

In The
Supreme Court of the United States

THOMAS KENNETH ABRAHAM d/b/a
PADDLE TRAMPS MANUFACTURING CO.,

Petitioner,

v.

ALPHA CHI OMEGA, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Although a finding of Laches or implied acquiescence bars any monetary recovery, may a trial court in its discretion nonetheless enjoin clear trademark infringement?

CORPORATE DISCLOSURE STATEMENT

The corporate respondents are Alpha Chi Omega Fraternity, Inc., Alpha Delta Pi Sorority Corporation, Alpha Gamma Delta Fraternity Corporation, Alpha Gamma Rho Fraternity Corporation, Alpha Omicron Pi Fraternity, Inc., Alpha Phi International Fraternity, Incorporated, Alpha Tau Omega Fraternity, Inc., Alpha Xi Delta Fraternity Corporation, Beta Theta Pi Corporation, Chi Omega Fraternity Corporation, The Chi Phi Fraternity, Inc., The Delta Chi Fraternity, Inc., Delta Delta Delta Corporation, Delta Gamma Fraternity Corporation, Delta Phi Epsilon, Inc., Delta Tau Delta Corporation, Gamma Phi Beta Sorority, Inc., Kappa Alpha Order Corporation, Kappa Delta Sorority, Incorporated, Kappa Sigma Fraternity, an unincorporated association, Lambda Chi Alpha Fraternity Incorporated, Phi Delta Theta Fraternity Corporation, Phi Kappa Sigma Fraternity, Inc., Phi Kappa Tau Fraternity Corporation, Phi Kappa Theta Fraternity Corporation, Pi Kappa Alpha Corporation, Pi Beta Phi Corporation, Sigma Alpha Epsilon Fraternity Corporation, Sigma Chi Corporation, Sigma Kappa Corporation, Sigma Phi Epsilon Fraternity Corporation, and Tau Kappa Epsilon Fraternity Corporation.

None of the corporate respondents are owned by any parent corporations, nor does any publicly held company own more than 10% of any of the corporate respondents.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Authorities	iv
Counterstatement of the Case	1
Reasons for Denying the Writ	5
I. The Public Policy of Trademark Law	5
II. When Trademark Infringement is “Clear,” Laches or Implied Acquiescence Precludes Only Monetary Recovery; Trial Courts Retain Discretion to Enjoin Continuation of the Infringement	7
A. The General Rule	7
B. The Exceptions to the General Rule	14
1. “Abandonment” Exception	15
2. Express “Encouragement” Excep- tion	16
III. The Case Law of the Fifth Circuit and the Holding Below are Completely Con- sistent with the General Rule	17
IV. There is No “Entrenched” Conflict Among the Circuits Relating to the General Rule	20
V. The Trial Court Did Not Abuse its Dis- cretion in Partially Enjoining the “Clear” Infringement	35
Conclusion	37

TABLE OF AUTHORITIES

Page

CASES

<i>AM Gen. Corp. v. DaimlerChrysler Corp.</i> , 311 F.3d 796 (7th Cir. 2002)	3
<i>Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux</i> , 279 U.S. 737 (1929).....	12, 13
<i>Angel Flight of Ga. Inc. v. Angel Flight Am., Inc.</i> , 522 F.3d 1200 (11th Cir. 2008)	7, 12
<i>Anheuser-Busch, Inc. v. Du Bois Brewing Co.</i> , 175 F.2d 370 (3d Cir. 1949).....	24
<i>Armco, Inc. v. Armco Burglar Alarm Co., Inc.</i> , 693 F.2d 1155 (5th Cir. 1982).....	19
<i>Autozone, Inc. v. Strick</i> , 2010 WL 883850 (N.D. Ill. March 8, 2010).....	29
<i>Black Diamond Sportswear, Inc. v. Black Diamond Equip., Ltd.</i> , 2007 U.S. App. LEXIS 23515 (2d Cir. 2007).....	23
<i>Chattanooga Mfg. Inc. v. Nike, Inc.</i> , 301 F.3d 789 (7th Cir. 2002)	29
<i>Conan Props., Inc. v. Conans Pizza, Inc.</i> , 752 F.2d 145 (5th Cir. 1985)	19
<i>Conopco, Inc. v. Campbell Soup Co.</i> , 95 F.3d 187 (2d Cir. 1996).....	22, 36
<i>Creswill v. Grand Lodge Knights of Pythias of Georgia</i> , 225 U.S. 246 (1912).....	12, 13, 14
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006).....	18, 19, 20, 37

TABLE OF AUTHORITIES – Continued

	Page
<i>E-Systems, Inc. v. Monetek, Inc.</i> , 720 F.2d 604 (9th Cir. 1983)	3, 30
<i>French Republic v. Saratoga Vichy Spring Co.</i> , 191 U.S. 427 (1903)	14
<i>Grupo Gigante v. Dallo & Co.</i> , 391 F.3d 1088 (9th Cir. 2004)	3, 30
<i>Haviland & Co. v. John Haviland China Corp.</i> , 269 F.Supp. 928 (S.D.N.Y. 1967)	16
<i>Hot Wax, Inc. v. Turtle Wax, Inc.</i> , 191 F.3d 813 (7th Cir 1999)	16, 29, 36
<i>Inwood Labs. v. Ives Labs.</i> , 456 U.S. 844 (1982)	7
<i>Jarrow Formulas, Inc. v. Nutrition Now, Inc.</i> , 304 F.3d 829 (9th Cir. 2002)	30, 31
<i>Kason Indus., Inc. v. Component Hardware Grp.</i> , 120 F.3d 1199 (11th Cir. 1997)	32, 36
<i>Kellogg v. Exxon Corp.</i> , 209 F.3d 562 (6th Cir. 2000)	28
<i>Knorr-Nahrmittel A.G. v. Reese Finer Foods</i> , 695 F.Supp 787 (D.N.J. 1988)	16
<i>Lyons Partnership, L.P. v. Morris Costumes, Inc.</i> , 243 F.3d 789 (4th Cir. 2001)	26, 27
<i>McLean v. Fleming</i> , 96 U.S. 245 (1877)	passim
<i>Menendez v. Holt</i> , 128 U.S. 514 (1888)	passim
<i>N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc.</i> , 753 F.2d 131 (D.C. Cir. 1985)	33, 37

