

## INTERVENTION

# A Tale of Two Trademarks: A US Analysis of the Protection Strategies of adidas and Converse

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Each day consumers are presented with numerous advertisements and marketing communications regarding goods and services. To break through the clutter, strong brands must have products and services that are distinguishable to consumers. Unfortunately, as brands seek to become more identifiable, they may be confronted with competing products that will use similar names, packaging or slogans to influence consumer purchase decisions. One of the best strategies to combat unfair marketing tactics by competitors is through the registration and protection of a trademark.

Recently, adidas and Converse have been characterized as being aggressive in their trademark protection strategies. Using these companies as a foundation, the purpose of this article is to provide guidance to sport brands regarding trademark enforcement and protection. First, the authors discuss the history of adidas and Converse and their approaches to trademark protection. Next, the strategies of these companies are compared and contrasted. Lastly, the authors provide recommendations to sport brands regarding best trademark protection practices.

**Keywords:** sport; brand management; marketing; trademark infringement; protection

Branding allows companies to distinguish themselves from their competition and protects both the consumer and producer from competitors' products that appear to be similar or identical (Aaker 1992). A strong brand is composed of 'identifiable, enduring and meaningful' components (Wallace et al. 2011: 428), and consumers are increasingly able to discern products and services simply by their logo (Clement 2002). With this in mind, a brand seeks to deliver a favourable image that designates a source of goods; when it satisfies the legal standard, it is recognized as a trademark (Cho 2015). A trademark identifies a company's goods or services through a name, word, symbol, device, or any combination thereof. Trademarks can be a slogan, such as 'Just Do It' from Nike, a paw-print design by New Millennium, or the Three-Stripe mark associated with adidas apparel. If an individual or company uses a sport brand's trademark without their permission, there may be a valid claim for trademark infringement.

Undoubtedly, the market is saturated with sport goods and services, which makes obtaining a trademark essential for brand development, management, and protection. Specifically, trademarks provide companies with a competitive advantage and help increase revenue streams, as the product or service has a unique association differentiating it from other products (Peterson, Smith & Zerillo 1999). Multiple sport companies have pursued legal action against competitors to protect their trademarks, but the term 'trademark bullying' has surfaced during certain litigation. Trademark bullying occurs when a trademark owner harasses or intimidates another business beyond a reasonable scope allowed by the law (Sullivan & Curran 2015). High volume plaintiffs, or trademark bullies, are considered brands who file at least 10 cases per year (Brachmann 2016). Adidas has averaged at least 9 filings per year over the past decade, which is considered aggressive compared to other sport brands.

While adidas has been under fire for actively filing lawsuits against competitors, for years Converse utilized a cease-and-desist letter approach rather than pursuing litigation. The two strategies are in stark contrast and offer interesting analyses, as protecting intellectual property rights can be an expensive, yet necessary expenditure (USDOC 2017). This study examines and compares how adidas and Converse have protected their marks over the past decade. A review of each brand and their trademark protection strategies will be used to provide guidance and implications for sport brands.

## Trademark Registration and Protection

Famous trademarks are broadly recognized by consumers, which makes them vulnerable to numerous types of actionable harm, including confusion, dilution, tarnishment, and other injuries based on damage to brand equity (Alexander & Heilbronner 1996). In 1946, Congress passed the Federal Trademark Act, known as the Lanham Act, to provide trademarks with comprehensive federal protection. The Lanham Act protects trademarks from competing products, services, or goods that could cause consumer confusion or deception in the marketplace (Lanham Act 1946). Likelihood of confusion accommodates the legal notion that the schematic association between a trademark and goods/services designated by the mark is the central value of the mark (Cho & Moorman 2014).

Inherently distinctive trademarks, which are fanciful, arbitrary, or suggestive, immediately qualify for legal protection (Economides 1988). *Abercrombie & Fitch Co. v Hunting World Inc.* (1976) 537 F.2d 4 established trademark law that relies upon the distinctiveness test to characterize legally protected marks from unprotected ones. Therefore, if this association is disrupted by another deceptively similar mark or other allegedly infringing activities, it would devalue the core function of the trademark and consumer confusion would likely follow (Manta 2006). Marks not inherently distinctive can be legally protected if they have acquired a secondary meaning or are deemed to have acquired distinctiveness. In this instance, the owner must establish there is an association between the trademark and origin of the good in a consumer's mind (Economides 1988).

