

**United States Court of Appeals  
for the Federal Circuit**

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**CONVERSE INC.,**  
*Appellant*

v.

**INTERNATIONAL TRADE COMMISSION,**  
*Appellee*

**SKECHERS U.S.A., INC., WAL-MART STORES, INC., NEW  
BALANCE ATHLETICS, INC., fka New Balance Athletic Shoe, Inc.,  
HU LIQUIDATION, LLC, fka Highline United LLC,**  
*Intervenors.*

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**On Appeal from the United States International Trade Commission  
Investigation No. 337-TA-936**

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**BRIEF OF *AMICUS CURIAE* INDUSTRIAL DESIGNERS SOCIETY OF  
AMERICA, INC. IN SUPPORT OF NEITHER PARTY**

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## **CERTIFICATE OF INTEREST**

Counsel for *amicus curiae* Industrial Designers Society of America, Inc. certifies the following:

**1. The full name of every party or amicus represented by me is:**

Industrial Designers Society of America, Inc.

**2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

N/A

**3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:**

Industrial Designers Society of America, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

**4. The names of all law firms and partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:**

None

Date: February 1, 2017

/s/ James J. Aquilina II  
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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

Founded in 1965, *amicus curiae* Industrial Designers Society of America, Inc. ("IDSA") is one of the oldest and largest membership associations for professional industrial designers.<sup>2</sup> IDSA is a non-profit organization dedicated to improving industrial design knowledge and representing the industrial design profession to businesses, the government, and the public. IDSA has thousands of members in dozens of Student Chapters, Professional Chapters, and Special Interest Sections. IDSA also sponsors the annual International Design Excellence Awards® (IDEA), one of the world's most prestigious and rigorous design competitions.

The IDSA's Design Protection Section is actively involved in monitoring and commenting on legal issues relating to design rights, and has been a sponsoring partner of the USPTO's annual Design Day event. Members of the

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<sup>1</sup> No party's counsel authored the present brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting the present brief, and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the present brief. FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E).

<sup>2</sup> *About IDSA*, <http://www.idsa.org/about-idsa>.

Design Protection Section routinely speak at leading law schools, have testified before Congress on design rights issues, and have served as expert witnesses in hundreds of design-related cases, including those related to trade dress law. IDSA has a primary interest in the outcome of this matter based on its longstanding commitment to design rights issues.

IDSA's specific interests in this case are to: (i) advocate for strong trademark rights for iconic product configurations that have acquired secondary meaning as source identifiers; and (ii) foster and encourage a transparent and just legal system that affords owners of registered trademarks for famous product configurations the full extent of legal protections available to them under the Lanham Act. These interests are important to industrial designers, trademark owners, and the purchasing public.

## ARGUMENT

### **I. STRONG TRADEMARK RIGHTS FOR INDUSTRIAL DESIGNS THAT HAVE DEVELOPED INTO SOURCE IDENTIFIERS ARE IMPORTANT TO THE U.S. ECONOMY, AND THE LANHAM ACT AFFORDS GREAT STRENGTH TO THESE RIGHTS ONCE THEY HAVE BEEN REGISTERED**

Industrial designers design all types of consumer products, and in doing so combine artistic creativity, engineering skills, and a broad array of business considerations to make the most appealing designs and to make products more competitive in the marketplace. Sometimes, these industrial designs become iconic of a brand or supplier and develop secondary meaning as an identifier of the source of the underlying good or service. Examples of iconic product designs which later became source identifiers include Herman Miller's Aeron® chair<sup>3</sup>, Honeywell's T-86 thermostat<sup>4</sup>, and Volkswagen's Beetle® automobile<sup>5</sup>, each of

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<sup>3</sup> See U.S. Design Patent No. D346,279, issued April 26, 1994, and U.S. Trademark Registration No. 2,754,826, registered on August 26, 2003 based on first use dates in 1994.

<sup>4</sup> See U.S. Design Patent No. D136,850, issued Dec. 14, 1943, and U.S. Trademark Registration No. 1,622,108, registered on Nov. 13, 1990 based on first use dates in 1952.

