

Rich Rochford in Law360 on Adidas, Skechers and Trademark Irreparable Harm

May 21, 2018 Richard Rochford

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Law360 quoted Haynes Boone Partner [Rich Rochford](#) on a May 10 ruling by the 9th U.S. Circuit Court of Appeals in a trademark fight between shoe companies Adidas and Skechers. The decision has perpetuated confusion about the level of irreparable harm that must be shown to win a preliminary injunction on an infringement claim.

Here's an [excerpt](#):

The question has nagged at trademark attorneys since the U.S. Supreme Court's 2006 ruling in *eBay Inc. v. MercExchange LLC*, a patent case that overturned a long-standing presumption of "irreparable harm" when a plaintiff can show infringement is likely.

In 2013, the Ninth Circuit applied that ruling to the Lanham Act, telling a lower court that it couldn't presume that a trademark owner would be injured beyond repair simply because they had shown they would likely prove infringement. More evidence of harm, the court said, was needed.

That ruling, in a case filed by the estate of musician Herb Reed, made clear that the presumption was gone, but left a lot else unclear. In trademark cases, where proving infringement inherently means proving customer confusion, what else is there to show?

"In trademark cases, the presumption of irreparable harm really had a certain logic to it," said Richard Rochford, the head of the IP litigation group at Haynes Boone. "If someone is knocking you off, and you prove that they're knocking you off, it's not a big leap to make to say you've been injured."

Adidas' case, which went to the Ninth Circuit after a trial court granted a preliminary injunction against Skechers, presented the court with a perfect opportunity to clear up how this should all work. ...

The appeals court affirmed the injunction against a Skechers line called the "Onix" that Adidas claimed looked like its famous Stan Smith sneaker, citing clear evidence that the German giant would be injured by it. But it overturned the ban on the Skechers "Cross Court," saying Adidas had failed to offer the same kind of proof. ...

"The evidence of harm seemed to be pretty consistent for both shoes," said Rochford, the Haynes Boone attorney. "With both shoes, it seemed that Adidas showed that the infringement would undermine their investment and cause them to lose control over their goodwill."

Rather than relying on differences in evidence of harm, Rochford said, it at times seemed that the distinction the court saw was more in the merits of Adidas' argument on the likelihood of confusion — precisely the kind of thing that *Herb Reed* said shouldn't drive the analysis of injury.

“The only thing we can come to is kind of a cynical view,” Rochford said. “With the Stan Smith, they really thought it was a knockoff, and the other shoe they were less concerned about.” ...

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