TABLE OF AUTHORITIES – Continued

Page

<i>Oriental Fin. Group, Inc. v. Cooperperativa De Ahorro Crédito Oriental</i> , 698 F.3d 9 (1st Cir. 2012)	21, 22
<i>Potter Instrument Co. v. Storage Tech. Corp.</i> , 641 F.2d 190 (4th Cir. 1981)	36
<i>Pro Football, Inc. v. Harjo</i> , 565 F.3d 880 (D.C. Cir. 2009)	33
<i>ProFitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.</i> , 314 F.3d 62 (2d Cir. 2002)	23
<i>Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.</i> , 673 F.3d 294 (4th Cir. 2012)	27
<i>Reid, Murdoch & Co. v. H.P. Coffee Co.</i> , 48 F.2d 817 (8th Cir. 1931)	30
<i>Resorts of Pinehurst, Inc. v. Pinehurst National Corp.</i> , 148 F.3d 417 (4th Cir. 1998)	11
<i>Sara Lee Corp. v. Kayser-Roth Corp.</i> , 81 F.3d 455 (4th Cir. 1996)	12, 26, 27
<i>Saratoga Vichy Spring Co. v. Lehman</i> , 625 F.2d 1037 (2d Cir. 1980)	16, 23
<i>Saxlehner v. Eisner & Mendelson Co.</i> , 179 U.S. 19 (1900)	<i>passim</i>
<i>Seven-Up Co. v. O-So-Grape Co.</i> , 283 F.2d 103 (7th Cir. 1960)	29
<i>SunAmerica Corp. v. Sun Life Assurance Co. of Can.</i> , 77 F.3d 1325 (11th Cir. 1996)	12, 32

TABLE OF AUTHORITIES – Continued

	Page
<i>Swank, Inc. v. Ravel Perfume Corp.</i> , 438 F.2d 622 (C.C.P.A. 1971)	7
<i>Tandy Corp. v. Malone & Hyde, Inc.</i> , 769 F.2d 362 (6th Cir. 1985)	28
<i>Ultra-White Co. v. Johnson Chemical Ind., Inc.</i> , 465 F.2d 891 (C.C.P.A. 1972)	11, 33
<i>United Drug Co. v. Theodore Rectanus Co.</i> , 248 U.S. 90 (1918).....	14, 15, 17, 34
<i>Univ. of Pittsburgh v. Champion Products Inc.</i> , 686 F.2d 1040 (3d Cir. 1982).....	24, 25, 36

STATUTES

15 U.S.C. § 1114(1)(a)	5
15 U.S.C. § 1125(a)	6
15 U.S.C. § 1127.....	15

TREATISES

GILSON, TRADEMARK PROTECTION AND PRACTICE (2011)	8
MCCARTHY ON TRADEMARKS AND UNFAIR COMPE- TITION (4th ed. 2012).....	3, 16

COUNTERSTATEMENT OF THE CASE

The Respondents, collectively referred to herein as the “Greek Organizations,” are the parent/headquarter organizations of 32 national collegiate fraternities and sororities.

Petitioner is in the wooden products industry. Petitioner operates a local shop in Lubbock, Texas, and also distributes his products to craft and gift shops and other retail outlets. More recently, he began operating online websites marketing the products, including www.awardplace.com and www.paddletramps.com.

The primary products marketed by Petitioner and distributed to his retail store customers are generic novelty items such as blank wall plaques, picture frames, jewelry boxes, and so forth, as well as small wooden alphabet letters and other small wooden items in the shape of stars, moons, hearts, musical instruments, animals, and such. The business model most commonly used by Petitioner and his retail store customers is to market these products as *component parts*. Petitioner and his retail store customers display the blank wall plaques, picture frames, and jewelry boxes in conjunction with a number of bins containing the assorted small letters and other wooden items. A customer selects and purchases the desired components to later glue together to create an individualized finished product, the composition and layout of which is personally designed by the customer. The infringement claims involved in this lawsuit

do not involve either Petitioner's primary business model, nor its primary product lines. For example, Respondent Alpha Chi Omega cannot and does not complain about a member of that sorority purchasing a blank wooden plaque, purchasing the individual Greek Alphabet letters for Alpha Chi Omega, AXΩ, and then gluing those letters to the blank wooden plaque.

The only products considered to be infringements are *the extremely few* finished products produced by Petitioner which are complete replicas of the Greek Organization's insignia, for example, wooden carved replicas of the respective Greek Organization's coat-of-arms insignia.¹

Only a tiny, tiny fraction of Petitioner's business is subject to the extremely narrow injunction meticulously crafted by the trial court below. The overwhelming majority of Petitioner's products include generic items that are not in issue. The infringement claim involves less than 2.44% of Petitioner's business. Indeed, had Petitioner agreed to become a licensed vendor, the royalty which he would have paid to each of the 32 Greek Organizations for the past few years would have been only about an average of \$140.78 per

¹ Petitioner also sells press-on decal replicas of the Greek Organizations' coat-of-arms, but those products are officially licensed products acquired by Petitioner from an approved vendor of the Greek Organizations. The mere resale of officially licensed products is acceptable; it is not claimed to be an infringement.

year. Notably, the limited extent of the offending sales in recent years is exponentially larger than the volume of Petitioner's business in the past. As Petitioner's long time Production Manager testified at trial, the volume today is about 26 times larger than the sales volume back in the 1970s. Consequently, had the Greek Organizations opted to litigate back in the 70s, the fight would have been over a lost average royalty of perhaps only \$5.41 each per year, not the \$140.78 per year amount based upon current sales volumes.²

It is inaccurate for Petitioner to claim that the Greek Organizations tolerated or acquiesced in the infringement for over forty years. Quite to the contrary, although the infringements were too *de minimis* to justify the expense of litigation, since at least 1991, the Greek Organizations repeatedly contacted Petitioner *dozens of times* pleading with him to either

² Although Respondents are not proceeding with a cross-petition relating to the Laches holding, it is significant to note the evidence would have supported a trial court finding there was no Laches due to the *de minimis* extent of the infringing sales. See *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 823 (7th Cir. 2002) ("a trademark owner [is allowed] to tolerate *de minimis* or low-level infringements") (quoting 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31.21 (4th ed. 2012)). See also *E-Systems, Inc. v. Monetek, Inc.*, 720 F.2d 604, 607 (9th Cir. 1983) ("Had defendant's encroachment been minimal, or its growth slow and steady, there would be no laches"); and *Grupo Gigante v. Dallo & Co.*, 391 F.3d 1088, 1102 (9th Cir. 2004) (a trademark holder is allowed "to delay when a defendant engages in *de minimis* infringement").

become a licensed vendor or to discontinue the infringing portion of the business.

Notwithstanding the pleas, rather than terminate the infringement or become licensed, in about 2001, in exacerbation of the infringement, Petitioner modified its business model by going online with an internet store selling the infringing products. As noted above, Petitioner's prior business model consisted primarily of retail display of blank wall plaques, picture frames, and jewelry boxes along with assorted bins containing small wooden alphabet letters and small wooden components in the shape of stars, moons, hearts, musical instruments, animals, and such, whereby the consumer selected the desired components to later glue together to complete an individualized finished product. Then, with its internet store, Petitioner began *widespread advertising* regularly utilizing the names and other insignia of the Greek Organizations to market the products, including "kits" containing the component parts advertised using the marks of the respective Greek Organizations, for example, an "Alpha Chi Omega Paddle Kit."

