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How to Play (and Win) in the Wearables Market

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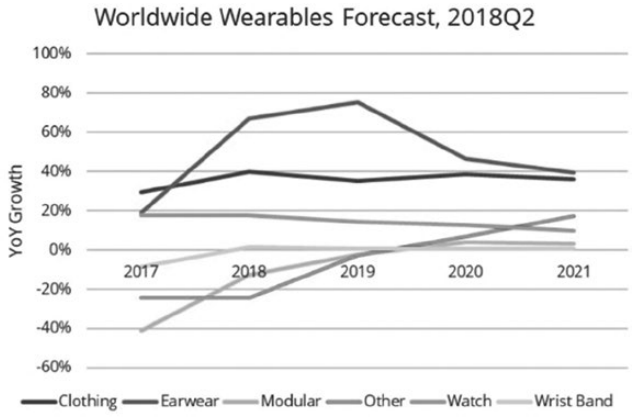
Powered by a frenzy of funding, advertising, and global interest, wearables (electronics that may be worn on the body, such as smartwatches, fitness trackers, and the like) have become a key priority for many CEOs. The bourgeoning wearables market has and continues to attract new entrants, causing some analysts to believe that sectors within this market may soon be saturated.[1] Today is not that day, as room for significant growth still remains in this market. According to industry analyst firm CCS Insight, the wearables market could be worth more than $25 billion by the end of 2019.[2] That projected growth is attributed to more than just wrist-mounted devices: the smart clothing segment alone rose 58.6 percent in the first quarter of 2018.[3] Although some segments of the wearables market are slowly becoming saturated, significant profit growth is possible in other segments of the wearables market.



Source: IDC 2018

For instance, recent forecasts conducted by the International Data Corporation (IDC), a leading global provider of market intelligence in consumer technology markets, project strong year-over-year growth through 2021 for the smart clothing and eyewear segments.[4] Other wearable sectors (*e.g.*, jewelry, implantables, pet-tech, enviro-trackers) are also expected to see an upward trend.[5]

But how might a company best prepare for success in the wearables market? The short answer: look before you leap. Innovate strategically by looking for promising entry points into the appropriate sector of the wearables market. Once those entry points are identified, develop a long-term growth strategy that includes building a strong IP portfolio, keeping in mind that speed and international coverage can be critical. After all, failing to develop a visible protection plan for your IP assets is an open invitation for competitors to imitate your wearable technology—the likely precursor to a decline in market share. Once you have built a targeted "IP" portfolio, prepare for the worst, and be ready to cross-license with and/or litigate against competitors.

Determine Entry Points

Fierce competition in the wearables market necessitates careful planning. As the saying goes—only fools rush in! To the extent possible, determine areas where innovation can be profitable, rather than merely possible.

Before spending money on research and development, evaluate the wearables market to determine where relevant, viable, and profitable entry points may exist. Trends in the wearables market suggest that trivial modifications to existing products are likely to produce only incremental benefits and,

thus, are not worth pursuit.[6] To that end, there has been an overall decline in so-called "basic" wearables and a rather significant increase in higher-priced, "smarter" wearables.[7] Indeed, some analysts believe that much of the future growth in the wearables market will relate to "[a]dditional sensors, years of underlying data, and improved algorithms."[8] Successful players in this market will therefore be apt to focus on unique technologies and implementations of existing technologies, instead of dashing to capitalize on minor variants of presently popular trends. To be clear, today's current wearables trend could quickly become yesterday's news, particularly since certain segments of the wearables market—like the smartwatch—may become saturated. In other words, strong consideration should be placed on finding natural markets for underserved, consumer-recognized needs (*e.g.*, new hardware implementations, software implementations, and the like).

Focus on unique problems imposed by wearables, and try to solve them. Merely coming up with new ways to put electronics in fashion items is, standing alone, probably not the best way to go: the market is replete with successful and unsuccessful attempts to implement computing hardware in jewelry and clothing (*e.g.*, rings, watches, bangles, necklaces, shirts, coats, shoes—the list goes on).[9] If nothing else, look to solve existing problems with existing devices. As a simplistic example, both the smartphone market and the wearables market grapple with implementing increasingly powerful hardware in increasingly smaller devices while still preserving battery life, managing heat, and keeping devices resilient. Even minor improvements that address these problems, *e.g.*, those that enable wearables to be smaller, more powerful, cooler, more resilient, and/or consume less power, would likely benefit the entire wearables space, if not many additional fields.

