



Three Stripes? No—Ninth Circuit Rules on Evidence to Establish Irreparable Harm

In a much-anticipated ruling, the United States Court of Appeals for the Ninth Circuit modified a preliminary injunction entered against Skechers on May 10, 2018, in *adidas America, Inc. v. Skechers USA, Inc.*

The ruling comes from a nearly three-year-old dispute between adidas and Skechers dating back to a September 14, 2015, lawsuit adidas filed against Skechers for trademark and trade dress infringement arising out of two of Skechers's shoe designs: the Onix and Cross Court. adidas claimed that these designs infringed adidas's Stan Smith trade dress and the famous Three Stripe trademark, respectively.

The district court granted adidas's request for preliminary injunction against both of Skechers's shoes, notwithstanding the high bar set by the Ninth Circuit in *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239 (9th Cir. 2013). In *Herb Reed*, the Ninth Circuit became the first to adopt the holding in *eBay Inc. v. MercExchange, LLC*, 547 US 388 (2006), which eliminated the presumption of irreparable harm. The *adidas* case is the first since *Herb Reed*, where the quantum of proof required to show irreparable harm was directly at issue. Skechers appealed the injunction on that basis.

The Ninth Circuit affirmed the injunction barring Skechers's sale of the Onix shoe, holding that adidas provided ample proof of irreparable harm, including evidence of "extensive and targeted advertising and unsolicited media, along with tight control of the supply of Stan Smiths."

However, notwithstanding evidence of likelihood of confusion, the court reversed the preliminary injunction entered against Skechers's Cross Court shoe, holding that adidas did not prove that it would suffer irreparable harm from Skechers's sales of a shoe that infringed its Three Stripe trademark. It held that "adidas advanced only a narrow argument of irreparable harm as to the Cross Court: that Skechers harmed adidas' ability to control its brand image." Ultimately, adidas's loss of control theory relating to a comparison of the quality of the respective shoe brands proved insufficient.

Dissenting, Circuit Judge Richard Clifton stated that the district court had discretion to infer that confusion was likely to harm adidas's reputation, noting "this is precisely the type of harm that is 'irreparable.'"

Trial is set in Oregon for June 2018.

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