The United States Patent and Trademark Office (USPTO) is the federal agency responsible for reviewing the registration of, and ultimately granting, US patent and trademark protection (USPTO 2017). The USPTO requires trademark or service mark applications be based on an authentic intention to use the mark in commerce with goods, or in connection with services in the near future (USPTO 2017). This is termed an intent-to-use (ITU) application; however, one must show actual use of the mark in the marketplace in connection with certain goods and/or services prior to registering the mark. Brands can also seek trademark protection for potentially infringing goods/services outside the US. The United States International Trade Commission (USITC) is the federal agency tasked with investigating matters of trade domestically, as well as conducting global safeguard investigations and adjudicating cases involving imports that purportedly infringe upon intellectual property rights (USITC 2017). Section 337 of the Tariff Act of 1930 specifically addresses intellectual property issues, and allows complainants to file a request for investigations based on unlawful importation of products into the US, sale for importation into the US, or sales within the US after importation that may infringe upon domestically registered trademarks (Lafuze & Stanford 1992).

As the global nature of a brand expands, it is increasingly important to register and manage marks internationally. Patents and trademarks are considered territorial, and a US trademark is not protected under another country's trademark law. Subsequently, a trademark application must be filed in each country. To ease the burden of multiple country registration filings, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) streamlines the process by requiring one application in which US applicants can simultaneously seek protection in 99 countries (USPTO 2014). The Madrid Protocol is a more efficient way for trademark holders to concurrently obtain protection of trademarks internationally (WIPO-Administered Treaties 2007). International trademark protection can be expensive, but brands should ensure they prioritize where they need brand protection and have local counsel contacts in countries where their product is trademarked.

## Lessons from adidas and Converse

### **About adidas**

The Adidas Group was founded in Bavaria, Germany in 1924 by Adi Dassler. His brother, Rudolf Dassler soon joined the business, which became the 'Gebrüder Dassler Schuhfabrik' (Dassler Brothers Shoe Factory), and the group specialized in equipping athletes with track shoes (Mahdi et al. 2015). The most notable time in the group's early days came during the 1936 Olympics in Berlin, where Jesse Owens won four gold medals while wearing the Dassler Brothers' product. Eventually, the partnership deteriorated and Adi registered 'Adi Dassler Adidas Sportschuhfabrik' (adidas) in 1949, creating a separate apparel company. That same day, Adi registered the soon-to-be-famous three-stripe mark manufactured on the apparel (adidas 2012).

Three parallel stripes have become synonymous with the name adidas, as the sponsoring of association football stars such as David Beckham and Lionel Messi has intensified the popularization of the stripes (adidas team 2017). Over the years, adidas expanded the three parallel stripe mark to be included on sportswear and sporting equipment, in addition to athletic footwear. Adidas is the exclusive apparel provider for Major League Soccer (MLS), and recently reached a six-year, \$700 million extension with MLS (Smith 2017). Adidas also sponsors international association football club teams, including Bayern Munich and Real Madrid, along with national teams such as Argentina, Spain, and Germany, events such as the Boston Marathon (adidas 2012), and approximately 94 colleges/universities (adidas team 2017). The stripes typically appear on the shoulder, with the adidas logo displayed prominently on the right side of the chest.

### **adidas's Strategy**

The three-stripe trademark has become vital to the distinctiveness of adidas's brand, and has been considered 'famous' by courts since the 1970's (McKelvey 2008). Recently, adidas has been accused of pursuing trademark infringement claims too aggressively against manufacturers who use any number of stripes on its products. In *Forever 21, Inc. v*

*adidas* (2017) 2:17-cv-01752, the plaintiffs filed a lawsuit against *adidas* asserting the company should not have a monopoly over all striped clothing, and multiple claims by *adidas* against Forever 21 showed an aggressive pattern. The complaint also contended *adidas* asserts no clothing can have any stripes without infringing upon *adidas*' trademarks and accused the brand of being a trademark bully. Some sport brands argue *adidas* is within their rights to protect its brand from infringement (Cho 2015); others believe *adidas* has over-policed its marks and may be filing frivolous claims (Howard et al. 2000). Regardless, *adidas* has retained ownership of their mark for many years which can seemingly be attributed to their strategy of pursuing litigation against use of stripes on apparel, merchandise, and trademark registration applications.

