

Economic Damages in Trademark Litigation

April 21, 2016

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Trademark - Defined

Definition under Lanham Act

“any word, name, symbol or device or any combination thereof adapted
and used by a manufacturer or merchant to distinguish them from
those manufactured by others.”

15 U.S.C § 1127

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Possible Remedies

1. Injunctive Relief
2. Monetary Relief

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Injunctive Relief Under the Lanham Act

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Injunctive Relief

- Injunctive Relief is most common
- Likelihood of confusion
- A finding of infringement may result in an injunction but no monetary relief (unlike patent infringement)

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Injunctive Relief – ABPN v. Johnson-Powell

- Dr. Gloria Johnson-Powell claimed on her cv and in expert testimony that she was ABPN-certified. ABPN requested a preliminary injunction to keep Dr. Johnson-Powell from infringing its mark. The court denied the injunction because it believed she was unlikely to infringe in the future. The court reasoned that ABPN was likely to prevail on the merits in trial, but it had failed to demonstrate irreparable harm in the near future.
- Appeals court found that district court had not clearly erred or abused discretion, noting ABPN would be able to request permanent injunction.

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Injunctive Relief – Starter Corp. v. Converse, Inc.

- Converse and Starter entered into a 1990 Agreement in which Starter agreed not to apply for a trademark for the Starter Star Marks for use on shoes and sneakers.
- In 1995 Starter sought a declaratory judgment that using its Starter Star Marks on shoes would not infringe the Converse Star Marks. Converse filed counterclaims, but later withdrew these.
- Jury found a likelihood of confusion with regard to the marks on athletic footwear, that there was a binding contract and that Starter had made oral representations it would not use its Star marks on athletic shoes.
- District Court entered a permanent injunction preventing Starter from use of its Star marks on any footwear, and related items.
- Court of Appeals determined injunction was appropriate, although counterclaims had been withdrawn, but the scope should match the jury finding (that is, limited to athletic footwear).

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Monetary Relief Under the Lanham Act

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15 U.S.C. § 1117(a)

Monetary Remedies for Trademark Infringement, Unfair Competition, Dilution

(a) Profits; damages and costs; attorney fees

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

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Remedies Available under Lanham Act

- Plaintiff's Damages
 - Lost Profits of Plaintiff
 - Reasonable Royalty
 - Corrective Advertising
- Recovery of Defendant's Profits
- Statutory Damages
- Treble Damages
- Cost of the Action/Attorney Fees

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Damages Under the Lanham Act

- General Theory of Damages Under the Lanham Act:
 - “...to make violations of the Lanham Act *nonprofitable* to the infringing party.”

Otis Clapp & Sons, Inc. v. Filmore Vitamin Co.,
754 F. 2d 738; 225 U.S.P.Q. (BNA) 387

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Lanham Act Damages Combine Theories of:

COMPENSATION

The Common
Law Remedy of
Damages
(Assessing
Profits)



DETERRENCE

The Equitable
Remedy of
Disgorgement of
Unjust Enrichment
(Assessing
Damages)

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Remedies Available under Lanham Act

- The court has wide discretion in determining the appropriate remedy (*BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1092 (7th Cir.1994))
- “If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.” (15 U.S.C. § 1117(a))

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Award of Monetary Damages

- *Web Printing Controls Co. v Oxy-Dry Corp.*, 906 F.2d 1202, 1204-05 (7th Cir. 1990) – Actual confusion not required.
- *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1126-27 (5th Cir. 1991), *aff’d*, 505 U.S. 763 (1992) – Court affirmed damages even though plaintiff had not offered evidence of actual diverted sales or customers.
- *McClaran v. Plastics Indus., Inc.*, 97 F.3d 347, 361-62 (9th Cir. 1996) – Court denied claim for damages because it was speculative to assume production difficulties would have been resolved.

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Types of Lost Profits and Related Damages

- Lost Profits on Lost Sales
- Price Erosion

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Lost Profits on Lost Sales

- In order to receive damages, a plaintiff must generally prove:
 - Infringement (a Lanham Act Violation)
 - Actual Injury (but lack of actual harm does not preclude award of defendant's profits)

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Lost Profits On Lost Sales

Calculation of plaintiff's damages is subject to a degree of uncertainty:

“When determining damages in an unfair trade practices case, the courts distinguish between the amount of proof needed to show ‘that some damages were the certain result of the wrong’ and the amount of proof needed to ascertain the exact amount of damage.”

