

2016  
Guide to  
**INVESTIGATIVE SERVICES**

# Los Angeles Lawyer

JULY/AUGUST 2016 / \$5

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Los Angeles lawyer Margaret P. Stevens is the 2016-17 president of the Los Angeles County Bar Association

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by Larry C. Russ and Nathan D. Meyer

# FASHION SENSE

**Preserving a clothing brand requires a carefully analyzed application  
of the four main instruments of protection**







**INTELLECTUAL** property law is often a difficult concept for young companies in the fashion industry to focus on, with business and marketing issues effectively becoming all-consuming. Nevertheless, as a fashion company matures, protection of the brand becomes essential to continued success. Often, by the time a brand gains traction, foreign entities have registered the trademarks abroad or introduced knockoffs, causing avoidable headaches to the senior rights holder. Fundamental intellectual property protections are thus a necessity for the owner of a young brand. The key protections are trademark, trade dress, copyright, and design patent.

Turning first to trademarks, a trademark primarily protects against consumer confusion by protecting a word, phrase, symbol, or design that identifies and distinguishes the source of goods of one party from another. Trademarks can be words, symbols—and at least in theory, sounds or smells. Some of the more basic trademarks are obvious—Nike, Bloomingdale's, Forever 21, and other source-denoting names all function as trademarks.

Trademarks are often symbols, such as the Nike swoosh or Burberry plaid. When it comes to denim, it is common for the stitching on the back pocket to function as a trademark. Companies such as Levi's, Seven for All Mankind, and Citizens of Humanity use distinctive stitching to mark a set of jeans as their own. Use of some form of distinctive pocket stitching is near-universal in the industry. Other types of unique stitching on denim products have also been the subject of trademark protection, for example as with True Religion.

Because trademarks are about consumer protection (and not protection of intellectual property per se), a trademark is only enforceable if it actually serves as identifying the maker or service provider of the product or service. If consumers no longer associate the name with a specific company's product, then the mark may become generic and undergo what some refer to as genericide. For example, Thermos was the trademark for a vacuum flask made by a specific company. However, over time, so many consumers came to associate the term "thermos" with vacuum flasks in general that Thermos lost its trademark protection.<sup>1</sup> Genericide is rare, but it is worth mentioning, as evident in the case of Ugg sheepskin boots.

While creation of enforceable trademarks is relatively straightforward in the fashion industry, a company occasionally may wait too long to police its own trademark. In the early 1970s, Ugg boots, a generic term for a style of sheepskin boots, became popular in Australia and New Zealand and were sold by a range of companies. Surprisingly, the mark remains generic to this day in Australia. In 1979, a single manufacturer, which was subsequently bought by Deckers Outdoors, began manufacturing and selling Ugg-style boots in the United States. It obtained a registration in the mark "Ugg" in 1996, although marks including designs were registered earlier. Although another company, Severn, began selling Ugg-style boots under the name "Ug" in 1989, Deckers did not begin writing cease-and-desist letters until 1998 and did not sue for infringement until 2004. Based on this delay, Severn's primary defense was genericide.

The resulting case is *Ugg Holdings, Inc. v. Severn*.<sup>2</sup> Ugg Holdings merged with and was acquired by Deckers between the filing of the case and the opinion, and so the plaintiff can be described as Deckers. The court found the mark not to be generic, based its findings on key pieces of evidence, all of which offer guidance to mark holders. Notably, the Oxford English Dictionary (American edition) had described "Ugg" as a generic type of sheepskin boot; this evidence was bad for Deckers, but Deckers had written to the publisher of that dictionary and successfully demanded the definition be changed. Moreover, survey evidence showed that consumers generally viewed "Ugg" as a brand, not a "common name."<sup>3</sup> Advertisements referencing "Uggs" were almost exclusively from Deckers or its predecessor in interest. The fact that "Uggs" was generic in Australia did not matter.<sup>4</sup>

*Ugg Holdings* offers a few important lessons on brand protection. First, brand owners must monitor and protect the mark. Although it was not vigilant as it should have been, Deckers had policed its mark by writing to the Oxford English Dictionary. In addition, brand owners should strive to be exclusive. Deckers was the only manufacturer truly advertising "Uggs" during the relevant period. Establishing exclusivity, however, goes hand-in-hand with monitoring. If a company does not police its mark, others may use it. Finally, it is essential to make consumers aware of a mark as a mark. A major point in Deckers's favor was that a consumer survey indicated that consumers viewed its mark as a brand and not just a type of product. If there is a risk of a brand going generic, efforts to inform consumers can be essential. For example, Xerox has run advertisements stating, "You cannot 'xerox' a document, but you can copy it on a Xerox Brand copying machine."<sup>5</sup> Even if the campaign is not a commercial success, the effort may carry some weight with the U.S. Patent and Trademark Office (USPTO).

