Under(pants)dog down under?

Analysis of Carolyn Taylor v Lorna Jane

March 21, 2019

Several Australian news outlets have recently reported[1] a story interviewing Carolyn Taylor, who alleges that Lorna Jane has infringed on her patent for compression tights filed in 2009. Is this a classic underdog story, where the little guy has been exploited and swept under the carpet by their bigger competitor, or is there more to it? With litigation proceedings set to commence on the 3rd of May, we take a closer look. How far has innovation really wandered from the corsets used in the brothels of Europe?

In the blue corner, we have Carolyn Taylor, a physiotherapist from Bendigo, Victoria. For many years, she treated patients with lumbar pelvic problems using sacroiliac belts and various other methods. She eventually decided that the belts were too inconvenient for daily use and decided to integrate them into a pair of tights. Trademarks registered by her company between late 2002 and 2004 suggest that she entered the clothing business around this time, but it appears unrelated to core stabilizing tights. Trademarks filed between 2008 and 2012 seem more related to core stabilizing tights. Two of the trademarks, CYLK and SEAMLESSCIZE, show evidence of selling activewear up until around August 2015, when the product social media accounts became inactive. She applied for a patent for her pelvis-stabilizing leggings in January of 2009 which was granted in July 2010. The patent application is poorly researched and discloses "inventions" that have been around for over a century! To the most casual observer in any sporting goods or yoga store, the illusion of inventing her support clothing would require poses not fit to print.

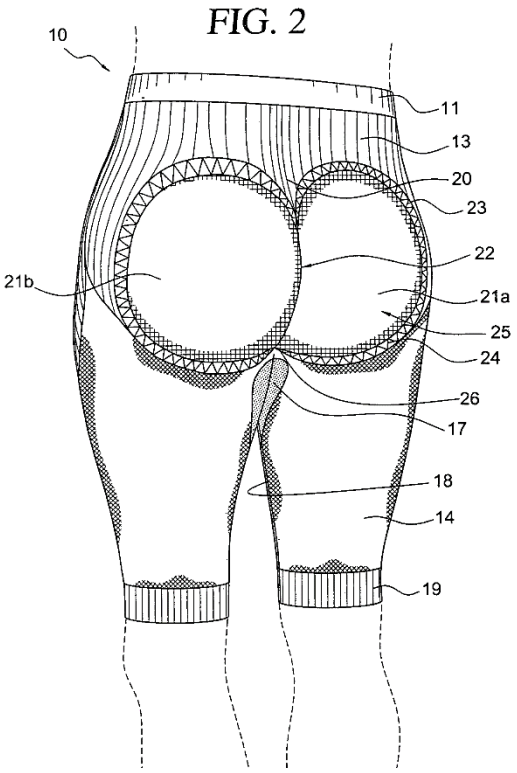


Figure 1: Patent review can be quite cheeky at times. Diagram from US 7260961. Stylistic throwback to the European brothels of yore

In the red corner, we have Lorna Jane Clarkson, who began designing and making her own activewear in 1989. She and her husband opened the first Lorna Jane store in 1990. Since then, they have expanded to have a global footprint, with stores in Australia and the United States, as well as third-party retailers all around the world. They've been developing, manufacturing, and selling compression shorts and tights, amongst many other lines of activewear, for thirty years.

Things began to heat up last month, when Carolyn Taylor filed two new trademarks – RibTech and Supa-X – on the 4th of February, 2019. These filings conveniently coincide with the date she claims correspondence between her solicitors, and those of Lorna Jane, ended[2]. Her patent infringement claim was filed soon after, on the 15th of February. **Ms. Taylor claims that Lorna Jane has infringed on most of the claims in her patent and is seeking an injunction on Lorna Jane selling the allegedly infringing articles of clothing; the destruction of all said infringing articles of clothing and any related marketing material; and damages, including lost profits, investigation costs, court costs, etc[3].** This last one is a particularly interesting claim, as we did not find any products currently sold by Ms. Taylor or her company, or any products carrying any of her several trademarks, and struggle to see how Lorna Jane has directly taken profits from her if she is not currently participating in the activewear market.