“The plaintiff is held to a lower burden of proof in ascertaining the exact amount of damages because, ‘the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.’ However, the plaintiff may not recover if he fails to prove that the defendant’s actions caused the claimed harm.”

Otis Clapp & Sons, Inc. v. Filmore Vitamin Co.,
754 F. 2d 738; 225 U.S.P.Q. (BNA) 387 (emphasis added)

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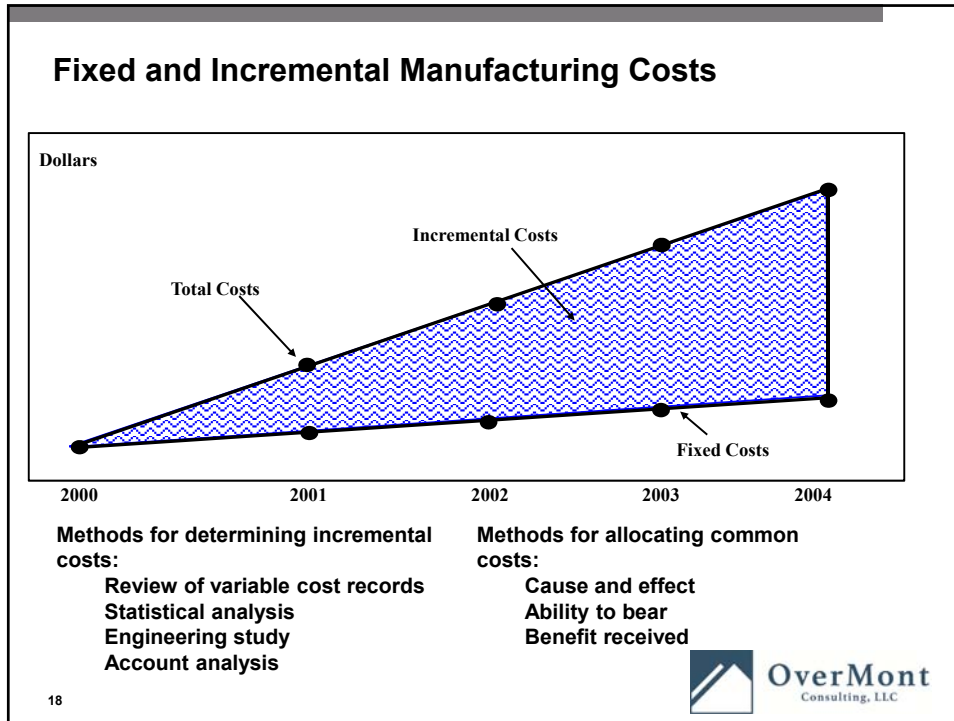


Lost Profits On Lost Sales

	Additional Units Sold
	“But For” Wrongful Conduct
x	<u>Price per Unit</u>
	Lost Revenues
-	<u>Incremental Costs</u>
	<u>Lost Profits</u>

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Price Erosion: A Definition

Form of lost profits which may occur if plaintiff reduces its prices or if price increases are forgone in order to meet competition.

- Generally found in a two supplier market
- Plaintiff is entitled to difference between "but-for" price (without infringer) and actual price (plaintiff's price during infringing period)
- Plaintiff can prove by illustrating market events in the period before, during and after infringer entered the market