*Adidas* has an extensive history of pursuing litigation against any company seeking to register a mark with stripes. In the last decade alone, an examination of cases available through Bloomberg Law revealed *adidas* has filed 93 trademark infringement lawsuits. The company has also actively protected the three-stripe mark beyond the scope of athletic apparel. In February 2017, *adidas* filed a notice of opposition with the USPTO for a registration of a mark by Tesla Motors. Tesla attempted to register a stylized number 3 made with three identical horizontal stylized lines but soon abandoned the registration after *adidas* opposed (Andree 2017). In the same year, the Barcelona Football Club filed an application to register a mark for sporting articles consisting of seven vertical stripes, with the stripes alternating between the colors blue and garnet. The Club also abandoned registration of the mark, even though there was no proof consumers may confuse seven stripes with the *adidas* three-stripe mark (Weiss 2017).

### **About Converse**

Converse was founded in 1908 as the Converse Rubber Shoe Company, which specialized in making rubber goods including boots and galoshes. The original Converse shoe, which bore the 'All Star' trademark, was a high-top sneaker introduced in 1917. In 1923, Converse's sales manager, Charles 'Chuck' Taylor, marketed himself as a great basketball player and added his name to the shoe (Wei-Haas 2016). The popularity of the All Star high-top shoes soared in the 1930's, and Converse became one of the first footwear companies to leverage an athlete endorsement. During the 1936 Olympic finals, the US men's basketball team sported the shoes in patriotic blue and red pinstripes (Wei-Haas 2016). In 1957, the low-top version of the Chuck Taylor All Star was introduced into US commerce and was tailored for everyday casual wear.

Even though athletes and celebrities promoted the All Star shoes in the 1980's, Converse struggled financially throughout the 1990's and eventually filed for bankruptcy in 2001. Converse emerged through bankruptcy after being acquired by Nike in 2003 (Linshi 2014). As of 2014, Converse has sold over a billion pairs of shoes with their signature trademarks – which include a midsole design comprising a toe bumper and toe cap, along with an upper and/or lower stripe, as well as the 'star in circle' logo. Between the years 2012–2014, in *Converse, Inc. v Certain Footwear Products* (2014) 79 Fed. Reg. 68482-83, the company claimed over \$30 million was spent on advertising and promoting their signature marks in the US alone and has grossed more than \$2.4 billion in the US in the past decade.

### **Converse's Strategy**

In *Converse* prior to 2000, the company's brand protection efforts were consistent in monitoring counterfeit products and policing protected marks. However, resources for trademark enforcement were scant leading up to bankruptcy in 2001, and protection was limited to cease-and-desist letters to potential trademark infringers. Around 2007, Converse identified an increasing number of counterfeit products entering European markets. In response, Converse incorporated more overt and covert features, or 'tells,' to their footwear as a way for consumers to identify an authentic pair of Converse shoes. These efforts did nothing to decrease the rise of counterfeit goods, as Converse seized over a million pairs of counterfeit shoes worldwide during 2011. According to *Converse*, this number doubled between 2012 and 2014, as international counterfeit goods became more difficult for consumers to differentiate from authentic Converse shoes. Converse did not actively begin enforcing its international trademark rights again until 2010 at the World Shoe Accessories (WSA) trade show, focusing their efforts on foreign contract manufacturers. The shoe company sent out more than 180 cease-and-desist letters, which had little to no effect on infringers.

In 2014, Converse filed lawsuits against 31 companies, including Wal-Mart, K-Mart, Skechers, FILA, Ed Hardy and Ralph Lauren, alleging trademark infringement (Abrams 2016; Linshi 2014). The lawsuits asserted companies were copying the rubber bumper design at the front of the shoe, the 'toe cap' above the bumper, and the lines or stripes running around the sides of their signature shoes (Rozansky 2016). Converse simultaneously filed a complaint with the USITC, alleging violations of section 337 of the Tariff Act of 1930, as an attempt to stop the importation of counterfeit products from entering the US (USITC 2017). Multiple defendants fought back, claiming Converse was participating in anti-competitive actions and using the lawsuit to extort monetary settlements (Rozansky 2016). Ultimately, the USITC issued a sweeping General Exclusion Order (GEO), which barred the importation of any shoe bearing Converse's trademark diamond-patterned outsole (Pearson, Pond & Belagodu 2016), but other trademark registrations were reversed and deemed invalid due in large part to decades (since the 1920s) of unrestricted use of similar looks by competitors. The USITC ruled that the rubber bumper, the toe cap, and the stripes on the sides lacked enforceable rights (Donahue 2017c); a decision which was in stark opposition to the federal protection afforded to these registered marks.