This use of the Greek Organizations' names and insignia *to advertise* Petitioner's generic blank products and component parts is primarily what the trial court enjoined. As for Petitioner's actual product lines, extremely little is enjoined: only the few wooden products *actually replicating* the Greek Organizations' insignia, not the generic component parts. Significantly, the trial court refused to enjoin the sale by Petitioner of the wooden replicas of the shape of

the Greek Organizations' coat-of-arms upon which the customer can mount the officially licensed decal of the respective coat-of-arms. Indeed, notwithstanding finding infringement to be "self-evident," the trial court ***declined to enjoin*** the sale of most of the infringing product; it enjoined only a few products, well less than 2.44% of Petitioner's business. *See* Petit. at 61a-64a.



REASONS FOR DENYING THE WRIT

I. The Public Policy of Trademark Law.

Trademark infringement occurs when one replicates or uses indicia so similar to marks of others in a way likely to cause consumer confusion. For example, the Lanham Act defines infringement of a federally registered mark as follows:

Any person who shall, without the consent of the registrant –

(a) use in commerce any reproduction, copy, colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant.

15 U.S.C. § 1114 (1)(a). The Lanham Act similarly prohibits unapproved replication or simulation of *unregistered* marks. As another provision of the Lanham Act provides,

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof . . . which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

The policy interests protected by trademark law are twofold: (1) the interest of protecting a trademark owner from unapproved commercial replication or simulation of its marks, and (2) the interest of protecting the consuming public from being confused, mistaken, or deceived. As this Court notes,

[T]rademark infringement inhibits competition and subverts both goals of the Lanham Act. By applying a trademark to goods produced by one other than the trademark's owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain. . . . *At the same time, the infringer deprives consumers of their ability to distinguish among the goods of competing manufacturers* [citations omitted].

Inwood Labs. v. Ives Labs., 456 U.S. 844, 854 n.14 (1982) (emphasis added). Of these two interests, “the public interest is *the dominant consideration*.” *Swank, Inc. v. Ravel Perfume Corp.*, 438 F.2d 622, 624 (C.C.P.A. 1971) (emphasis added).

To allow rather than enjoin continued infringement directly contravenes the policy interest of protecting the consuming public from confusion or deception. “The reason is simple: the public deserves not to be led astray by the use of inevitably confusing marks.” *Angel Flight of Ga. Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1209 (11th Cir. 2008). Thus, in addition to the named parties – the trademark owner and the infringer – trademark infringement litigation also takes into account the interests of the unnamed parties, the innocent consumers at risk of being confused or deceived by the infringement into believing the purchase is of genuine or official trademarked product.

II. When Trademark Infringement is “Clear,” Laches or Implied Acquiescence Precludes Only Monetary Recovery; Trial Courts Retain Discretion to Enjoin Continuation of the Infringement.

A. The General Rule.

Consistent with the public policy of protecting the innocent consuming public from confusion or deception, a well-regarded treatise notes, “Laches is probably the most frequently raised and most

unsuccessful defense in trademark cases.” 3 GILSON, TRADEMARK PROTECTION AND PRACTICE, § 11.08[3][i][ii] (2011). Rather than allow continued infringement, in cases of “clear infringement,” trial courts may enjoin the infringement, notwithstanding Laches or any implied acquiescence.

As a rich body of case law from this Court and the progeny thereof steadfastly provide, the routine consequence of Laches is that a trademark owner is barred from any monetary relief and *sometimes* precluded from obtaining injunctive relief. However when there is either (1) clear infringement or (2) intentional infringement, the interest of consumers, the innocent affected non-parties, are paramount, and thus, injunctive relief against ongoing infringement is appropriate. Although Laches may properly preclude injunctive relief in cases of innocent coincidental use of marks only arguably similar to marks of others, when there is either clear or intentional infringement, trial courts retain the discretion to enjoin such infringement.

Curiously the Petition provides only a mere paragraph of passing mention of the pertinent case law of this Court governing cases of clear infringement of trademarks. For instance, the Petition provides only a string cite acknowledgement of *McLean v. Fleming*, 96 U.S. 245 (1877). In *McLean*, the Court held as follows:

Equity courts will not, in general, refuse an injunction on account of delay in seeking

relief, *where the proof of infringement is clear*, even though the delay may be such as to preclude the party from any right to an account for past profits [citations omitted].

Positive proof of fraudulent intent is not required *where the proof of infringement is clear*, as the liability of the infringer arises from the fact that he is enabled, through the unwarranted use of the trade-mark, to sell a simulated article as and for the one which is genuine [citation omitted].

Id. at 253-54 (emphasis added). Even when “[a]cquiescence of long standing is proved . . . and inexcusable Laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits; but infringement having been proven,” an injunction is appropriate. *Id.* at 258.

In *Menendez v. Holt*, 128 U.S. 514 (1888), additional controlling authority of this Court also just barely acknowledged by the Petitioner here, the infringer sought the Court’s retreat from the principles set forth in *McLean*. The Court expressly declined to do so noting, “[w]e see no reason to modify this general proposition” reiterating that “even though a complainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded.” *Id.* at 523.

[W]hen the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. . . . Mere delay or acquiescence cannot defeat the remedy by injunction. . . . [R]elief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired by that negligence, the right to cut down the remainder. . . . Where consent by the owner to the use of his trade-mark by another ***is to be inferred from his knowledge and silence merely, 'it last no longer than the silence from which it springs'***; it is, in reality, no more than a revocable license' [citation omitted].

128 U.S. at 523-24 (emphasis added). See also *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 39 (1900) (quoting *McLean*, *supra*) ("equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though a delay may be such as to preclude the party from any right to an account for past profits").

The enjoined behavior here involves Petitioner's intentional commercial replication and marketing of products bearing copies of the Greek Organizations' marks. We are dealing with "clear" infringement. As the trial court found as a matter of law, the likelihood of confusion is so clear, it is "self-evident." Petit. at 185a ("After considering and weighing all the factors, and determining that a majority of them weigh in

favor of a likelihood of confusion, the Court agrees with the Greek Organizations that in this case, ‘confusion is self-evident’”).

Here, we are dealing with Petitioner’s intentional replication of marks of the Greek Organizations, not coincidental use of marks only arguably similar to the marks; we are dealing with the “clear” infringement which many courts now refer to as infringement “inevitably” likely to cause consumer confusion.

This is not a case wherein a likelihood of purchaser confusion or mistake is reasonably in doubt, and evidence of Laches, estoppel or acquiescence may be considered as a factor in resolving that doubt. [citation omitted]. Rather, it appears to us that *confusion or mistake here is not only likely but inevitable in light of the virtual identity of the parties’ marks* and goods, as well as the similarity of trade channels, market areas and advertising media. In such a situation, notwithstanding the equities . . . the public interest . . . is the dominant consideration.