Although it is possible to sue for trademark infringement based on common law, the preferred approach is to register a mark with the USPTO. This can be done on an intent-to-use basis before a mark is even used or at any time after use, even decades later. Preuse or intent-to-use registration is most common in the context of a company's effort to expand a mark. For example, Nike registered its mark in connection with sport balls before expanding into that line.

A registered trademark can usually be obtained relatively cheaply for a few thousand dollars and can last forever as long as the mark does not infringe on another's mark and is properly maintained. In addition, a federal trademark registration comes with favorable presumptions and with the possibility of recovering attorney's fees. It also allows owners to use the symbol "®" on their products, which usually has a deterrent effect in terms of infringement.

Trademark actions are generally filed in federal court, although a state action is technically permissible. Trademark-related claims have also been brought before the International Trade Commission (ITC), a separate judicial body that deals with importation. For instance, the Converse shoe company recently and successfully sought relief before the ITC to enjoin the importation of Chuck Taylor

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lookalikes that infringed Converse trade dress.<sup>6</sup>

The standard of liability in a trademark or trade dress case is “likelihood of confusion.” In other words, whether a consumer is likely to be confused into believing that the allegedly infringing product is in some way associated by or sponsored by the senior mark.<sup>7</sup> There are factors in determining the likelihood of confusion, which vary slightly from circuit to circuit, but the tests all involve some mix of the strength of the marks, the similarity of the marks, presence of actual confusion, intent, similarity of product lines and channels of trade, and the sophistication of customers. As with all multifactor tests, it is often difficult to predict how a jury will assess the evidence.

In terms of economic damages, trademark plaintiffs may collect their own lost profits, the disgorgement of the defendant’s profits or a reasonable royalty, and request attorney’s fees in “extraordinary” cases. If the damage to the mark is bad enough, the defendant may also be forced to pay for corrective advertising. In such cases, the infringer must pay for advertising to address misconceptions stemming from the infringing actions of the defendant.

### First to File

In the area of brand expansion, there are major advantages to being the first to file. Trademark rights in the United States are based on use, which comes in two forms under trademark law. The first is use in the literal sense in that the mark is actually being used. The second is created by filing an intent-to-use mark with the trademark office with a bona fide intent to use.<sup>8</sup> Once an application of intent to use a mark has been filed and registered, the mark is deemed to have been used as of the date of filing. Thereafter, the trademark owner is allowed up to three years after its application is approved to show actual use of the mark.<sup>9</sup>

Fashion companies usually start small in size and breadth of offerings. A company may start out offering only shoes, bags, jeans, or T-shirts, with the goal of expanding into a full line if the business is successful. If the business files only an actual use mark, someone else may start using it—particularly if the name is at least somewhat descriptive or based on a semicommon given name. In addition, others may file their own intent-to-use mark in adjacent areas of commerce, making expansion difficult.

For example, imagine that two completely unrelated and non-competing companies with somewhat similar names enter the marketplace. One sells shoes and the other sells belts. Both do well in their respective markets and are considering expansion into purses and clothing. Assuming confusion is likely, who gets to use the name on the new goods? The answer is whoever uses first, either by actually creating and selling goods or by filing an intent-to-use application to register the mark with the USPTO.

The central lesson here is to think and plan ahead. If a fashion company intends to expand its brand, filing a few intent-to-use applications to register the mark is a quick, easy and relatively cost-effective means of protecting its mark. Initiating a dispute with a company that has beaten you to the trademark office is much, much harder than filing applications and can be extremely costly.