[1] *https://www.smh.com.au/business/small-business/physio-sues-lorna-jane-over-very-similar-leggings-20190307-p512dw.html*

[2] "The solicitors for the Applicants and the Respondent engaged in correspondence between 29 June 2018 and February 4 2019. See note 3 for link to full document

[3] Patent and court documents available for download from IP Australia*: http://pericles.ipaustralia.gov.au/ols/auspat/applicationDetails.do?applicationNo=2010200001*

This case could set a dangerous precedent if successful, as Bonds, 2XU, Lululemon and Skins amongst others all have product ranges that are extremely similar to the Lorna Jane leggings in question.

For those new to the patent world, here is some background to the frivolous patent litigation scene: After a famous case involving the University of California and Microsoft, the long dormant eggs containing troll embryos hatched. When trolls feed, they observe goat passages across heavily trafficked bridges, and install toll booths with the cunning aid of men (and precious few women) in wigs and robes. By making the cost of litigation a burden on genuine businesses, these parasites can suck blood from active businesses and unsuspecting consumers. With the cost of litigation in both time and money extremely high, it is not uncommon for patent opportunists to select a single target with whom litigation or settlement is considered likely to build a war chest for going after much larger targets. Is this a case of that model being fired up in Australia, or a genuine infringement? After all, to win money for its greatest invention – the delusional claim that Australia "invented" WiFi in which its very first patent application describes Motorola's "commercially available" wireless technology, the CSIRO in Australia had to use the patent troll court in Texas to extract its much celebrated, and clearly erroneous, settlement reported to the Australian public as a legal victory. (The annoyance value of the case led to settlement – not a victory.) If Ms. Taylor is successful in her case against Lorna Jane, all of these other brands may be in the firing line.

Analysis

To better break down the situation, we've used our proprietary analytical systems to research compressive and supportive garment technology. We identified 1548 highly relevant patents for supportive garments used in sport, pregnancy, surgery, recovery, and other similar fields. Sieving through both the claims and the supporting diagrams, we have highlighted a number of current and expired patents that are strikingly similar to the one being used to sue Lorna Jane.

To emphasize how non-obvious some of these claims are, one of the claims that Ms. Taylor alleges that Lorna Jane is infringing on is ***"the support and compression garment as claimed in any preceding claim wherein the garment is made of a comfortable fabric material."*** That's right, one of the patentable elements of her invention is that they are made of a comfortable fabric material. It may just be us, but that seems like a low bar for patent inventiveness.

Just for fun, here are two somewhat 'historical' patents that have integrated abdominal bands into the waistband for pelvis support. The first is a pair of shorts that integrates a sacroiliac belt in the waistband, and the second best described as a nappy-like garment with a similar function, this time without adjustability around the waist – more like the current invention. You don't have to look very hard to find similar patents. This is far from a new idea.

If this case prevails, expect to see us at yoga wearing a sacroiliac diaper like this one.