Ultra-White Co. v. Johnson Chemical Ind., Inc., 465 F.2d 891, 893-94 (C.C.P.A. 1972) (emphasis added).

Following the guidance of this Court which provides that in cases of “clear” infringement, injunctive relief is appropriate notwithstanding any implied acquiescence or Laches, courts regularly grant injunctive relief. *See Resorts of Pinehurst, Inc. v. Pinehurst National Corp.*, 148 F.3d 417, 423 (4th Cir. 1998) (“The public interest in avoiding confusion and

mistake requires that the doctrines of Laches and acquiescence not be rigidly applied when a strong showing of a likelihood of confusion is made.”) (internal citations omitted); and *Angel Flight of Georgia*, 522 F.3d at 1209 (citing *SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 77 F.3d 1325, 1336 (11th Cir. 1996)) (an inevitable likelihood of consumer confusion overrides otherwise inexcusable delay in bringing suit; when consumer confusion is inevitable “injunctions against the infringing party are the order of the day”); and *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461 (4th Cir. 1996) (“[I]n consideration of the public interest, estoppel by Laches may not be invoked to deny injunctive relief if it is apparent that the infringing use is likely to cause confusion.”).

In summary, it is well settled in the Supreme Court cases and the progeny thereof that even if there has been such delay adequate to support a finding of implied acquiescence or Laches, an injunction is nonetheless appropriate in cases of (1) “[t]he intentional use of another’s trade-mark,” *Saxlehner*, 179 U.S. at 39, or (2) “where the proof of infringement is clear.” *McLean*, 96 U.S. at 253.

Paddle Tramps misplaces its reliance on the Court’s decisions in *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246 (1912) and *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737 (1929). Both of these cases involve fraternal organizations with membership rolls exclusively limited to white people versus other

fraternal organization with membership rolls exclusively limited to blacks or Asians.

Neither case involved either “intentional” infringement or “clear” infringement. Rather, in both cases, the Court found there was no intent to capitalize on the name of the adverse party. *See Ancient Egyptian Arabic Order*, 279 U.S. at 747 (“there is no evidence of a fraudulent intent on the part of the negro order, or of a purpose on its part to induce any one . . . to believe that it was the white order or that they were parts of the same fraternity. On the contrary, it is shown that the negro order always held itself out as entirely distinct from the white order”) and *Creswill*, 225 U.S. at 827-28 (“On examining the evidence we are compelled to say we do not think it has any tendency to prove an intent on the part of the defendant order . . . to make it appear that their order and that of the complainant is one and the same, or that it tends to show that the use of [the similar name and insignia] operated in any degree to deceive the public or to work pecuniary damage to the complainant order”). That is to say, not only were there no improper intentions in either of these cases, but further, because of the racial exclusivity membership policies of the respective organizations, there was no risk of one being confused for the other. Thus, these were not cases of “clear” infringement.

These cases do not, as Petitioner suggests, supersede the general rule set forth by the Court in *McLean*, *Menendez*, and *Saxlehner*. Since neither *Creswill* nor *Ancient Egyptian Arabic Order* involved

cases of clear infringement, the general rule was inapplicable therein. Indeed, rather than supersede *McLean*, *Menendez*, and *Saxlehner*, it is quite notable that subsequent to *Creswill*, the Court again expressly reiterated the general rule that in cases of clear infringement, injunctive relief remains appropriate notwithstanding any acquiescence or Laches. See *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 103 (1918) (“where the proof of infringement is clear, a court of equity will not ordinarily refuse an injunction for future protection of the proprietor of a trademark right, even where his acquiescence and Laches have been such as to disentitle him to an accounting for the past profits of the infringer”).

B. The Exceptions to the General Rule.

The Court does recognize two exceptions to the general rule, namely, (1) situations where lengthy delay has caused the trademark in issue to become “abandoned,” *Menendez*, 128 U.S. at 524,³ and (2) cases where the trademark owner is guilty of *expressly* encouraging the ongoing infringement. *Id.* Neither exception is present here.

³ See also *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427, 437 (1903) (trademark claimant “had allowed the name to become generic”).

1. “Abandonment” Exception.

“Abandonment” involves situations in which a trademark owner has been so lax in enforcing its mark that it allows a mark to lose all of its significance as a reference to a specific source. If that occurs, a mark is deemed “abandoned” or “generic”; it is no longer enforceable. Under the Lanham Act, a trademark becomes abandoned and protectable rights lost, “[w]hen any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become a generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark.” 15 U.S.C. § 1127.

On the factual question of whether any of the Greek Organization marks had become unenforceable, in granting partial summary judgment for the Greek Organizations, the trial court below found as a matter of law that the marks here in issue have not gone generic or otherwise been abandoned. *Petit*. at 160a. Thus, the exception to the general rule dealing with “abandoned” marks is inapplicable.

Although delay so lengthy as to cause a mark to lose its significance and become generic and abandoned would, of course, bar an injunction, Petitioner’s superficial suggestion that lengthy delay, even without abandonment, should be enough to bar injunctive relief ignores the actual general rule set forth by the Court in *McLean*, *Menendez*, *Saxlehner*, and *United Drug*. Representative of this superficial position is

Petitioner’s misplaced reliance on Professor McCarthy’s treatise. Yes, McCarthy does note that “a grossly long period of delay” can avoid the imposition of any injunctive relief. 6 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION (4th ed. 2012) § 31:7. However, upon reviewing the cases cited by McCarthy in support of this assertion, it is apparent that none involve “clear” infringement of valid marks. To the contrary, they involve cases of little likelihood of confusion, not “clear” infringement, e.g., *Haviland & Co. v. John Haviland China Corp.*, 269 F.Supp. 928, 956 (S.D.N.Y. 1967); weak descriptive marks, e.g., “Saratoga Vichy” vs. “Saratoga Geyser,” *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037 (2d Cir. 1980); abandoned marks, e.g., *Knorr-Nahrmittel A.G. v. Reese Finer Foods*, 695 F.Supp 787 (D.N.J. 1988) and false advertising cases, not cases involving “clear” infringement of trademarks, e.g., *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir 1999).

2. Express “Encouragement” Exception.

As for the exception to the general rule dealing with actions by the trademark owner “encouraging” the infringement, this exception deals with situations involving express encouragement, or explicit acquiescence, situations in which the infringer’s “action is taken on the strength of encouragement to do it.” *Menendez*, 128 U.S. at 524. As the Court notes however, this exception does not apply when the alleged acquiescence is merely inferred or implied. “Where consent by the owner to the use of his trade-mark by

another *is to be inferred from his knowledge and silence merely*, ‘it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.’” *Id.* (emphasis added) (citation omitted).