### International Trademark Rights

It is not enough to focus only on trademark rights in the United States. One of the most frustrating experiences of successful small apparel companies is the challenge of registering trademarks in foreign countries. There are professional squatters in China, Hong Kong, Taiwan, Korea, the Philippines, and many other countries who monitor trademark filings in the United States. These squatters will register the same marks in their own countries with the hope of extorting money from a U.S. company when the company seeks to register marks abroad. The only sure way to avoid this problem is,

at a minimum, to file applications to register core marks in countries where the company is most likely to distribute its products.

### Trade Dress

Turning next to trade dress, the more general goal of a fashion brand is to protect—for lack of a better word—the “look” of the brand. This is an achievable goal in the United States, but with a very high degree of difficulty. Under the doctrine of product design trade dress, the design of an article of apparel (or any product) can be protected, but only if that design has acquired distinctiveness, commonly known as secondary meaning. “Secondary meaning” can best be described as a distinctive feature or element of a product that identifies the source of the goods without the consumer’s having to see the name of the manufacturer. The classic shape of a Coke bottle is one example, as are the three black stripes on Adidas white tennis shoes. A fairly recent U.S. Supreme Court case that highlights the challenges of proving secondary meaning in apparel cases is *Wal-Mart Stores v. Samara Brothers*.<sup>10</sup>

In that case, Wal-Mart copied Samara’s line of children’s clothing. Samara sued for trademark infringement, claiming that, like the Nike swoosh, its designs were inherently distinctive. The Court held otherwise, stating that “a product’s design is distinctive, and therefore protectable, only upon a showing of secondary meaning.”<sup>11</sup> Samara was not able to and did not even try to prove that consumers could identify Samara as the source of its clothing without looking at its label. In order for a product or clothing design to have trademark protection, consumers must independently recognize the design and the source of the design. Samara’s loss notwithstanding, there have been some recent successes.

Christian Louboutin sued Yves St. Laurent (YSL) in an effort to protect Louboutin’s high-gloss red shoe soles and sought a preliminary injunction based on YSL’s monochrome shoes, which had red soles as well as red uppers. The district court ruled for YSL, stating that as a matter of law, color could never have secondary meaning.<sup>12</sup> The Second Circuit reversed, holding that the glossy red sole was a



valid trademark, based on an extensive showing that consumers (including Jennifer Lopez) recognized the shoes largely from Louboutin’s media coverage, advertising expenditures, and successful sales of lacquered red-soled shoes. However, the court limited Louboutin’s trademark rights to contrasting red lacquered soles—e.g., black shoes with red soles. In light of the narrowing of the trade dress, the Second Circuit found that YSL’s shoes did not infringe the trade dress.<sup>13</sup>

For Louboutin, this was in many ways a win from a design perspective, since it affirmed the distinctiveness of the red soles, as long as they were contrasting. The court’s finding is consistent with the way the shoes were actually advertised.<sup>14</sup> For companies, the lesson from this case is that if consumers truly recognize a mark, courts will offer protection. For attorneys, however, another lesson is there are risks to taking an overly aggressive legal position. Louboutin may have gone too far in arguing that YSL’s monochrome shoes would cause confusion, and YSL did likewise in arguing that consumers would not recognize contrasting red soles as originating with Louboutin. Louboutin successfully reversed a ruling that its shoes had no secondary meaning, but that ruling would not have existed



if the lawsuit hadn't been filed in the first place.

Another recent and significant trademark infringement decision stems from Converse's efforts to protect the design of its iconic Chuck Taylor sneaker. Converse has been making Chuck Taylor shoes since before 1920, and there have been knockoffs for much of that period. However, in recent years, Converse has attempted to crack down on knockoffs. Converse sought and obtained a trade dress registration for its design in 2013, but rather than filing an action in court, Converse filed before the International Trade Commission under the Tariff Act, which bars importation of goods that infringe a valid trademark. In a 149-page decision,<sup>15</sup> Chief Administrative Law Judge Charles E. Bullock of the ITC found the Chuck Taylor trademark enforceable. The opinion engages in a

detailed analysis as to which shoe designs infringed and which did not. The judge considered Converse's massive sales and advertisement



over the years, the defendants' deliberate copying of the design, and evidence of similar historic third-party use over the years. The history of similar third-party use was discounted on the grounds that consumers were not aware of this use. The ITC judge found that Converse's registration was valid, albeit as a close call.<sup>16</sup>

The judge then engaged in a shoe-by-shoe infringement analysis, finding some shoes to be infringing and others not. Then, based upon a showing that Converse manufactured in the United States, the judge barred importation of the infringing shoes. The ruling may be reviewed by the full ITC, and if it is upheld, the decision can be appealed to the Federal Circuit.<sup>17</sup> If upheld on appeal, the ruling could lead to a broad order barring imports of the look-alike sneakers.