Don't forget to assess the patent landscape of wearable technologies. Likewise, do not limit this search to traditional methods (*e.g.*, competitor searches, patent searches). Many yet-to-be-patented—and typically, yet-to-be-perfected—wearables can be found on nontraditional funding websites like Kickstarter[10] and Indiegogo.[11] Furthermore, keep in mind that past performance is not indicative of future returns. The nascent graveyard of failed wearables should not dissuade you from exploring similar concepts: sadly, many great ideas have failed for non-technical reasons, such as poor marketing, lack of technical knowledge, and/or substandard financial management.

Develop a Powerful Portfolio

Like many industries, the popularity, value, and breadth of competition in the wearables market necessitate careful IP strategies.

Get Good Patents, and Fast

Patents though being the most promising source of protection, they are often the most difficult form of IP protection to acquire. Thankfully, there are ways to intelligently acquire patent protection without breaking the bank.

Given the uncertainty of the wearables market, shrewd players in this space will take an experimental approach to developing their patent portfolio. Consider filing a relatively large number of provisional applications and only filing non-provisional applications for inventions that, upon further inspection and experimentation, seem ripe for market entry. In other words, file broadly, but pursue narrowly. Be willing to abandon applications that do not appear valuable or will generate only nominal returns. Even once you have elected to file an application as a non-provisional, don't shy away from abandoning an application that, during examination, doesn't have much promise. While at times painful, this strategy may save significant money in the long run (*e.g.*, by avoiding unnecessary prosecution, maintenance fees on unused patents, and the like).

When you do identify an idea worth pursuing, seek a quick allowance. Many great ideas languish at patent offices for years on end because applicants seek the broadest claims possible at the infancy of prosecution. While this strategy has many merits (particularly in jurisdictions like Europe, where divisional applications can be prohibitively expensive[12]), it can be more valuable to receive an allowance of narrow claims quickly than to receive an allowance of broad claims later. After all, broader claims can always be pursued through a continuation application. In this instance, time is money, literally: the opportunity costs of pursuing these broadest possible claims may, in fact, outweigh the benefit of asserting them against competitors—after years of prosecution—in a rapidly changing wearables market.

Ideally, applicants seeking a quick allowance should file a broad specification with appropriately narrow claims, and plan to file broader claims in a continuation after securing an allowance of the original application.

This strategy similarly applies to foreign patent protection. Like many areas of technology, the

wearables market is global, meaning that protection only in the United States is likely insufficient. By using Patent Prosecution Highway programs in various countries,[13] an applicant that has filed in the United States and foreign countries may then use the allowance of the claims of any one application to expedite the prosecution and allowance of corresponding claims filed in other countries. In other words, a fast allowance in, for example, the United States can be leveraged for a fast allowance abroad. While there can be negatives to using this program (particularly where the allowed claims are undesirably narrow and in countries where divisional/continuation applications are prohibitively expensive or even prohibited), the program can nonetheless be a valuable tool in acquiring international protection.

Get Creative with Design Patents, Copyrights, and Trademarks

Design patent, copyright, and trademark protection for your wearable inventions can be as valuable as a strong utility patent portfolio. Ultimately, your branding and proprietary software can be just as important as the wearable itself.

Design patents may protect ornamental designs of articles of manufacture. In the context of wearables, such ornamental designs may include the actual design of a wearable and elements of its graphical user interface, such as software icons. As, unlike trade dress, the subject matter of design patents need not be used in commerce to be protected, design patents may be particularly useful to protect ornamental designs before product launch.

While factual information is generally not open to copyright protection, software and unique databases may be protected by copyright.[14] The source code of applications designed to run on conventional wearables (*e.g.*, apps designed to run on the Apple Watch) or in conjunction with wearables (*e.g.*, smartphone apps enabling configuration of wearables) is almost certainly copyrightable.[15] Similarly, databases of biometric or other user information collected by a wearable over time may be copyrightable as compilations, at least insofar as the collection of data is creatively organized.[16] Additionally, and not insubstantially, creative works (*e.g.*, icons, background artwork) designed for wearables may be copyright-eligible.[17]

Keep trademarks and trade dress in mind for all wearable concepts. When possible, distinguish your product from the competition in both name and design. Like most aspects of business, branding is also important for wearables, as it makes a memorable impression on consumers while allowing them to know what to expect from your company.

Prepare for the Worst

Even the best portfolio cannot protect against competitors' actions—always prepare for the worst.

License IP

Entry in the wearables market may require licensing others' IP. For instance, consider acquiring patent rights secured by other entities (*e.g.*, via licensing or direct acquisition) rather than spending the time and effort to design around those same rights. Similarly, consider using existing software packages even when subject to onerous license agreements, rather than developing similar software packages of your own. Do not be shy about paying to stand on the shoulders of market giants: the initial cost might be undesirable, but it is often cheaper in the long run.