Here, we are not dealing with explicit encouragement of the infringement. Although the jury did find that the Greek Organizations’ silence constitutes an implied acquiescence, the jury did not find any expressed or explicit acquiescence. Thus, the exception to the general rule dealing with expressly encouraged infringement is also inapplicable.

III. The Case Law of the Fifth Circuit and the Holding Below are Completely Consistent with the General Rule.

The general rule is clear: unless lengthy delay has caused the trademark in issue to become “abandoned,” *Menendez*, 128 U.S. at 524, or unless the trademark owner is guilty of *expressly* encouraging the ongoing infringement, *id.*, “where the proof of infringement is clear, a court of equity will not ordinarily refuse an injunction for future protection of the proprietor of a trademark right, even where his acquiescence and Laches have been such as to disentitle him to an accounting for the past profits of the infringer.” *United Drug Co.*, 248 U.S. at 103. The holding of the trial court, as affirmed by the Fifth Circuit is not at all inconsistent with the general rule.

Petitioner suggests the trial court and the Fifth Circuit are wrongly of the view that infringement should be enjoined “as a matter of course.” Neither the analysis of the courts below, *nor even the actual holding* supports such a suggestion. Indeed, notwithstanding finding clear “self-evident” infringement, the trial court ***declined to enjoin*** the sale of most of the infringing product; it enjoined only some product, well less than 2.44% of Petitioner’s business. *See* Petit. at 61a-64a.

The trial court did not enjoin the infringement “as a matter of course.” In meticulously crafting a narrow injunction relating to only a small fraction of the infringing product, the trial court engaged in the balancing of interests factors referenced by this Court in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). The trial court held, in the balance, there was adequate prejudice to allow Petitioner to actually continue selling most of the infringing product; it enjoined only a fraction of the infringement, and did not determine to do so before proceeding with the following analysis:

In order to determine whether the injunction should issue, the court balances the equities, weighing the degree of prejudice Abraham would suffer if either use was permanently enjoined against the Greeks’ right to exclusive use of the marks and the public interest in avoiding consumer confusion caused by their continuing use.

Petit. at 57a. Consistent with the “clear infringement” general rule, the trial court did note the fact

that the offending “products are exact replicas of the Greeks’ marks . . . adds a thumb on the scale in favor of the Greeks.” *Petit*. at 63a. Even so, after giving weight to the fact that likelihood of confusion is “self-evident,” *Petit*. at 185a, a factor “in favor of the Greeks,” the court enjoined only a slight fraction of the infringing product. It is inaccurate to suggest the court disregarded its duty and proceeded to enjoin infringement “as a matter of course.”

It is likewise inaccurate to suggest the Fifth Circuit encourages injunctions “as a matter of course.” In this case it expressly noted just the opposite, “There is no doubt laches may defeat claims for injunctive relief.” *See Petit*. at 21a (quoting *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1161 n.14 (5th Cir. 1982)). The Fifth Circuit further noted its prior holding in *Conan Props., Inc. v. Conans Pizza, Inc.*, 752 F.2d 145, 152 (5th Cir. 1985), a clear infringement case which expressly followed this Court’s *Menendez* case. Rather than affirm “as a matter of course” the injunction entered by the trial court in *Conan*, the Fifth Circuit *actually reversed a portion of that injunction*, reversing so much of the injunction as related to infringing behavior expressly encouraged by the trademark owner.

In this appeal, rather than hold that infringement should be enjoined “as a matter of course,” the Fifth Circuit scrutinized the trial court’s application of the law, including the requisite *eBay* balancing analysis, before agreeing the trial court correctly performed the analysis. *See Petit*. at 24a-25a. Accordingly,

following its own detailed review of the trial court judgment, the Fifth Circuit merely concluded the issuance of the partial injunction was not an abuse of discretion. *Id.*

Neither the trial court, nor the Fifth Circuit placed the burden on Petitioner to prove that an injunction was improper as the Petition suggests. “The district court’s test did not erroneously place the burden of proof on Abraham; rather it correctly considered the relevant [*eBay*] factors.” *Petit.* at 24a.

In summary, both the trial court and the Fifth Circuit faithfully applied the general rule that in cases of “clear infringement,” trial courts may enjoin continuing infringement notwithstanding Laches or any implied acquiescence. The courts below did not do so, however, without first considering the balance of hardships and the public interest as required by *eBay*.

IV. There is No “Entrenched” Conflict Among the Circuits Relating to the General Rule.

The issue here is not whether there are articulable differences among the circuits as to what constitutes Laches. The courts below held that the delay here *was lengthy enough* to constitute Laches. Indeed there may be some differences, insignificant here, among the circuits as to what constitutes Laches. As Petitioner correctly notes, some circuits hold that if the period of delay exceeds the duration of the statute

of limitations imported into trademark infringement cases, Laches may be presumed. Indeed, the limitation periods imported in trademark infringement cases do vary from circuit to circuit, but that is not the issue here. *Whether* Laches occurred here is not the issue. Respondents have not cross-petitioned seeking review of the finding of Laches.

The *real issue* here is the question of whether in cases of “clear infringement,” trial courts may enjoin continuing infringement, notwithstanding Laches or any implied acquiescence. On that question, and notwithstanding Petitioner’s protestations to the contrary, there is no “entrenched” circuit conflict. A simple objective review of the analyses and holdings of the published circuit court level cases relied upon by Petitioner does not disclose any “entrenched” circuit conflict as to the application of the general rule. For instance, note the following:

First Circuit: *Oriental Fin. Group, Inc. v. Cooperperativa De Ahorro Crédito Oriental*, 698 F.3d 9 (1st Cir. 2012) is not at all inconsistent with the general rule. *Oriental* does not even involve the issue of when injunctive relief is proper in view of a Laches defense as the court held the Laches defense was not even applicable in the case. “[W]e conclude that the defense is not available here.” *Id.* at 21. In a passing reference of *dictum*, the court did note,

Although the circuits vary somewhat in their interpretations as to when the laches defense can operate bar injunctive relief, the defense

is now generally accepted whether asserted as a defense to an injunction or damages, and we agree that the defense is available *in some circumstances* to defend against an injunction.

Id. at 20 (emphasis added). The references in support of this *dictum* note principles such as “a balancing of the equities is required”; “laches *may* bar . . . injunctive relief *under certain circumstances*” (italics added); “laches can bar injunctive relief”; and so forth. *Id.* None of these principles are at all in conflict with the general rule. This First Circuit *dictum* does not manifest any “entrenched” conflict among the circuits.