Although the ITC decision offers a thorough test for secondary meaning, other courts provide a more general test, with some variation among the circuit courts. In the Ninth Circuit, courts follow a seven-part test, focusing on consumer protection (surveys), extent and exclusivity of use, actual confusion, copying, and advertisement.<sup>18</sup> The test is roughly analogous to those in other circuits and before the ITC.

In short, once a brand becomes famous, its look may be protectable. But establishing a brand takes time, as one of the key elements of trade dress is a period of exclusive use. Design patent can be a means of achieving this exclusivity, however. If a company is using product design as a means of distinguishing itself in the marketplace, it is important to consistently and aggressively link the product design to the brand, as Louboutin accomplished with his lacquered red soles. Trade dress can be registered in the same manner as a trademark, but the trademark office will insist on evidence of secondary meaning. Trade dress rights are enforced in the same manner as trademarks and with the same damage models.<sup>19</sup>

### Community Design Rights in Europe

Another protection is community design rights, which are much easier to get in Europe. While the "look" of a piece of clothing is

not protectable in the United States without a very strong showing of secondary meaning, the rules are different in the European Union. Under the law of community design, a design that has distinctiveness similar to that required for a trademark in the United States can be protected up to 25 years with registration and even be protected up to three years without a registration. For example, in 2014, a company called Karen Millen was able to successfully sue in Ireland for infringement of unregistered community designs.<sup>20</sup> In the United States, these same designs would almost certainly have been held unprotectable under the holding in *Wal-Mart*. The Innovative Design Protection and Piracy Act marked one attempt to pass laws analogous to community design in the United States.<sup>21</sup>

### Copyright

One major type of fashion brand protection is copyright. Copyright covers creative original works, and with limited statutory exceptions (e.g., boat hulls and architectural works), copyright is not available for "useful articles," such as clothing, except to the extent that the design elements are separate and independent of the useful article.<sup>22</sup>

For this reason the Copyright Office will reject most attempts to register copyrights in clothing designs.

However, copyright protection in the fashion world has traditionally applied to 1) prints, 2) denim pocket designs, 3) lace embroidery, and 4) most decorative embellishments. The boundary between a useful article and copyrightable material, however, is currently in flux.<sup>23</sup> This May, the U.S. Supreme Court granted certiorari in *Star Athletica v. Varsity Brands*<sup>24</sup> on the issue of how to tease out design elements from a useful article. In that case, the design at issue was a cheerleading uniform. The plaintiff in that case was able to convince the Copyright office and the Sixth Circuit that the design was separately copyrightable. The Supreme Court has granted certiorari on the precise test for separating a design from a useful article. Currently, there are a number of separate tests that vary according to the circuit. A decision expected in 2017.

Regardless of the outcome in *Star Athletica*, competitors are barred from creating works that are "substantially similar" to the copyrighted work.<sup>25</sup> In the fashion industry, copyright infringement involves reasonably blatant copying, with a nearly identical print appearing on a nearly identical garment.<sup>26</sup> Although the underlying garment is almost never copyrightable, the fact that the garment is identical is often strong evidence of copying and access.

The filing fee for copyright registration is inexpensive—only \$55 if filed electronically, which is easily done, often without an attorney. When a design is copied, however, a lawsuit cannot be filed until the owner has applied for a copyright registration in the design—except in the Ninth Circuit, which requires the copyright application be fully processed by the Copyright Office before a suit can be filed. When a deposit is submitted to the Copyright Office in connection with registration, the Library of Congress has the option to place the deposit in its collection. Early registration is strongly encouraged, and a registrant's preinfringement contribution to the Library of Congress is rewarded in the form of increased potential damages against infringers.<sup>27</sup> If registration predates infringement, or if the copyright application for the design is filed within 90 days of publication, a copyright plaintiff that prevails can elect statutory damages<sup>28</sup> and may be able to obtain attorney's fees.<sup>29</sup> Copyright lawsuits must be filed in federal court.<sup>30</sup>

### Design Patents

Last on the list of significant protection in the fashion industry is the design patent, which protects ornamental characteristics on a



useful article. This type of protection is particularly common in shoes and accessories. For example, Tiefs shoes with their bright blue soles, are design patented, as are Crocs.

