

## 2020 Brings (Some) Clarity to Trademark Profit Awards

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Nearly a year ago, we previewed the U.S. Supreme Court’s then-upcoming decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.*—a case set to provide some much needed clarity on the question of whether plaintiffs in trademark infringement cases must demonstrate that defendants acted willfully in order for plaintiffs to recover defendants’ profits.

Justice Gorsuch delivered the opinion of the Court resolving the circuit split on this issue and holding that a plaintiff alleging trademark infringement under § 1125(a) of the Lanham Act is **not required** to prove willful infringement as a precondition to recovering lost profits. The Court reasoned that the clear and unambiguous language of the Lanham Act’s remedies provision only requires a precondition of willfulness when awarding profits for trademark *dilution* under § 1125(c), not trademark *infringement* under § 1125(a). The Court was careful to note that willfulness, though not a precondition to awarding profits, remains an important factor a court should consider when assessing damages. It simply is not, however, an “inflexible” threshold inquiry.

Given the expansive nature of the ruling, it seems likely to benefit not only plaintiffs bringing trademark infringement cases—it may also benefit litigants bringing false advertising lawsuits because false advertising claims are also governed by § 1125(a) of the Lanham Act.

It remains to be seen how this guidance will ultimately be implemented by the lower courts. But one thing is certain: infringers should expect more aggressive enforcement efforts from rights holders and an uptick in infringement filings. Stated differently, the needle has moved in rights holders’ favor, and there is now more incentive to litigate.

Justice Gorsuch delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, Alito, Kagan, and Kavanaugh joined. Justice Alito filed a concurring opinion, in which Justices Breyer and Kagan joined. Justice Sotomayor filed an opinion concurring in the judgment.

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