Second Circuit: Similarly, the case law in the Second Circuit does not manifest any “entrenched conflict.” Citing *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187 (2d Cir. 1996), Petitioner suggests that the Second Circuit holds that when the delay exceeds the applicable statute of limitations, not only is Laches presumed, but so too is it “presumed” that equitable relief is barred. *Conopco* actually notes that Laches may be presumed, but does not hold that injunctive relief is necessarily barred. Rather it holds, “the determination of whether laches bars . . . equitable relief is entirely within the discretion of the trial court” and even notes that in exercising its discretion, the trial court must consider “the public interest.” *Id.* at 193.

Whether Laches may be “presumed” is not in issue here. The real issue is whether Laches, *presumed*

or not, bars an injunction in cases of clear infringement. On that point, the case law of the Second Circuit is totally consistent with the general rule; it is well settled within the Second Circuit that even if there has been delay sufficient to support a Laches defense, an injunction is nonetheless appropriate in cases of “clear” or “intentional” infringement. See *ProFitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 68 (2d Cir. 2002) (“Given the strong interest in preventing public confusion . . . , a plaintiff’s apparent acquiescence or delay in bringing suit does not necessarily bar relief.”); *Black Diamond Sportswear, Inc. v. Black Diamond Equip., Ltd.*, 2007 U.S. App. LEXIS 23515, *11 (2d Cir. 2007) (“We have recognized that, even where laches is a valid defense to damages, ‘a court may nonetheless grant injunctive relief if it determines that the likelihood of confusion is so great that it outweighs the effect of plaintiff’s delay in bringing suit.’”) (citation omitted).

Granted, an early Second Circuit case suggested that Laches would bar injunctive relief, but that was not a case of “clear” infringement. *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037 (2d Cir. 1980). *Saratoga* dealt with generic marks as well as a lack of clear infringement. Similarly, *Black Diamond Sportswear*, 2007 U.S. App. LEXIS 23515, *11 is inapplicable. There the injunction was denied because of the “lack of any record evidence suggesting a high likelihood of confusion.”

None of the published Second Circuit case law relied upon by Petitioner is at all in conflict with the general rule. The Second Circuit case law does not manifest any “entrenched” conflict among the circuits.

Third Circuit: The law of the Third Circuit is not inconsistent with the general rule. In the older case cited by Petitioner, *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 175 F.2d 370 (3d Cir. 1949), an injunction was denied, but not simply because of lengthy delay. The injunction was denied for multiple reasons, all consistent with the general rule. The infringement did not constitute intentional replication of the trademark. *Id.* at 376. It was not a case of clear infringement. *Id.* at 377 (the products were “clearly distinguishable”). The plaintiff’s predecessor had publicly acknowledged that the mark was not a protectable mark, announcing that “‘no one can have an exclusive right’ to the word.” *Id.* at 376. Further, the trademark owner had expressly encouraged the defendant’s continuing use of the mark when in 1909 it voluntarily dismissed a prior infringement suit against the same defendant relating to that usage.

The more recent Third Circuit case relied upon by Petitioner, *Univ. of Pittsburgh v. Champion Products Inc.*, 686 F.2d 1040 (3d Cir. 1982), is just as consistent with the general rule. As expressly noted therein, relying on *Menendez*, injunctive relief is improper if a mark has been allowed to become “abandoned” or there has been “a general surrender of the use to the public.” *Id.* at 1045. Relating to

“abandonment,” the Third Circuit did offer conjecture that a delay “of a hundred years or more” should be more than adequate to render a mark abandoned. *Id.* at 1044. Delay less than 100 years though is a different situation; it “will bar . . . an accounting for past infringement but not for prospective injunctive relief.” *Id.* Here though, we are not dealing with delay “of a hundred years or more.”

What is actually much more interesting and pertinent from the *Univ. of Pittsburgh* case is the fact that the delay in issue there was at least 44 years; the University became aware of the unapproved merchandising by Champion of University of Pittsburgh sportswear at least as early as 1936, but did not put Champion on notice of its trademark claims until 1980. *Id.* at 1043. Notwithstanding at least 44 years of delay, the Third Circuit *actually reversed* the trial court holding that Laches barred an injunction. Here, in the present case, the delay was considerably less than 44 years. The Greek Organizations began complaining in the early 1990s, directing Petitioner to either become a licensed vendor or to discontinue infringing the marks.

The Third Circuit case law is neither inconsistent with the holding in this case, nor does it manifest any “entrenched” conflict among the circuits.

Fourth Circuit: Petitioner suggests that the Fourth Circuit’s case law is both “internally inconsistent” as well as inconsistent with the other Circuits. Petitioner is mistaken.

Actually following the general rule, the Fourth Circuit holds that Laches does not necessarily bar injunctive relief in cases of clear infringement. In *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455 (4th Cir. 1996), the trial court declined to impose an injunction finding Laches. On appeal, the Fourth Circuit held the trial court had “miscalculated the likelihood of . . . confusion” between the marks at issue. *Id.* at 462. Finding that the trial court had understated the significance of the infringement, the Fourth Circuit reversed the denial of an injunction *Id.* at 462 (citation omitted). Simply put, the Fourth Circuit found that notwithstanding Laches, because of the clear infringement, injunctive relief was appropriate. Petitioner is mistaken in suggesting that *Sara Lee* holds that injunctions are appropriate in every case of infringement; in fact, the court expressly noted that an injunction may be denied when the balance of equities tips in favor of the defendant. *Id.* at 461.

Similarly, *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001) is not at all inconsistent with the general rule. Pertinent to the real question here, *Lyons* merely follows the law as applied by the Fourth Circuit in *Sara Lee* noting that “laches may not be invoked to deny injunctive relief that otherwise would appear appropriate,” meaning that laches may not be invoked to deny an injunction in cases of obvious infringement. *Lyons Partnership*, 243 F.3d at 800. In fact, citing *Sara Lee*, the court in *Lyons* acknowledges that “[i]n consideration of the

public interest, estoppel by laches may not be invoked to deny injunctive relief if it is apparent that the infringing use is likely to cause confusion.” *Id.* at 799.

Likewise, *Ray Commc’ns, Inc. v. Clear Channel Commc’ns, Inc.*, 673 F.3d 294, 307 (4th Cir. 2012) aligns with the general rule. Petitioner argues that the Fourth Circuit in *Ray* reached the “irreconcilable conclusion that ‘laches *may* act as a bar to both monetary and injunctive relief under certain circumstances.’” *Ray Commc’ns*, 673 F.3d at 307 (citing *Sara Lee*, 81 F.3d at 461). This is certainly not contrary to other Fourth Circuit holdings; all the courts in the Fourth Circuit agree that laches *may*, in some circumstances, act as a bar to injunctive relief. However, as the court noted in *Ray*, “in the consideration of the public interest, estoppel by laches may not be invoked to deny injunctive relief if it is apparent that the infringing use is likely to cause confusion.” *Id.* (quoting *Sara Lee*, 81 F.3d at 461).