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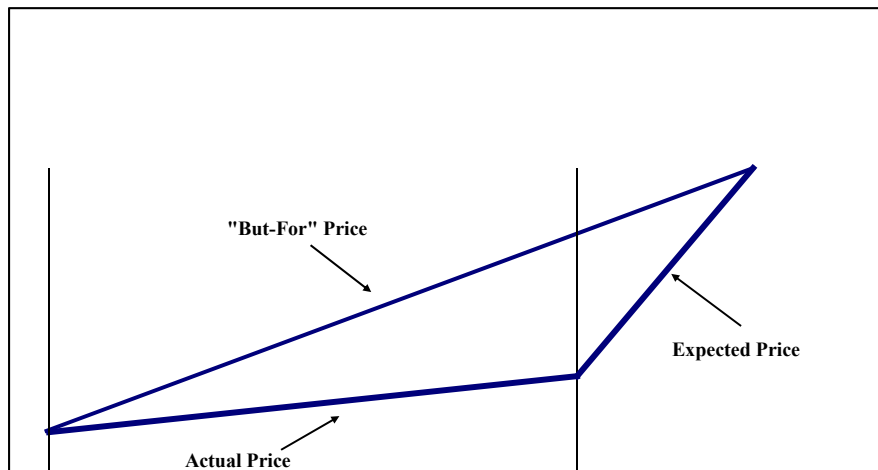
Price Erosion

- In a Lanham Act case, the plaintiff may claim price erosion if it can establish that its price would have been higher but for the defendant's wrongful acts.
 - *BASF v. Old World Trading Co.*, 41 F. 3d 1081 – Court denied plaintiff's price erosion claim because relevant market had a number of competitors and pricing had historically represented an important competitive tool.
 - *Artmark-Chicago, Ltd. v. E. Mishan & Sons Inc.* 26 USPQ 2d1201 (DC N I11 1992) – Court allowed price erosion claim calculated by applying to the plaintiff's net profits the ratio of the plaintiff's but-for price to the defendant's actual lower price.

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Price Erosion: Pre- and Post-Injunction Damages

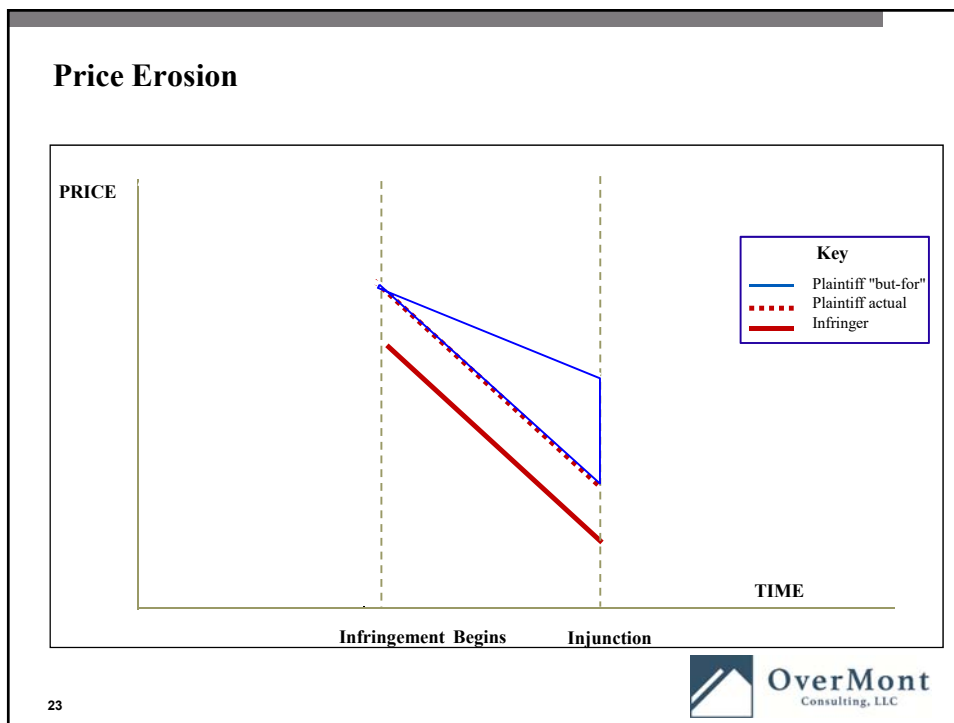
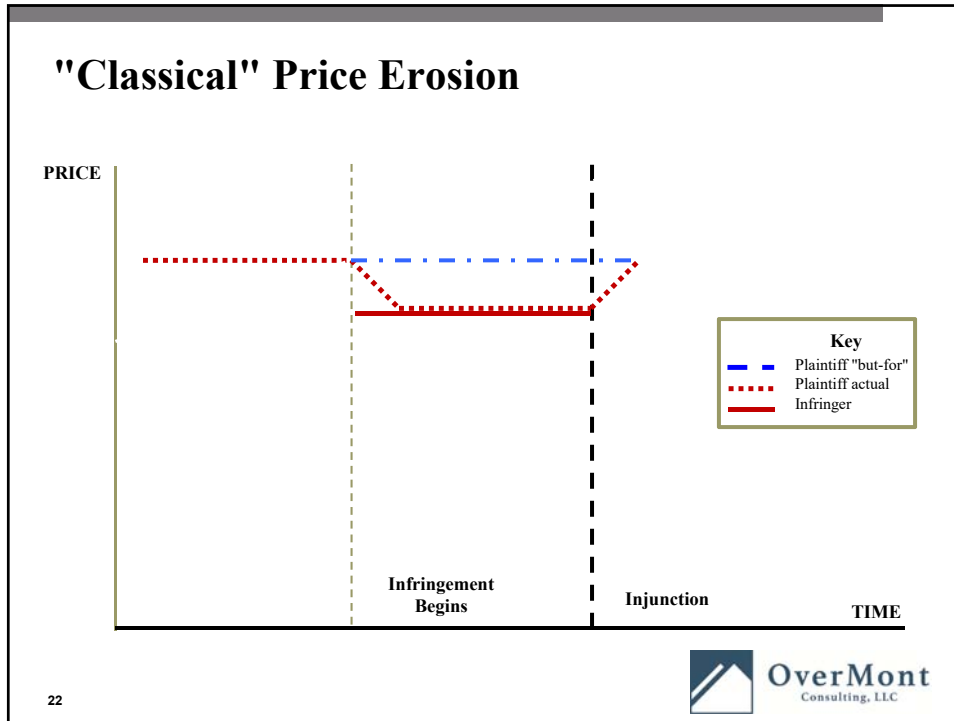