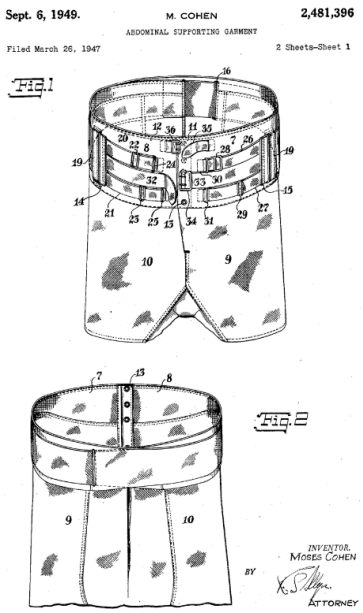


Figure 2: Extract from US2481396 by Moses Cohen

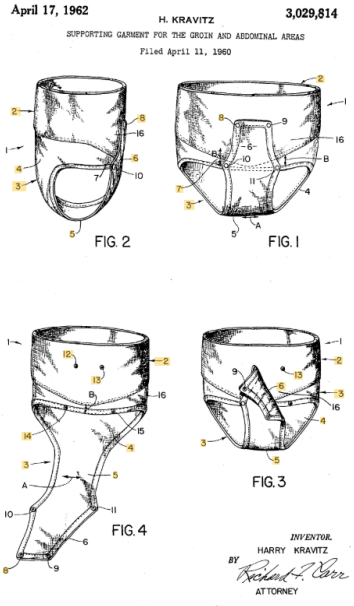


Figure 3: Extract from US3029814 by Harry Kravitz

Getting down to the nitty gritty, below is a diagram extracted from Ms. Taylor's patent, compared side by side to a diagram of a patent filed in 2007 by Asics Corp. You may notice some similarities in the diagrams that are supposed to represent a pair of shorts or tights with a compressive waist band designed to aid pelvic stability. The premise is identical – an integrated compressive waistband, designed to act like a sacroiliac belt, which improves pelvic and lumbar stability in the wearer. **There are a number of patents claiming the exact same principles that are expired, abandoned, and otherwise not enforceable that Lorna Jane and others can use to build a portfolio of open-source patents to defend itself from these allegations, as well as any future similar claims.**

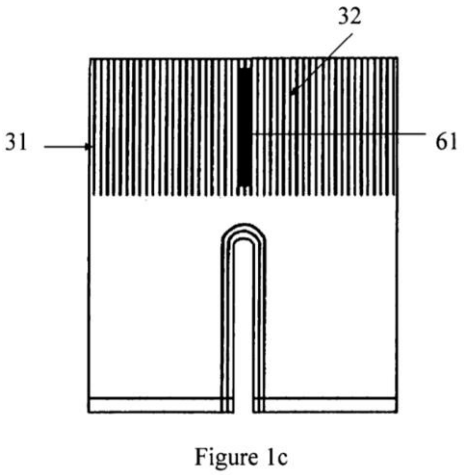


Figure 4:Diagram extracted from Carolyn Taylor's patent - AU2010200001

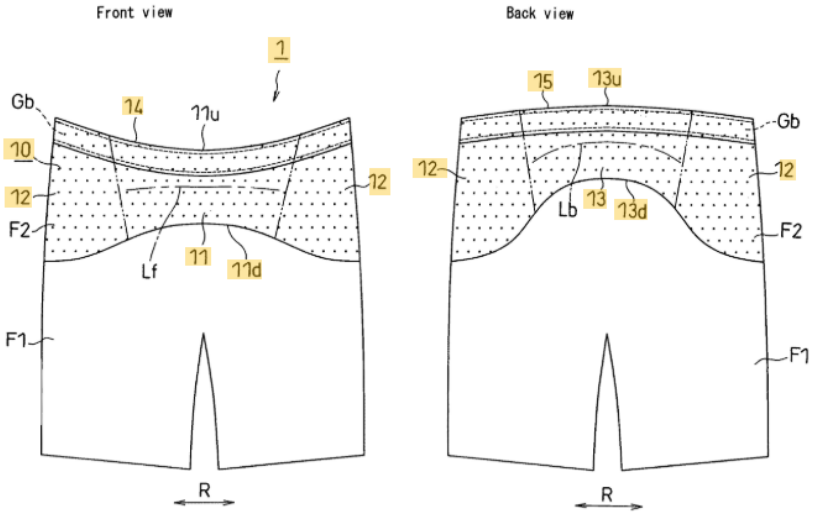
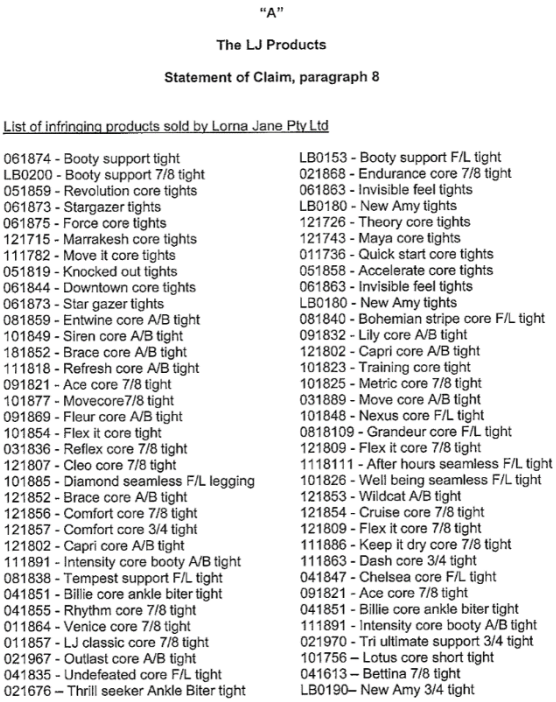