In terms of brand protection, one interesting aspect of design patents is that it is possible to use a design patent in order to build up the protection needed for trade dress. During the 15-year term<sup>31</sup> of a design patent from the time of issuance, no one can copy the design, and the patent holder has exclusive use. This period of exclusivity allows a company to develop an ornamental design, secure patent protection, patent it, and use the 15-year grace period granted by the patent process to attempt to develop secondary meaning. For instance, Moen, a faucet maker, was able to do this with one of its faucets,<sup>32</sup> but the most well-known example was Bayer Aktiengesellschaft, which used the period of exclusivity in the aspirin patent to build its Bayer brand in the United States.<sup>33</sup>

Patent registration is expensive, more akin to the complex process of a utility patent filing than a copyright or trademark registration. The protection offered by a patent is also relatively short. The patent application also must be filed quickly, within a year of sale to the public.<sup>34</sup> One key aspect of a patent, as opposed to copyright or trademark, is that protection is contingent on marking the product with a patent notice. If a patent owner fails to mark its products with the patent number, it will not be able to recover monetary damages, although there is an exception if it is proven the infringer was on actual notice of the infringement and continued to infringe thereafter.<sup>35</sup> In patent enforcement lawsuits, the damages available are roughly equivalent to those available in the trademark context.

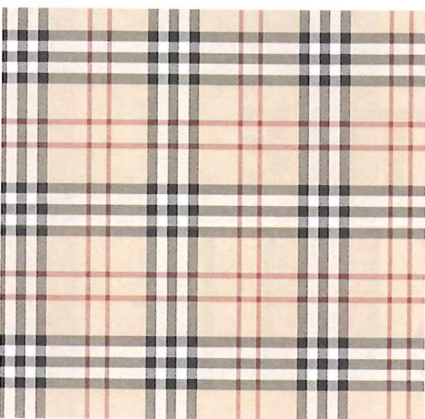
### Future Developments

Unlike utility patent law, the legal environment surrounding brand building has been stable over the past 10 years, particularly compared to the 1990s and early 2000s. That said, there may be change on the horizon.

First, the Supreme Court will presumably soon resolve the boundary between a useful article and a design in the *Star Athletica* case in the coming term. Although the decision is unlikely to radically change the law, it will provide much-needed uniformity on this issue across all circuits and may shift the needle somewhat on the scope of copyrightability.

Proponents of the European-style community design protection have not given up, and there may be future legislative efforts. Converse's somewhat successful use of the ITC to ban importation of infringing goods may also presage further use of the ITC. Overall, the key for counsel who advise fash-

ion companies is to be well versed in the pros and cons of the core protections and to keep track of the formalities that must be followed in order to grow or protect a brand.



<sup>1</sup> King Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F. 2d 577 (2d Cir. 1963).

<sup>2</sup> Ugg Holdings, Inc. v. Severn, No. CV 04-1137-JFW, 2005 WL 5887187 (C.D. Cal. Feb. 23, 2005).

<sup>3</sup> "Coke" is not generic, despite its use to refer to carbonated soft drinks generally, and "Google" is not a generic verb; most people still know each word as a brand name. A term is not generic as long as consumers also understand it designates a source. Kleenex and Xerox are generally considered borderline.

<sup>4</sup> Ugg Holdings, 2005 WL 5887187.

<sup>5</sup> See Megan Garber, 'Kleenex Is a Registered Trademark' (and Other Desperate Appeals), THE ATLANTIC (Sept. 25, 2014), available at <http://www.theatlantic.com>.

<sup>6</sup> Certain Footwear Prods, Inv. No. 337-TA-936 (I.T.C. Nov. 17, 2015).

<sup>7</sup> 15 U.S.C. §§1114(1), 1125(a).

<sup>8</sup> 15 U.S.C. §1051(b)(1). Bona fide means having, based on an objective view of the circumstances, a good faith intention to eventually use the mark in commerce. In other words, marks cannot be warehoused for a rainy day. M.Z. Berger & Co. v. Swatch

AG, 787 F. 3d 1368 (Fed. Cir. 2015) (Swiss watch company registered iWatch without a real intent to use, and the mark was canceled).