Date of Infringement

Date of Injunction

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Price Erosion

- Price Declines
- Slower/lower price increase
- Foregone price increase
- Initial prices set too low
- Quality improvements without price increases
- Accelerated price decline
- Bid competition

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Reasonable Royalty

Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947, 963 (7th Cir. 1992) – court determined reasonable royalty was a more appropriate measure of damages than profits; 34 F.3d 1340, 1344 (7th Cir. 1994) – affirmed award of reasonable royalty

Boston Profession Hockey Association v. Dallas Cap & Emblem Manufacturing, Inc. 597 F.2d 71, 75-76 (5th Circuit 1979) – court determined reasonable royalty based in part on amount that defendant had previously offered to pay plaintiff for license to make cloth emblem of professional hockey team

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Reasonable Royalty

- A reasonable royalty may be used in the following circumstances:
 - When lost profits are nonexistent or difficult to prove
 - When defendant has failed to make a profit
 - When plaintiff has a history of licensing
 - When “windfall” is a concern

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Reasonable Royalty

- Royalty damages presume the plaintiff would have granted the defendant a license to use its trademark, trade dress, etc.
- For example:
 - ABC Corp. grants XYZ, Inc. a license to use the ABC Mark in connection with the sale, offer for sale, or importation of XYZ's products.
 - In exchange, XYZ agrees to pay ABC a 5% running royalty on all sales of XYZ's products in the U.S.
- A “reasonable royalty” is what would have been the negotiated royalty between a willing licensor/willing licensee at the time of first infringement.

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Reasonable Royalty
Example Formula

Revenues from Infringing Product

x Royalty Rate (%)

Reasonable Royalties

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Reasonable Royalty

Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp.
1116 (S.D.N.Y. 1970)

- Patent infringement case establishing 15 factors to consider in determining a reasonable royalty.
- Most factors can be adopted for use in connection with a Lanham Act violation.