The case law of the Fourth Circuit manifests neither an “irreconcilable internal conflict” within that circuit, nor any “entrenched” conflict with the other circuits.

Sixth Circuit: The case law of the Sixth Circuit appears to be especially consistent with the general rule as set forth by the Court in *Menendez, supra*. As noted above, in *Menendez*, the Court held that delay may bar a monetary recovery, but does not necessarily bar injunctive relief in cases of clear infringement *unless* (1) there was express encouragement,

something other than mere silence, or (2) the mark has lost its significance, that is to say, has become abandoned. *Menendez*, 128 U.S. at 523-24.

Totally consistent, in *Kellogg v. Exxon Corp.*, 209 F.3d 562 (6th Cir. 2000), the Sixth Circuit states that, “although laches precludes a plaintiff from recovering damages, it does not bar injunctive relief” and notes that “abandonment” of the mark is an exception to this rule. *Id.* at 568-69 (“To deny injunctive relief . . . affirmative conduct in the nature of estoppel, or conduct amounting to ‘virtual abandonment’ is necessary”). See also *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 366, n.2 (6th Cir. 1985) (“To deny injunctive relief in trademark litigation, however, some affirmative conduct in the nature of an estoppel . . . or conduct amounting to ‘virtual abandonment’ . . . is necessary.”) (internal citations omitted).

Nothing in the case law from the Sixth Circuit relied upon by Petitioner appears at all inconsistent with the general rule, nor does it manifest any “entrenched” conflict with the other circuits.

Seventh Circuit: Nor is the case law of the Seventh Circuit inconsistent with the general rule. Petitioner contends that the Seventh Circuit holds that when the plaintiff’s delay is extreme, Laches conclusively bars injunctive relief and when the delay exceeds the closest analogous state statute of limitations, *laches presumptively bars injunctive relief*. However, one of the very cases relied upon by Petitioner states just the opposite. “Laches does not

necessarily constitute a conclusive and automatic bar to injunctive relief in trademark actions.” *Seven-Up Co. v. O-So-Grape Co.*, 283 F.2d 103 (7th Cir. 1960).

Scrutiny of the Seventh Circuit cases cited by Petitioner shows that the *actual holdings* in the cases are not at all inconsistent with the general rule. Petitioner misplaces its reliance on cases that involve neither “intentional” nor “clear” infringement. For instance, in *Chattanooga Mfg. Inc. v. Nike, Inc.*, 301 F.3d 789 (7th Cir. 2002) and *Autozone, Inc. v. Strick*, 2010 WL 883850 (N.D. Ill. March 8, 2010), the factual situations did not involve clear infringement. Similarly, *Seven-Up Co.* is inapplicable; it deals with a situation of explicit acquiescence and encouragement.

As for *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999), that is not even a trademark infringement case; it involves allegations of false advertising. Further, as the court noted there, an injunction was not necessary because the alleged false advertising may not even have been, “false,” or “deceiving.” 191 F.3d at 827. It certainly is not a case of any “clear” wrongdoing, much less, any “clear infringement.” *Hot Wax* is inapplicable here.

The analysis of whether an injunction can be awarded in cases of clear infringement, notwithstanding Laches, is no different in this circuit than in any other circuit. The actual holdings of the Seventh Circuit cases relied upon by Petitioner are not at all inconsistent with the general rule, nor do they manifest any “entrenched” conflict with the other circuits.

Eighth Circuit: Petitioner agrees that the Eighth Circuit authority is consistent with that of the Fifth Circuit. *See* Petit. at 15. Not only that, the authority of the Eighth Circuit is also clearly consistent with the general rule. For instance, in *Reid, Murdoch & Co. v. H.P. Coffee Co.*, 48 F.2d 817 (8th Cir. 1931), the court held that, notwithstanding Laches, an injunction was proper because the infringement was intentional. In support of its holding, the court stated that, “Violation of a trade-mark and unfair competition constitute a continuing wrong, and, while laches may be a ground for denying a right to recover damages, it will not ordinarily constitute a bar to an injunction for future infringement.” *Id.* at 820.

The case law of the Eighth Circuit cited by Petitioner does not manifest any “entrenched” conflict among the circuits.

Ninth Circuit: The *trademark infringement cases* from the Ninth Circuit relied upon by Petitioner are entirely consistent with the general rule. In both *E-Systems, Inc. v. Monitek, Inc.*, 720 F.2d 604 (9th Cir. 1983) and *Grupo Gigante SA de CV v. Dallo & Co., Inc.*, 391 F.3d 1088 (9th Cir. 2004), the court denied injunctions, but the factual situations did not involve “clear” infringement.

Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829 (9th Cir. 2002) is not a trademark infringement case; it is a false advertising case. If *Jarrow* were a trademark infringement case, one might be

able to credibly suggest that it is slightly – *but only slightly* – inconsistent with the general rule. Whereas the case law of the Court holds that Laches does not necessarily bar an injunction in cases of “clear” infringement, in *Jarrow*, the Ninth Circuit states that injunction trumps Laches “only when the suit concerns allegations that the product is harmful or otherwise a threat to public safety and well being” *Id.* at 841. That is to say, when Laches is present, the Ninth Circuit would not approve of an injunction involving “clear” false advertising, unless the falsity relates to something “harmful or otherwise a threat to public safety and well being.” However, this slightly heightened test certainly does not manifest an “entrenched conflict” among the circuits.

The focus of the public interest of concern *in trademark infringement cases* is not only to protect consumers from physical harm or injury, the actual focus is to protect consumers from any material confusion *as to the source* of the product bearing a trademark.

The fact remains, in relation to Laches and “clear” *trademark infringement*, the case law of all of the circuits appears totally consistent with the general rule. There is no “entrenched” conflict among the circuits.

Tenth Circuit: Petitioner does not cite any Tenth Circuit cases in support of his contention that there is an “entrenched conflict” among the circuits.

Likewise, Respondents are unaware of any Tenth Circuit authority in conflict with the general rule.

Eleventh Circuit: Consistent with the general rule, it is well settled in the Eleventh Circuit that even if there has been such delay as to support a Laches defense, an injunction is nonetheless appropriate in cases of “clear” infringement. Illustratively, the Eleventh Circuit refers to cases of “clear” infringement as situations involving an “inevitable” risk of confusion. *See Kason Indus., Inc. v. Component Hardware Grp.*, 120 F.3d 1199, 1207 (11th Cir. 1997) (“thus, if the likelihood of confusion is inevitable, or so strong as to outweigh the effect of the plaintiff’s delay in bringing a suit, a court may in its discretion grant injunctive relief. . . .”); *see also SunAmerica Corp.*, 77 F.3d at 1336 (Because of the interests of the innocent consumers, in “trademark infringement actions . . . complete injunctions against the infringing party are the order of the day”).