Figure 5: Extract from US8381314, Titled "Athletic Wear" owned by Asics Corp

These patents include very similar language in their claims and description to Ms. Taylor's patent, predating it, in some cases significantly. Several of these were not reviewed by patent office examiners when making a determination to issue Ms. Taylor's patent. A small sample of selected art of interest has been included below. To save readers from the boredom of comparing patents claims, which is slightly more enjoyable than having dental surgery, we haven't included the claims, just the patent numbers and basic information so interested readers can look for themselves.



"A"

The LJ Products

Statement of Claim, paragraph 8

List of infringing products sold by Lorna Jane Pty Ltd

061874 - Booty support tight
LB0200 - Booty support 7/8 tight
051859 - Revolution core tights
061873 - Stargazer tights
061875 - Force core tights
121715 - Marrakesh core tights
111782 - Move it core tights
051819 - Knocked out tights
061844 - Downtown core tights
061873 - Star gazer tights
081859 - Entwine core A/B tight
101849 - Siren core A/B tight
181852 - Brace core A/B tight
111818 - Refresh core A/B tight
091821 - Ace core 7/8 tight
101877 - Movecore7/8 tight
091869 - Fleur core A/B tight
101854 - Flex it core tight
031836 - Reflex core 7/8 tight
121807 - Cleo core 7/8 tight
101885 - Diamond seamless F/L legging
121852 - Brace core A/B tight
121856 - Comfort core 7/8 tight
121857 - Comfort core 3/4 tight
121802 - Capri core A/B tight
111891 - Intensity core booty A/B tight
081838 - Tempest support F/L tight
041851 - Billie core ankle biter tight
041855 - Rhythm core 7/8 tight
011864 - Venice core 7/8 tight
011857 - LJ classic core 7/8 tight
021967 - Outlast core A/B tight
041835 - Undefeated core F/L tight
021676 – Thrill seeker Ankle Biter tight
LB0153 - Booty support F/L tight
021868 - Endurance core 7/8 tight
061863 - Invisible feel tights
LB0180 - New Amy tights
121726 - Theory core tights
121743 - Maya core tights
011736 - Quick start core tights
051858 - Accelerate core tights
061863 - Invisible feel tights
LB0180 - New Amy tights
081840 - Bohemian stripe core F/L tight
091832 - Lily core A/B tight
121802 - Capri core A/B tight
101823 - Training core tight
101825 - Metric core 7/8 tight
031889 - Move core A/B tight
101848 - Nexus core F/L tight
0818109 - Grandeur core F/L tight
121809 - Flex it core 7/8 tight
1118111 - After hours seamless F/L tight
101826 - Well being seamless F/L tight
121853 - Wildcat A/B tight
121854 - Cruise core 7/8 tight
121809 - Flex it core 7/8 tight
111886 - Keep it dry core 7/8 tight
111863 - Dash core 3/4 tight
041847 - Chelsea core F/L tight
091821 - Ace core 7/8 tight
041851 - Billie core ankle biter tight
111891 - Intensity core booty A/B tight
021970 - Tri ultimate support 3/4 tight
101756 – Lotus core short tight
041613 – Bettina 7/8 tight
LB0190– New Amy 3/4 tight