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Reasonable Royalty *Georgia-Pacific* Factors

1. The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.
2. The rates paid by the licensee for the use of other patents comparable to the patent in suit.
3. The nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.
4. The licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly.
5. The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter.
6. The effect of selling the patented specialty in promoting sales of other products of the licensee; that existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or conveyed sales.
7. The duration of the patent and the term of the license.
8. The established profitability of the product made under the patent; its commercial success; and its current popularity.
9. The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results.
10. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention.
11. The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use.
12. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.
13. The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.
14. The opinion testimony of qualified experts.
15. The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee-- who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention-- would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

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Reasonable Royalty

Comparable License Agreements (*Georgia-Pacific* Factors 1, 2, 12)—Licensing transactions in the market place for trademarks comparable to those in suit can prove useful in determining the structure of a license and royalty rate.

Profit Premium/Analytical Approach (*Georgia-Pacific* Factor 13)—Additional profits generated as a result of using the trademark.

For example:

- Product sold with trademark = 35% profit margin;
- Product sold without trademark = 30% profit margin;
- Profits attributable to trademark = $(35\% - 30\%) = 5\%$.

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Reasonable Royalty

- Design-Around Costs - Costs and issues infringer would have faced in order to design and develop comparable technologies/trademarks without infringement
- Issues include:
 - › Expenses that would be incurred
 - › Time and manpower requirements
 - › Impact of delay of entry to market

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Corrective Advertising

Defendant may recover the amount needed to spend in “corrective advertising” to undo the confusion or damage created by infringement of a mark

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Corrective Advertising

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Company, 561 F.2d at 1365

- Trademark infringement case where the court said that “dispelling confusion and deception in the consuming public’s mind does not require a dollar-for-dollar expenditure.”
- The Appeals Court’s conclusion was to apply the FTC’s 25% Rule for corrective advertising to Goodyear’s actual advertising expenditures, pro-rated for states in which Big O competed with Goodyear.
- Enhanced damages also awarded.

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Corrective Advertising

- *U-Haul Int’l, Inc. v. Jartran, Inc., 793 F.2d at 1037 & 1041*
 - Court awarded plaintiff amount already spent on corrective advertising plus defendant’s advertising campaign costs.
 - U-Haul lost profits also awarded.
- *Alpo Petfoods, Inc. v. Ralston Purina Co., 997 F.2d 949, 952 (D.C. Cir. 1993)*
 - Past advertising costs may be recovered even if the advertising did not expressly rebut false or misleading claims made by defendant (award included difference between plaintiff’s planned and actual advertising expenditures).

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Corrective Advertising

Steps in corrective advertising analysis:

1. Determine where the infringing mark was used (e.g., website, on shelf in store, social media, paid search/banner ad campaigns, etc.) and for how long;
2. Determine the necessary corrective advertising campaign to correct consumers' association with defendant's product; and
3. Determine costs associated with deploying corrective advertising campaign.

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Corrective Advertising

- *Punch Clock, Inc. v Smart Software Development, 553 F. Supp 2d 1353 (S.D. Fla. 2008)*
 - Court awarded plaintiff seven years of corrective advertising at the cost for Punch Clock to purchase top placement of its website on Google search listings for the top five keywords associated with the Punch Clock mark.
 - At a cost of \$136 per day to purchase keywords for seven years, the corrective advertising damages totaled \$347,480, which the court trebled to \$1,042,440 due to the willful nature of the infringement.
 - The court also awarded \$100,000 in statutory anticybersquatting damages.
 - Domain name ordered to be transferred to Punch Clock.
 - The court also held this to be an “exceptional” case due to the bad faith and willful nature of SSD’s acts and awarded PCI its attorneys’ fees and costs.

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Recovery of Defendant's Profits

- Plaintiff may not recover damages (such as plaintiff's lost profits) and defendant's lost profits if they are based on the same economic loss
- Courts can increase an award of defendant's profits, however an increase must "constitute compensation and not a penalty."

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Recovery of Defendant's Profits

- *Venture Tape Corp. v McGillis Glass Warehouse* 540 f.3d 56 (1st Cir. 2008) – Venture was awarded McGillis's estimated lost profits based on willfulness of infringement. McGillis argued that damage award overstated harm to Venture because Venture did not attempt to show actual harm. However, the court found that "when a mark owner cannot prove actual damages attributable to the infringer's misconduct (e.g., specific instances of lost sales), its recover of an equitable share of the infringer's profits serves...as a 'rough measure' of the likely harm that the mark owner incurred because of the infringement, while also preventing the infringer's unjust enrichment and deterring further infringement."

