

## The Value of IP in Fashion/Retail Insolvencies

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A strong brand creates a competitive edge; such a brand will often enhance consumer loyalty, not only because of the products offered, but also because of the name on the label. While a brand may have a strong customer base, in today's climate it, unfortunately, does not mean that the business has enough financial security to withstand the struggles faced by the declining traditional bricks and mortar shopping in the United Kingdom or the global COVID-19 pandemic. In the first six months of 2020, more bricks and mortar retailers went into administration in the United Kingdom, compared with the whole of 2019. With the sad reality that many brands are facing financial struggles, it is important to consider the value of a brand's intellectual property (IP) when such brands are facing insolvency.

A brand's IP can be made up of registered trademarks, the associated goodwill with those marks, designs (registered and unregistered), copyright and trade secrets, to name just a few. The IP is how consumers identify one product from another. The value of a brand is likely to have huge appeal for anyone looking to step in and purchase a company going through administration, especially when it comes to fashion. Particularly where a brand has a strong reputation, it can often continue to thrive after going through the insolvency process. Many brands have ceased trading in retail units following administration but have adapted to create or maintain a strong online presence.

Many UK businesses have followed suit and this year have announced (following administration) that they are closing all of their bricks and mortar shops and will only continue to trade online. Such brands include the prestigious footwear company, Oliver Sweeney; TM Lewin, the 120-year-old British formal menswear brand; Antler, the luxury luggage company originally founded in 1914; and the retro fashion chain, Cath Kidston.

The timeline of buying a company that is in administration, and, therefore, the opportunity (if any) to carry out due diligence, is considerably shorter than the usual acquisition process. Additionally, any information provided by the administrators cannot be relied on, and no warranties or indemnities will typically be given. A buyer should, therefore, consider undertaking its own searches into the assets of a company. In relation to the IP, the following (at a minimum) should be considered:

1. **Identify the IP** — what IP does the brand have? Does the brand have registered trademarks

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(words/logos), designs protected by copyright or perhaps a registration, the 'get-up' of its websites or stores, or any potential databases such as customers or suppliers?

2. **Ownership** — it is important to consider whether the IP ownership sits with the correct party to ensure it will be validly transferred following completion of the acquisition. Any registrations should be in the name of the business, not an individual employee or contractor. If there are any discrepancies in ownership, steps should be taken to ensure a valid assignment could be put in place.
3. **Is it valid** — for any registered IP, a buyer should ensure the registrations have been renewed, as required, and subsist. For any unregistered rights such as copyright or designs, if possible, calculations should be made as to when the expiration dates might arise. For copyright, protection ends at the end of the calendar year following 70 years after the author's death and for unregistered designs, protection ends a maximum of 15 years after the first creation.

For those brands facing financial difficulty, the importance of validly holding IP assets cannot be understated. Having IP correctly and validly held could help in uncertain times when financial assistance may be needed, particularly where the brand is of interest to bankruptcy bidders.

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