<sup>5</sup> See U.S. Trademark Registration No. 3,038,741, registered on Jan. 10, 2006 based on first use dates in 1948.



which is the subject of at least one U.S. product configuration trade mark registration.



Herman Miller Aeron® chair



Honeywell T-86 thermostat



*Volkswagen Beetle® automobile*

When an applicant applies to register a product design, product packaging, color, or other trade dress for goods or services with the USPTO, the USPTO will evaluate the applied-for mark for both functionality and distinctiveness. *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28-29, 58 USPQ2d 1001, 1004-1005 (2001). In *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215, 54 USPQ2d 1065, 1069 (2000), the Supreme Court distinguished between two types of trade dress—product design and product packaging—and held that product design could never be inherently distinctive, and therefore must acquire secondary meaning before it may be registrable. *Id.* at 212, 54 USPQ at 1068.

The USPTO's trademark Examining Attorneys are subject matter experts who, during examination of a trademark application, evaluate the mark for secondary meaning, functionality, and genericness, and will not allow marks to be

registered that do not, in their expert opinions, satisfy these criteria for registration. Since product design is never inherently distinctive, and therefore must acquire secondary meaning before it may be registrable, trademark applications for product designs are strictly scrutinized by the USPTO's trademark Examining Attorneys on the question of whether the mark has acquired secondary meaning. The USPTO's Trademark Manual of Examining Procedure confirms this stringent level of review, stating that "[a]pplicants face a heavy burden in establishing distinctiveness in an application to register trade dress." § 1202.02(b)(i) (Jan. 2017 ver.) (citing *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549 (TTAB 2009)).

As discussed in greater detail below, a registered trademark for a product configuration—having survived the USPTO's heightened scrutiny of its acquisition of secondary meaning—should be afforded the full possible extent of validity deference in accordance with the language of Section 33(a) of the Lanham Act (15 U.S.C. § 1115(a)). The requested clarification from this court regarding the strength of these registered trademark rights would add transparency to the U.S. intellectual property system and permit intellectual property owners to better understand the strength and scope of the rights that they have acquired for their iconic product designs.

**II. THE COURT SHOULD HOLD THAT WHERE ONLY PROSPECTIVE RELIEF IS REQUESTED BY THE OWNER OF A REGISTERED TRADEMARK, IT IS ERROR FOR A FACTFINDER TO CONSIDER SECONDARY MEANING AT THE TIME OF FIRST USE OF A CONFUSINGLY SIMILAR MARK, RATHER THAN ONLY AT THE TIME OF SUIT**

It is well established that monetary relief under the Lanham Act is only available when secondary meaning can be shown to have existed prior to the date on which the accused infringer began using a confusingly similar mark. *Tone Bros., Inc. v. Sysco Corp.*, 28 F.3d 1192, 1201 (Fed. Cir. 1994); *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125-26 (4th Cir. 1990); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1043 (2d Cir. 1980); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1231-32 (3d Cir. 1978)). Therefore, in cases where monetary relief is sought, it is proper and necessary for a factfinder to evaluate secondary meaning at the time of first use of a confusingly similar mark.

However, in the present case, Converse has sought only injunctive relief from Appellee International Trade Commission (“Commission”).<sup>6</sup> Some federal

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<sup>6</sup> As this court is well aware, the Commission is in fact unable to grant monetary damages pursuant to an investigation under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 337), and can only grant prospective relief, including general exclusion orders preventing the future importation of certain products into the United States.

courts have recognized that a grant of injunctive relief requires proof only that secondary meaning existed at the time of suit. *Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc.*, 26 F. Supp. 2d 834, 850 n.10 (E.D. Va. 1998) (citing *McDonald's Corp. v. Druck & Gerner*, 814 F. Supp. 1127, 1132-33 (N.D.N.Y. 1993)). This holding makes sense from both legal and policy standpoints. It is axiomatic that some descriptive marks can, and do, acquire distinctiveness over time and thus become registrable on that basis on the trademark Principal Register. 15 U.S.C. § 1052(f). When such marks are evaluated by the USPTO's trademark Examining Attorneys for secondary meaning, functionality, and genericness, the relevant point in time for that analysis is the date of filing of the application, not some point in time prior to that date. While third party use of similar marks prior to the filing date of a trademark application may be relevant to an Examining Attorney's secondary meaning analysis, the Examining Attorney must evaluate secondary meaning as of the filing date of the application, and it would be error to consider evidence of lack of secondary meaning at some point prior to that date since consideration of that evidence may cloud the Examining Attorney's evaluation of secondary meaning as of the application filing date.