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Recovery of Defendant's Profits

Considerations

- May require showing willful infringement
 - Although willful infringement is an important factor, it is not a prerequisite to an award of defendant's profits (*Quick Technologies, Inc. v. The Sage Group PLC, et al.* 313 F.3d 338)
- Does not require plaintiff showing actual confusion
- Plaintiff must only show defendant's gross sales
- Defendant must provide accounting of costs
- Six Factor Test ¹
 - Defendant's intent to confuse or deceive
 - Whether sales have been diverted
 - Adequacy of other remedies
 - Unreasonable delay by plaintiff in asserting rights
 - Public interest in making misconduct unprofitable
 - Whether case of palming off

1. *Pebble Beach Co. v. Tour 18 Ltd.*, 155 F.3d 526, 554 (5th Cir. 1998)

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Recovery of Defendant's Profits

Accounting for Profits:

- May be calculated as sales or gross profit
- May be awarded even when no actual profit has occurred

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Recovery of Defendant's Profits

- In calculating an accounting for profits, the burden is on the defendant:
 - To prove appropriate deduction of costs
 - To maintain and produce records
 - To prove a case for apportionment (profits due/not due to alleged action)

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Recovery of Defendant's Profits

Tommy Hilfiger Licensing, Inc. v. Goody's Family Clothing, Inc., 1-CV-1934-BBM, U.S. Dist. (D.Ga.2003) – Court denied defendant's deduction of certain elements of costs of goods sold because similar costs "would have been incurred even without the sale of the prohibited product."

Bishop v. Equinox International Corp. – Equinox used Bishop's "Essence of Life" trademark, and continued to use mark after agreeing to end use. Bishop did not establish actual losses; an award of Defendant's profits was determined by the appeals court to be a potential remedy. Consideration given to deliberate, willful infringement and motivation for infringement from economic weakness of Plaintiff.

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Recovery of Defendant's Profits

Gucci America Inc. v. Daffy's Inc. – Appeals court determined that while defendant had sold counterfeit trademarked product, the district court had not abused its discretion in denying plaintiff trademark holder (a) an accounting of the trademark infringer's profits, (b) a recall of the infringing product, and (c) an injunction against future infringement.

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Recovery of Defendant's Profits

- Common types of deductions:
 - Labor and Material Costs
 - Advertising Expenses
 - Operating Expenses
 - Overhead
- Courts differ on the type of deductions defendant allowed to take as costs
 - Third, Fifth, Seventh and Eleventh Circuits: Only those expenses which directly relate to the infringing product
 - Second, Fourth and Ninth Circuits: Portion of the defendant's general expenses, such as overhead, operating expenses, and taxes can also be deducted

Smith, Gordon V., and Russell L. Parr. *Intellectual Property: Valuation, Exploitation, and Infringement Damages*, pg. 681.

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Statutory Damages

- In counterfeiting cases, plaintiff may elect to choose statutory damages rather than actual damages and profits
- Statutory damages shall not be less than \$500 and not more than \$100,000 “per type of good or services sold, offered for sale, or distributed as the court considers just.”
- \$1,000 to \$100,000 per infringing domain name under Anticybersquatting Protection Act (15 U.S.C. 1125d)
- If infringement is willful, plaintiff may not recover statutory damages of more than \$1,000,000 per counterfeit mark.

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ACPA Damages

- *Ticketmaster Corp. v DeVane* (E.D.N.C. May 14, 2008) – court enjoined DeVane from using Ticketmaster or any other confusingly similar marks in domain names, on websites, in metatags, as keywords, in email or marketing materials or any other conduct likely to cause confusion with Ticketmaster. Ticketmaster requested \$10,000 in statutory damages but court awarded \$5,000 as “just and reasonable” based on circumstances of the case of bad faith of DeVane. Court found this to be an “exceptional” case and awarded attorney’s fees, citing DeVane’s continued use of domain name after receiving cease and desist letter, failure to appear in the action and lack of any rights or legitimate interests in the domain name.

