inc. in December, Gucci America Inc. in November, Calvin Klein Inc. and Marc Jacobs International LLC in October, Oscar de la Renta LLC in September and Coach Inc. in July.

All of the cases accuse the fashion brands of roughly the same thing: violating state labor law by requiring interns to do nonfashion tasks without pay and justifying it with false claims that they were getting "industry experience." Burberry interns, for instance, allegedly washed dishes and served pastries at meetings.

Meanwhile, Abercrombie & Fitch Stores Inc. is in front of the U.S. Supreme Court, urging the justices to affirm an appeals court ruling that said it didn't violate anti-discrimination law when it refused to hire a Muslim teen who wore a headscarf to a job interview. The Equal Employment Opportunity Commission claimed Abercrombie passed on her because her hijab conflicted with the retailer's "look policy," a carefully chosen set of fashion guidelines for store employees.

Though arguably the most high-profile, Abercrombie is far from the only apparel retailer to have such a dress policy. Many in the fashion biz will be keeping an eye on what the justices say about the kinds of "reasonable accommodations" that should be offered by fashion brands with look policies to prospective employees who wear religious attire.

"With retail employees in fashion, there's often a desire to create a total atmosphere, to the extent that some consider the look of the employees to be a kind of trade dress," said Fordham's Scafidi. "A case weighing 'reasonable accommodations' in that context will be quite interesting to see play out."

### **Social Media Advertising**

As much as any industry, fashion has jumped headfirst into digital and social media for advertising and marketing - a move that's posing plenty of new legal challenges.



For instance, according to Kenyon's Marsh, many apparel firms are doing much of their marketing through influential fashion bloggers, and they often offer the writers "goodies" like free merchandise and tickets to elite events to writers. That's likely to cause issues down the road, she said.

"If there isn't disclosure of that, is it false or deceptive advertising? If the consumer isn't aware that this is the only reason this product is being shown?" Marsh asked. "You're not really seeing backlash on that, but it's only a matter of time."

There's similar uncertainty about what's OK on social networks, particularly after the Federal Trade Commission warned Cole Haan Inc. last year for failure to disclose that a trending hashtag on Pinterest was created and spread with inducements of free merchandise. The agency didn't pursue an enforcement action because it had never before weighed in on the subject, but it was a warning shot that federal advertising laws are going to govern the world of social media.

"People were waiting with baited breath on what might happen with Pinterest, and I know everyone was watching what happened with Cole Haan," said Tamara Carmichael, a partner with Loeb & Loeb LLP. "It's definitely something we're talking about with clients big and small."

### **Lack of Design Protection**

The problem isn't new, but it remains as big an issue as ever for the fashion industry: Designs for apparel, footwear and many accessories aren't really covered by any area of American intellectual property law.

The European Union and several other jurisdictions like Japan have specific legal protections known as design rights, but the U.S. lacks an equivalent category of intellectual property rights. Bills have repeatedly been introduced to create one, like the Design Piracy Prohibition Act in 2006, or the Innovative Design Protection and Piracy Prevention Act in 2010. None have come close to passing.

"The most frustrating thing is that here we sit, years later, and nothing has happened," Carmichael said. "It's an issue that's grown with the global expansion of fashion. [Companies] selling into Europe and elsewhere face inconsistent rules, and it's very frustrating that the issue has stagnated."

The lack of progress on the issue has been manifesting in creative legal arguments under existing IP regimes, as brands try to twist, bend and cram the laws they have into something that will replicate a true design right.

Many brands, like high-end sportswear company Lululemon Athletica Inc., have turned to design patents. Lululemon sued Calvin Klein Inc. in 2012 for infringing patents on a set of yoga pants, and it owns dozens of others for bras, tank tops and other workout gear.

"It's being used more and more by U.S. fashion companies these days," said Marsh. "There's a lot more litigation involving design patents, and we're seeing a lot more clients in that space."

Design patents aren't perfect, though: They protect only novel ornamental designs, and they're both expensive and time-consuming to get. Those limitations have sent some brands toward trademark law, claiming particular designs are so connected to their brands that copying them would confuse consumers.

On that front, all eyes are on Converse. The Nike unit went on the trademark warpath this fall, suing Wal-Mart Stores Inc., H&M Hennes & Mauritz LP, K-Mart Corp., Skechers USA Inc. and dozens of others for allegedly ripping off the trademarks rights it has in the design of its iconic Chuck Taylor sneaker.

Converse's case is an aggressive push to use trademark law to protect designs, and it's going to face tough counterarguments from well-funded opponents about trademark limitations. Converse will need to show that the Chuck developed enough distinctiveness in consumers' minds to be eligible for

trademark protection, for instance, and that the protected elements aren't functional aspects of the shoe.

Challenges aside, Converse's is unlikely to be the last such push.

"Fashion will continue to try to push the envelope to protect fashion designs in light of the absence of movement on comprehensive protection for fashion design," said Theodore C. Max, a partner at Sheppard Mullin Richter & Hampton LLP and a leader of the firm's fashion and apparel team.

Barnes & Thornburg LLP. If you have questions regarding any article, would like further information, or have suggestions about future articles, please contact David Spooner at david.spooner@btlaw.com

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