### **Strategic Comparison**

Adidas's and Converse's strategies to protect their trademarks may be contrasting, yet both can be seen as aggressive tactics in their own right. Converse's strategy of filing lawsuits and USITC complaints on the same day against 31 companies convinced 21 of respondents to settle (Rozansky 2016). Converse was able to obtain default judgements against five others (Pearson et al. 2016). Adidas unceasingly pursues litigation to safeguard their three-stripe trademark, and has claimed victories due to the distinctiveness their trademark has acquired through secondary meaning. The courts have ruled in favour of adidas multiple times because consumers more than likely associate the three-stripes with the source rather than the product itself (Daniels 2017). On the other hand, Converse lost multiple trademarks after the USITC said the design of Converse's sneaker lacked the necessary secondary meaning needed to qualify for trade dress protection under the Lanham Act (Donahue 2017a).

Nonetheless, adidas and Converse have provided brands valuable information for protecting their trademarks and trade dress. Adidas has been accused of being a trademark bully, with companies alleging adidas tries to monopolize the use of stripes by heavily policing the attempted registration or use of stripes, reaching beyond the scope of the sport apparel industry (Donahue 2017b). Nevertheless, adidas has managed to continuously protect against the use of stripes by competitors, as the likelihood of stripes becoming generic is high if not unremittingly defended.

Even though Converse believed the popularity of the Chuck Taylors would uphold the registered marks, the lack of litigation prior to 2014 provided an opportunity for the design to become broadly used by competitors. While the USITC issued the GEO, competitors such as Wal-Mart, Skechers, New Balance, and Highline United will be allowed to continue importation of similar shoes so long as they do not include Converse's diamond sole (Pearson et al. 2016). Sport brands should heed this outcome, as this decision indicates if companies are not actively monitoring and policing potential infringers and counterfeits, they may lose one or more of their most valuable assets.

### **Recommendations and Conclusion**

The sport brand marketplace is rapidly growing, and brands looking to distinguish themselves from competitors should seek to establish distinctive trademarks. Trademarks should be easily identifiable to consumers, as this association allows consumers to determine the source/origin of a particular good/service. In the case of a counterfeit product, creating 'tells' will allow consumers to differentiate an authentic product from a fake one. For example, when Nike released the Air Jordan 13, there was a unique hologram on the shoe bottom and ankle to aid consumers with counterfeit detection (Betschart 2015).

Additionally, when considering an application for a trademark, companies should first conduct a trademark search of the USPTO database and state government databases of trademark registrations to assess the risk of using the proposed trademark (Lemper 2012). This is to help prevent future problems regarding goods/services utilizing similar marks. However, registering a trademark is only the first step in establishing and maintaining protection of the mark. Many companies seek litigation for potential trademark infringement, though some choose to issue cease-and-desist letters prior to taking legal action. Unfortunately, cease-and-desist letters are not legally binding and formal complaints may be the only option a company has to protect against unauthorized use.

Maintaining a trademark also requires continuous use by the registered owner, known as 'use it or lose it' (Kane 2002). A trademark has the potential to last indefinitely, unless the mark is abandoned or, as in Converse's case, loses its distinctive nature. Sport brands would be well-advised to maintain use of registered marks in commerce and build associations for consumers between the trademark and the source of the good. The stronger the associations for consumers, the more likely brands will be able to retain validity of their trademarks and protect against infringers.

Unquestionably, policing a trademark is crucial for guarding against infringing products and counterfeiters. The takeaways from this study show actively policing and defending registered marks are in the best interest of the brand, even if competitors believe the brand to be a 'trademark bully.' Adidas is a noteworthy example of a sport brand willing to put money behind the protection of their mark. Without a distinctive mark, a brand fails to seize the opportunity to create and build an incredibly valuable asset. A legal team that actively monitors potential use of a mark and responds to infringers promptly will enable a sport brand to vigorously safeguard their trademark. While adidas has been successful at protecting against the use of stripes by other brands, Converse did not fare as well. Companies should not rely solely on cease and desist letters, and even though making the product more distinctive is prudent, following through with litigation in the case of unauthorized use may be the best strategy to retain a brand's most valuable asset. Brands should work with experienced international trademark lawyers who have a network of local counsel contacts in other countries. Protecting a brand's intellectual property can be expensive, but as Converse showed, the potential to lose business and previously registered marks to counterfeiters may be greater.

### **Competing Interests**

The authors have no competing interests to declare.



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