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ACPA Damages

- *Kiva Kitchen & Bath v Capital Distributing* No. CIV.A H-06-2562 (S.D. Tex. Apr. 22, 2008) aff'd 5th Cir., Apr. 2, 2009— court awarded maximum statutory damages of \$100,000 for 3 domain names forwarded to defendants due to direct competition with plaintiff in Dallas, intentional diversion of customers and defendant's year-long refusal to cease its domain-name forwarding. The court awarded \$40,000 for 5 other domain names of plaintiff's stores due to lack of direct competition between Kiva and Capital in other markets and determination that neither retailer sold appliances over the internet. The court ordered the transfer of the 8 domain names and awarded attorneys' fees and costs, and post-judgment interest.

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Trebling of Damages

- Section 35(a) of the Lanham Act, 15 U.S.C. §1117(a), grants courts the right to “enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not to exceed three times such amount.”

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Trebling of Damages

- Mandatory in trademark counterfeiting cases
- Awards shall be compensation and not a penalty
- Willful ignorance not a defense
- Must be intentional in two ways:
 - › Defendant knew goods were counterfeit
 - › Intended to offer goods for sale

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Trebling of Damages

- *H-D Michigan, Inc. v. Biker's Dream, Inc.* WL 697898, 48 U.S.P.Q. 2d 1108 (C.D. Cal. 1998)- plaintiff awarded treble damages only.
- *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 45 U.S.P.Q. 2d 1027 – court awarded treble damages in addition to actual damages.

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Attorney's Fees & Costs of Action

- Appropriate for “exceptional” cases
- Plaintiff must show defendant engaged in malicious, fraudulent, willful and/or intentional misconduct.
- Successful defendant may seek attorney’s fees by demonstrating the case lacked a good faith basis or was frivolous.

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Recent Trademark Cases

- Christian Louboutin (“CL”) v. Yves Saint Laurent America (“YSL”), USDC SD NY
- CL is famous French shoe designer best known for its heels with the red sole
- Sued YSL claiming damages greater than \$1 million over its monochromatic shoes (specifically those that had red heels)
- Yves challenged trademark – No fashion designer should be able to monopolize any color
- District Court – Denied a preliminary injunction, stating that trademark was overly broad; granting trademark protection to the color red would provide a monopoly over the color that would stifle creativity of other designers

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Recent Trademark Cases

- CL v. YSL, Appellate Court:
 - Color can be the subject of trademark protection if it acts as a symbol that distinguishes a product and identifies its source
 - Mark was not simply a red outer sole in any circumstance, but a red outer sole *contrasted* with a different color on the remainder of the shoe
 - Because YSL designed a monochromatic shoe, it could not infringe CL’s mark, which required a contrast.
 - Interesting, CL’s description of the mark in the trademark registration did not mention the contrast between the outer sole and the shoe
 - Court’s response: CL’s shoes have been characterized by their most striking feature: a bright, lacquered red outsole, which nearly always contrasts sharply with the color of the rest of the shoe
 - Seems Court revised the description of the protectable mark as contained in the trademark registration to facilitate a compromise: CL could retain exclusive use of its red sole on a contrastingly colored shoe, while YSL could products its monochromatic line of shoes

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Case Study

PODS v. U-Haul


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“Established in 1998, PODS is making moving and storage more convenient and less stressful through its innovative solution of delivering a level container and providing the customer all the time they need to load and unload their container.”

Here's how PODS® storage and moving containers work



We deliver.

We deliver an empty container to you at your convenience.



You pack.

Fill the container your way, at your pace, and call us when you're ready.



We store.

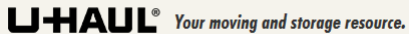
We can store your container in one of our secure Storage Centers.



We move.

Or, we'll come pick up your container, and drive it across town or across the country.


56 <http://www.pods.com/>


U-Box® pods for moving & storage | [Share](#) | [Frequently asked questions](#)

The U-Box is a revolution in how you can move. A U-Box pod fits about a room and a half of household items. If you got it into your house, you can get it into a U-Box. **Save time, save money, and have peace of mind** while moving.

Why should you get a U-Box?




You deliver to your door



We have multiple delivery options available to work around your schedule. Take our custom designed trailer with you today or schedule a U-Box delivery.