<sup>9</sup> 37 C.F.R. §2.89. The trademark owner has six months from the issuance of a notice of allowance, but the period can be extended five times, for a total of three years.

<sup>10</sup> Wal-Mart Stores v. Samara Bros., 529 U.S. 205 (2000).

<sup>11</sup> *Id.* at 216.

<sup>12</sup> Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc., 778 F. Supp. 2d 445, 457 (S.D. N.Y. 2011), *rev'd in part*, 696 F. 3d 206 (2d Cir. 2012). ("[T]he Court cannot conceive that the Lanham Act could serve as the source of the broad spectrum of absurdities that would follow recognition of a trademark for the use of a single color for fashion items.")

<sup>13</sup> Christian Louboutin, 696 F. 3d at 228.

<sup>14</sup> Although Louboutin has marketed a monochrome red shoe, the court held that Louboutin's secondary meaning was associated with contrast, citing press on this point. *Id.*

<sup>15</sup> Certain Footwear Prods, Inv. No. 337-TA-936 (I.T.C. Nov. 17, 2015).

<sup>16</sup> *Id.* at 56.

<sup>17</sup> 19 C.F.R. §210.42(h) (discretionary review); 28 U.S.C. §1295(a)(6) (Federal Circuit jurisdiction). (Editor's Note: The full ITC ruled on this matter subsequent to publication of the present article.)

<sup>18</sup> Avery Dennison Corp. v. Sumpton, 189 F. 3d 868, 876 n.6 (9th Cir. 1999).

<sup>19</sup> 15 U.S.C. §1052(f), TMEP R. 1212, available at <http://www.uspto.gov>.

<sup>20</sup> Karen Millen Fashions Ltd. v. Dunnes Stores, Ltd., Case C-345/13 (Ct. of J. of E.U. June 19, 2014).

<sup>21</sup> See, e.g., H.R. 2511 (112th Cong., 2011), S. 3728 (111th Cong., 2010), available at [Thomas.loc.gov](http://Thomas.loc.gov).

<sup>22</sup> See 17 U.S.C. §101.

<sup>23</sup> See, e.g., Lyle Denniston, *Useful or creative: a look at design protection*, Scotusblog, May 2, 2016, available at <http://www.scotusblog.com>.

<sup>24</sup> Star Athletica, L.L.C. v. Varsity Brands, Inc., et al., No. 15-866 (Jan. 7, 2016).

<sup>25</sup> Nichols v. Universal Pictures Co., 45 F. 2d 119, 121-22 (2d Cir. 1930) (Hand, J.).

<sup>26</sup> There are dozens (potentially hundreds) of these cases filed every year in Los Angeles federal court; nearly all of them settle, and very few generate published opinions. For an example of this type of case, see L.A. Printex Indus., Inc. v. Aeropostale, Inc., 2012 U.S. App. Lexis 12033 (9th Cir. June 13, 2012).

<sup>27</sup> This is how the Library of Congress has built up most of its collection, and it maintains copyright deposits dating back to the War of 1812.

<sup>28</sup> Up to \$30,000 per infringement if not willful, up to \$150,000 if willful. 15 U.S.C. §504(c).

<sup>29</sup> 17 U.S.C. §§412, 504, 505.

<sup>30</sup> 28 U.S.C. §1338(a).

<sup>31</sup> For design patents filed before May of 2015, it was 14 years. 35 U.S.C. §173.

<sup>32</sup> Kohler Co. v. Moen Inc., 12 F. 3d 632 (7th Cir. 1993).

<sup>33</sup> Bayer lost the mark and all of its other U.S. assets when the American government seized them and auctioned them off during World War I. Bayer AG bought the US mark back in the 1990s. See, e.g., <http://www.bayer.com/en/logo-history.aspx>.

<sup>34</sup> This is the "on sale bar" doctrine. See generally 2 DONALD S. CHISUM, CHISUM ON PATENTS, §6.02 (2015).

<sup>35</sup> Nike, Inc. v. Wal-Mart Stores, 138 F. 3d 1437 (Fed. Cir. 1998) ("In order to satisfy the constructive notice provision of the marking statute, Nike must have shown that substantially all of the Air Mada Mid shoes being distributed were marked, and that once marking was begun, the marking was substantially consistent and continuous.")