The case law of the Eleventh Circuit does not manifest any “entrenched” conflict among the circuits.

Federal Circuit: Although not cited by Petitioner, the Court of Customs & Patent Appeals, now known as the Court of Appeals for the Federal Circuit, holds just the same.

This is not a case wherein a likelihood of purchaser confusion or mistake is reasonably in doubt, and evidence of Laches, estoppel or acquiescence may be considered as a factor in resolving that doubt [citation omitted].

Rather, it appears to us that confusion or mistake here is not only likely but inevitable in light of the virtual identity of the parties' marks and goods, as well as the similarity of trade channels, market areas and advertising media. In such a situation, notwithstanding the equities . . . the public interest . . . is the dominant consideration.

Ultra-White 465 F.2d at 893-94.

D.C Circuit: Finally, just like the other circuits, the D.C. Circuit follows the general rule and recognizes that “mere passage of time does not bar injunctive relief.” *N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc.*, 753 F.2d 131, 138 (D.C. Cir. 1985). Ignoring that, Petitioner misplaces its reliance on the D.C. Circuit’s decisions in that case as well as in *Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009). Neither of these cases involved either “intentional” or “clear” infringement. Instead, *N.A.A.C.P.* dealt with a situation of explicit acquiescence, and *Pro Football* dealt with disparagement rather than trademark infringement – a completely different issue.

The case law of the D.C. Circuit cited by Petitioner is not inconsistent with the general rule; it does not manifest any “entrenched” conflict among the circuits.

The issue here is not the question of how much delay constitutes Laches in trademark infringement cases. *Whether* Laches occurred here is not the issue.

Respondents have not cross-petitioned seeking review of the finding of Laches.

The real issue is whether the trial court holding affirmed by the Fifth Circuit is inconsistent with the general rule set forth by the Court in *McLean*, *Menendez*, *Saxlehner*, and *United Drug*. As a rich body of case law from this Court and the progeny thereof steadfastly provide, the routine consequence of Laches is that a trademark owner is barred from any monetary relief and *sometimes* precluded from obtaining injunctive relief. However when there is either (1) clear infringement or (2) intentional infringement, injunctive relief against ongoing infringement is appropriate. Although Laches may properly preclude injunctive relief in cases of innocent coincidental use of marks only arguably similar to marks of others, when there is either clear or intentional infringement, trial courts retain the discretion to enjoin such an infringement.

There is no “entrenched” conflict among the circuits relating to the application of the general rule. Further, the holding of the trial court is completely consistent with the general rule. As the Fifth Circuit concluded on appeal, the issuance of the partial injunction was not an abuse of discretion; the trial court correctly followed the law. *See* Petit. at 24a-25a.

V. The Trial Court Did Not Abuse its Discretion in Partially Enjoining the “Clear” Infringement.

The general rule which is uniformly followed among the circuits is that notwithstanding any implied acquiescence or Laches, a trial court may *in its discretion* enjoin “clear” infringement unless the mark holder expressly encouraged the infringement or unless the mark in issue has become abandoned.

The implicit reality here is that Petitioner is actually challenging whether the trial court properly exercised its discretion when, in the balance, it held a partial injunction is appropriate. The enjoined behavior here involves Petitioner’s intentional commercial replication and sale of products bearing copies of the Greek Organizations’ marks. We are dealing with “clear” infringement. As the trial court found as a matter of law, the likelihood of confusion is so clear, it is “self-evident.” *Petit.* at 185a. (“After considering and weighing all the factors, and determining that a majority of them weigh in favor of a likelihood of confusion, the Court agrees with the Greek Organizations that in this case, ‘confusion is self-evident’”). Petitioner did not appeal this finding of clear infringement; it is the law of the case.

Here, we are not dealing with explicit encouragement of the infringement. Although the jury did find that the Greek Organizations’ silence constitutes an implied acquiescence, the jury did not find any express or explicit acquiescence. Petitioner did not

appeal the finding of only implied acquiescence, without a finding of explicit acquiescence; it is the law of the case. Thus, the exception to the general rule dealing with express encouragement is inapplicable.

The trial court below found as a matter of law that the marks here in issue have not gone generic or otherwise been abandoned. *Petit*, at 160a. Petitioner did not appeal this finding; it is the law of the case. Thus, the exception to the general rule dealing with abandoned marks is also inapplicable.

Trial courts have authority to enjoin clear infringement, notwithstanding any implied acquiescence or Laches, and that is precisely what the trial court below did by meticulously crafting a narrow injunction prohibiting only a small portion of the infringement. Whether to enjoin clear infringement, notwithstanding any implied acquiescence or Laches, is left to the discretion of the trial court. *Conopco*, 95 F.3d at 193 (“The determination of whether laches bars a plaintiff from equitable relief is entirely within the discretion of the trial court”); *Potter Instrument Co. v. Storage Tech. Corp.*, 641 F.2d 190, 191 (4th Cir. 1981) (noting that “invocation of . . . laches . . . is within the sound discretion of the district court”); *Univ. of Pittsburgh*, 686 F.2d at 1045 (“laches is an equitable doctrine addressed to the sound discretion of the district judge”); *Hot Wax*, 191 F.3d at 819 (“a district court enjoys considerable discretion in determining whether to apply the doctrine of laches to claims pending before it”); *Kason*, 120 F.3d at 1207

(“if the likelihood of confusion is inevitable, or so strong as to outweigh the effect of the plaintiff’s delay in bringing a suit, a court may *in its discretion* grant injunctive relief”) (emphasis added); *N.A.A.C.P.*, 753 F.2d at 138 (“considerable deference is given to the trial judge’s discretion on the question of laches”).

As the Fifth Circuit concluded on appeal, the issuance of the partial injunction by the trial court was not an abuse of discretion. The trial court correctly followed the law, including the requisite *eBay* balancing analysis. *See* Petit. at 24a-25a.

Petitioner’s discomfort with the trial court’s factual findings, Petitioner’s discomfort with the result of the trial court’s balancing of the respective interests of the parties in conjunction with the interests of the consuming public, and Petitioner’s discomfort with the trial court’s appropriate exercise of its discretion does not warrant issuance of a Writ.



CONCLUSION

There is no “entrenched” conflict among the circuits; to protect the consuming public from the inevitable likelihood of confusion caused by unapproved replication of the trademarks of others, clear infringement may in the discretion of the trial court be enjoined, notwithstanding any implied acquiescence or Laches.

Here there was no abuse of discretion. The trial court correctly followed the law and appropriately exercised its discretion to enjoin clear infringement. The Fifth Circuit appropriately scrutinized and approved the trial court's exercise of its discretion.

There is no reason, much less any compelling reason, for the Court to grant the requested Writ.

Respectfully submitted,

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