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Delivered to your door



Pack up U-Box pod at your own schedule. Reserve what you need and pay for only what you use. When you are done, deliver the U-Box back to us or we can pick-up and we will ship it to your destination or store for as long as you need. With U-Box you are in control.


We ship & store anywhere



U-Box pods are stored in a secure warehouse. When you're ready for re-delivery just let us know or rent a U-Box trailer and pick them up.

[See our locations & U-Box trailer](#)

57 <https://www.uhaul.com/>; <https://web.archive.org/web/20121231202443/http://www.uhaul.com/ubox/>



Google Search for “moving pods”

The screenshot shows a Google search interface with the query 'moving pods'. The results are dominated by advertisements for PODS and U-Haul U-Box. A red arrow labeled 'PODS' points to a search result for 'The Best Moving & Storage Idea Ever for Self Storage, Portable ...'. Another red arrow labeled 'U-Haul U-Box' points to a search result for 'U-Haul U-Box pods for moving and storage.'.

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PODS v. U-Haul Jury Verdict Liability

- Likelihood of confusion (federal and common law trademark infringement)
- Unfair competition (federal and common law)
- Trademark dilution (federal and state)
- Violation of Florida Deceptive and Unfair Trade Practices Act (i.e., because of trademark infringement or unfair competition)
- Unjust enrichment through use of “pod” or “pods”

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PODS v. U-Haul Jury Verdict Form Actual Damages

Experts testified at trial that PODS was entitled to corrective advertising damages, consisting of an Internet paid search campaign to counteract “misimpressions” on U-Haul’s website.

17. Do you find by a preponderance of the evidence that PODS has suffered actual damages?

Answer YES or NO YES

If your answer is YES, go to the next question. If your answer is NO, go to Question 19.

18a. If you answered “YES” to the previous question, what is the amount of PODS’ actual damages you find by a preponderance of the evidence?

\$ 45 million

If your answer is more than zero, go to the next question. If your answer is zero, go to Question 19.

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PODS v. U-Haul Jury Verdict Form Unjust Enrichment

Expert testified at trial that U-Haul generated incremental profits from U-Box container rentals.

19. Do you find by a preponderance of the evidence that U-Haul’s conduct was willful and deliberate, or U-Haul was unjustly enriched (you answered YES to Question 12), or an award of U-Haul’s profits is necessary to deter future conduct?

Answer YES or NO YES

If your answer is YES, go to the next question. If your answer is NO, you have finished your deliberations and should sign and date this form.

20a. If you answered “YES” to the previous question, what is the amount of U-Haul’s profits attributable to its use of the terms “pod” or “pods” you find by a preponderance of the evidence?

\$ 15.7 million

If your answer is more than zero, go to the next question. If your answer is zero, you have finished your deliberations and should sign and date this form.

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PODS v. U-Haul Court Order Entering Injunction

B) U-Haul International, Inc. ("U-Haul") and its subsidiaries, divisions, licensees, dealers, franchisees, assigns, affiliates, and each of their directors, officers, agents, servants, employees, representatives, attorneys, and those persons in active concert or participation with them, are hereby permanently restrained and enjoined from using the term "Pods", "Pod", "pods", or "pod", including without limitation all forms of those terms regardless of whether (a) any or all of the letters are capitalized or in lower case, (b) they are in singular or plural, or (c) they are modified before or after with one or more words or incorporated into or combined with other words (e.g. as part of a phrase) or any other marks, names or designations that are confusingly similar to the PODS Marks, or any other term confusingly similar to, or that is likely to cause dilution of, the PODS Marks in any manner, including without limitation, as trademarks, service marks (or any other type of designation), trade names, business names, descriptors, product names, domain names, keywords, metatags, or on websites (whether as part of hidden or visible text), Internet sites (including without limitation social media sites), products, or on any other electronic or printed material for the purpose of advertising, promoting, marketing, or describing any products or services. Notwithstanding the above, U-Haul may use the phrase "compare to PODS®" in comparative advertising in a manner that is not likely to confuse the public as to the source of the goods in question.

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U-Haul Website as of Apr. 20, 2016

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