Likewise, if the owner of a trademark registration petitions a court or other body only for prospective relief, as Appellant has done here, it would be error for a factfinder to consider any arguments in support of a lack of secondary meaning at

some point in time prior to the registration date of the trademark or the date of suit, since the period of time prior to registration or suit is irrelevant to the requested remedy, and because consideration of these arguments may improperly influence the factfinder's ability to properly evaluate secondary meaning as of the date of registration or suit.

In its Commission Opinion - Public Version, the Commission considered whether the Converse Midsole Trademark had acquired secondary meaning as of 2003, the year of first use of a confusingly similar mark by one of the intervenors, instead of at the time of Appellant's initial complaint filing with the Commission in 2014. (Comm'n Op. - Public Version at p. 26). Since the Commission was petitioned only to provide prospective relief, *amicus curiae* submits that this evaluation of whether the Converse Midsole Trademark had acquired secondary meaning as of 2003 was in error, and likely served to later confuse and wrongly color the Commission's evaluation of secondary meaning as of the registration date of the Converse Midsole Trademark.

Accordingly, IDSA respectfully urges the court to hold that, where only injunctive or other prospective relief is requested by the owner of a registered trademark, it is clear error to evaluate the secondary meaning (or other elements of validity) of the mark prior to the time of suit, since to do so prejudices a factfinder's ability to properly perform this evaluation at the correct point in time.

### **III. THE COURT SHOULD CONFIRM THAT THE OVERALL BURDEN OF PROOF TO PROVE A LACK OF SECONDARY MEANING FOR A REGISTERED TRADEMARK IS SHIFTED TO THE RESPONDING PARTY**

Section 33(a) of the Lanham Act establishes that registration of a mark on the USPTO’s trademark Principal Register “shall be admissible in evidence and shall be prima facie evidence of the validity of the registered mark and of the registration of the mark.” 15 U.S.C. § 1115(a). Even for those registered marks that have not yet become incontestable under Section 15 of the Lanham Act (15 U.S.C. § 1065), a federal registration on the Principal Register acts to shift the burden of proving the invalidity of the mark—including but not limited to arguments challenging that the registered mark has acquired secondary meaning—to the responding party.

This court has already ruled on the burden-shifting effect of this presumption of validity, holding in *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1356 (Fed. Cir. 2009) that “the presumption of validity that attaches to a Section 2(f) registration includes a presumption that the registered mark has acquired distinctiveness,” and that to rebut this presumption, a party seeking to cancel a Section 2(f) registration must produce sufficient evidence, in view of the entire record, to rebut the mark’s presumption of acquired distinctiveness by a preponderance of the evidence. *See also Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 1023 (Fed. Cir. 1989) (“Because a

trademark owner's certificate of registration is *prima facie* evidence of the validity of the registration and continued use of the registered mark, the burden of proof is placed upon those who seek cancellation. Accordingly, in a cancellation for abandonment, as for any other ground, the petitioner bears the burden of proof. Moreover, the petitioner's burden is to establish the case for cancellation by a preponderance of the evidence") (citations omitted) (internal quotation marks omitted).

In its rulings, the Commission thus correctly found that the registration of U.S. Trademark Registration No. 4,398,753 for the Converse Midsole Trademark (the "'753 Registration") provides *prima facie* evidence of the validity of the '753 Registration under Section 33(a) of the Lanham Act (15 U.S.C. § 1115(a)), regardless of when infringement of the mark first began. (Initial Determination at p. 14; Comm'n Op. - Public Version at pp. 16-17). In doing so, the Commission correctly explained that this statutory "*prima facie* evidence" of validity has three facets, namely that the registered trademark: (1) possesses secondary meaning; (2) is not functional; and (3) is not generic. (Comm'n Op. - Public Version at p. 17 ) (citing *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1300 (2015)).