Figure 6: List infringing articles, extracted from Appendix A of the Federal Court Statement of Claim filed against Lorna Jane Pty Ltd. We're not talking about one or two infringing articles, we're talking about a huge number of products from different ranges – not even just the booty support or core tight ranges. That's a lot of inventory to be destroyed…

Selected Art of Interest

Document #	Title	Assignee Name	Priority	File	Issue
US8752216	Compression garment	DM Orthotics Limited	2-Aug-10	4-Aug-10	17-Jun-14
US8381314	Athletic wear	Asics Corporation	15-Oct-07	15-Oct-07	26-Feb-13
US7426754	Functional clothing article	Nancy Dukyong Chun	19-Mar-04	9-Mar-05	23-Sep-08
US7074204	Garment	Wacoal Corp.	11-Dec-00	11-Dec-00	11-Jul-06

Conclusion

Coming along nine years after a largely inactive and unused patent has been filed and using it to sue well established businesses raises the suspicion of patent trolling even if it is done by the original inventor. Patent law requires patent holders to maintain vigilance on the marketplace and actively enforce rights that they intend to defend. Failure to do this may result in a finding of abandonment of interest. Given that the claimant is unsure when the alleged infringement began, and only noticed on the 29th of June 2018, nine years after the patent was filed, this may be a concern.

The patent system is designed to reward genuine innovation by protecting the successful business that stems from it, not for launching opportunistic attacks on business. While it is extremely unfortunate that Ms. Taylor made a large investment in getting a patent in 2008, we suspect that her unfortunate financial hardship may have more to do with her selection of legal advice. Her advice to pursue patent rights was ill informed by the lawyers profiting from her inexperience. The lawyers, engineers and patent examiners all may have more culpability in damage than the business that Ms. Taylor is suing. But we're sure MDP lawyers have fully informed Ms. Taylor of all of these equally egregious sources of potential loss. Otherwise, they may be caught with their tights down.

This case is a symptom not of corporate infringement as much as it is a case of patent office carelessness. At least Lorna Jane has the decency not to re-patent the corset and hundreds of other activewear designs, which I'm sure yoga lovers around the world are very grateful for.

For more details on this report, please contact patentlyobvious@m-cam.com.

A Brief Primer on the Patent System

In recent years, the importance of patents and intellectual property rights as an important variable in the marketplace has come to the forefront of the public consciousness as world leaders declare their country's lead in the innovation race. Damaging intellectual property litigation is becoming increasingly common across all industries. This is exacerbated when patent rights are granted for non-novel ideas. A vast amount of precedent innovation is unconsidered by patent-granting authorities in the creation of new IP rights. Patent granting authorities including the United States Patent and Trademark Office (USPTO), European Patent Office (EPO), Japanese Patent Office (JPO), Chinese State Intellectual Property Office (SIPO), Korean Intellectual Property Office (KIPO) and many others are constrained by the use of patent classification systems which are routinely circumvented by patent applicants.

There is a two-way social contract underlying the patent system. In the United States, patent terms are generally limited to 20 years from the date of application. By statutory intention, once a patent has expired, the patent holder loses the right to exclude others from fully utilizing any innovation described in the patent. A large number of patents enter the public domain when they are "abandoned" – when owners discontinue paying patent maintenance fees. Patents also only provide an exclusionary right in the country for which the patent is filed. As demonstrated by the Global Innovation Commons[4] (G.I.C.), using intellectual property available in the public domain eliminates the need to pay licensing fees on those innovations in countries where the patent was never registered, or worldwide, if abandoned.

Patently Obvious® is a report focusing on select groups of patents in order to increase transparency in markets, addressing information asymmetries, and providing a more level playing field for all parties.

[4] http://www.globalinnovationcommons.org/