Also, explore technology standardization and standards-essential patents available under Fair, Reasonable, and Non-Discriminatory (FRAND) licensing terms. Patents available under FRAND terms can be—as the name suggests—surprisingly fair and affordably licensed. More importantly, standards-essential technology is often well-documented and well-known by engineers, so that implementation of standards-essential technology in new and innovative products can be remarkably easy.

Develop a Litigation Strategy

Given the value and intensity of the wearables market, it is unfortunately likely that new entrants into this market will be targets of litigation. Prepare for this inevitability. Involve patent attorneys early and often to protect viable IP assets. Along these same lines, design around known IP to any extent practicable. Remember, a strong IP portfolio can, standing alone, help dissuade litigants that make their own wearable devices: after all, they may very well be infringing your patents to the same degree that you may infringe their own.

The question of whether to sue infringers is complex and would merit an article of its own. Suffice it to say, do not forget the value of market discipline. While the cost of a lawsuit against a potential infringer may well exceed its potential recovery, the lawsuit itself may send a signal to other, bigger entities in the wearables market that infringement will not be tolerated.

Conclusion: Look Before You Leap

In the wearables market, as in many areas of business and law, an ounce of prevention is worth a pound of cure. Strategic, rather than unplanned, innovation can help avoid wasted research and development efforts and can help identify particularly profitable segments of the wearables market. As with many industries, a strong IP portfolio, in conjunction with careful approaches to licensing and litigation, can avoid many unexpected problems.

1. *See, e.g.,* Emily Bary, *Have Wearables Peaked in the U.S.?,* BARRON'S (Mar. 3, 2017), *available at https://www.barrons.com/articles/have-wearables-peaked-in-the-u-s-1488577870.*
2. CCS Insight, *Wearables Market to be Worth $25 Billion by 2019,* CCSINSIGHT.COM, *available at https://www.ccsinsight.com/press/company-news/2332-wearables-market-to-be-worth-25-billion-by-2019-reveals-ccs-insight* (last accessed Oct. 30, 2018).
3. International Data Corporation, *Wearable Device Shipments Slow in Q1 2018 as Consumers Shift from Basic Wearables to Smarter Devices, According to IDC,* IDC.COM (June 4, 2018), *available at https://www.idc.com/getdoc.jsp?containerId=prUS43900918*.
4. *Id.*
5. *Id.*
6. This may be in part because even popular wearables struggle to present a clear use case, particularly for older users. *See* Sarah Perez, *U.S. Wearables Market is Doing Much Worse than Expected,* TECH CRUNCH (Dec. 21, 2016), *available at https://techcrunch.com/2016/12/21/u-s-wearable-market-is-doing-much-worse-than-expected/*
7. International Data Corporation, *Wearable Device Shipments Slow in Q1 2018 as Consumers Shift from Basic Wearables to Smarter Devices, According to IDC,* IDC.COM (June 4, 2018), *available at https://www.idc.com/getdoc.jsp?containerId=prUS43900918*.
8. *Id.*
9. For example, even Intel has struggled to develop compelling smart devices in formats like sunglasses. *See* Hugh Langley, *Intel Leaves Behind a String of Wearable Failures – And Some Great Experiments,* WAREABLE (Apr. 20, 2018), *available at https://www.wareable.com/wearable-tech/intel-wearable-tech-exit-basis-3022*.
10. *See https://www.kickstarter.com/discover/categories/technology/wearables*.
11. *See https://www.indiegogo.com/explore/fashion-wearables*.
12. This is, in part, because applicants filing a divisional application must pay outstanding renewal fees for the parent. *See* European Patent Office, *Guide for Applicants: How to get a European Patent,* EPO.ORG, *available at https://www.epo.org/applying/european/Guide-for-applicants/html/e/ga_d_viii.html* (last accessed Oct. 30, 2018).
13. *See, e.g.,* European Patent Office, *Patent Prosecution Highway Pilot Programme between the IP5 Offices Based on PCT and National Work Products,* EPO.ORG, *available at https://www.epo.org/law-practice/legal-texts/official-journal/information-epo/archive/20131218.html* (last accessed Oct. 30, 2018).
14. *See generally* U.S. Copyright Office, *What Does Copyright Protect?,* COPYRIGHT.GOV, *available at https://www.copyright.gov/help/faq/faq-protect.html* (last accessed Oct. 30, 2018).
15. *See id.*
16. *See generally* U.S. Copyright Office, *Copyright in Derivative Works and Compilations*, COPYRIGHT.GOV (Nov. 2013), *available at https://www.copyright.gov/circs/circ14.pdf*.
17. *See generally* U.S. Copyright Office, *What Does Copyright Protect?,* COPYRIGHT.GOV, *available at https://www.copyright.gov/help/faq/faq-protect.html* (last accessed Oct. 30, 2018).