However, the Commission abstained from resolving what it believed to be the unresolved legal question of whether the "*prima facie* evidence" language of



Section 33(a) of the Lanham Act (15 U.S.C. § 1115(a)) shifts the burden of proof—which includes both the burden of production and the burden of persuasion<sup>7</sup>—to the responding party, reasoning that it was unnecessary to do so in order to decide whether the ‘753 Registration had acquired secondary meaning. (Comm’n Op. – Public Version at p. 18). On the contrary, because this court had already resolved this legal question at the time of the Commission Opinion, the Commission was bound to apply this court’s prior holdings, and it was error for it to have not done so. The court should thus hold that the Commission must apply the court’s prior holdings in *Cold War* and *Cerveceria Centroamericana*, *supra*, recognizing that the burden of proof is on the responding party to prove the invalidity of a registered trademark by a preponderance of the evidence.<sup>8</sup>

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<sup>7</sup> See, generally, Charles L. Cook and Theodore H. Davis Jr., *Litigating the Meaning of “Prima Facie Evidence” Under the Lanham Act: The Fog and Art of War*, 103 Trademark Reporter 437 (2013).

<sup>8</sup> It is notable that a significant majority of the federal appeals courts—as well as district courts in at least one other federal judicial circuit—generally support this burden-shifting result of a federal registration. See *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 373 (1st Cir. 1980); *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 393 (2d Cir. 1995); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1529 (4th Cir. 1984); *Vision Center v. Opticks, Inc.*, 596 F.2d 111, 119 (5th Cir. 1979); *Leelanau Wine Cellars v. Black & Red*, 502 F.3d 504, 514 (6th Cir. 2007); *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 638 (7th Cir. 2001); *Aromatique*,

Accordingly, IDSA respectfully urges the Court to restate its holding that the burden of proof—including the burdens of both production and persuasion—is shifted to the responding party to prove, by a preponderance of the evidence, a lack of secondary meaning or other grounds of invalidation, for a mark that has been registered in accordance with the Lanham Act, since the registration serves as *prima facie* evidence of the validity of the registration pursuant to Section 33(a) (15 U.S.C. § 1115(a)) thereof.

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*Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 868-69 (8th Cir. 1994) (holding that the burden of proof on distinctiveness is shifted only as to inherent distinctiveness or secondary meaning); *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999); *Cold War Museum*, 586 F.3d at 1356 (Fed. Cir. 2009); *KM Mentor, LLC v. Knowledge Mgmt. Prof'l Soc'y, Inc.*, 712 F. Supp. 2d 1222, 1242 (D. Kan. 2010) (citing *Leelanau, Aromatique*, and *Arrow*, *supra*). See also Cook and Davis Jr., *Litigating the Meaning of “Prima Facie Evidence” Under the Lanham Act: The Fog and Art of War*, 103 Trademark Reporter at 444-50 (discussing in detail the application of the “*prima facie* evidence” standard in the various circuits and recognizing that the circuits disagree as to whether the burden shifting result applies to both the burdens of production and persuasion, or to the burden of persuasion only).

## CONCLUSION

Based on the foregoing, *amicus curiae* IDSA respectfully urges the Court to hold that: (i) ) where only injunctive or other prospective relief is requested by the owner of a registered trademark, an evaluation of the secondary meaning (or other elements of validity) of the mark should be evaluated only at the time of suit; and (ii) the burden of proof is shifted to the responding party to prove a lack of secondary meaning, or other grounds of invalidation, for a mark that has been registered in accordance with the Lanham Act, since the registration serves as *prima facie* evidence of the validity of the registration pursuant to Section 33(a) of the Lanham Act (15 U.S.C. § 1115(a)).

Respectfully submitted,

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Date: February 1, 2017

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# United States Court of Appeals for the Federal Circuit

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Date: February 1, 2017

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**United States Court of Appeals  
for the Federal Circuit**

**CERTIFICATE OF SERVICE**

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