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Just "Dropped": Nike's Latest Trademark Foreshadows the Demise of the Knockoff Sneaker Industry and Limits Consumer Choice

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**JUST “DROPPED”: NIKE’S LATEST TRADEMARK FORESHADOWS
THE DEMISE OF THE KNOCKOFF SNEAKER INDUSTRY AND LIMITS
CONSUMER CHOICE**

*Claudia Perez**

Trademark law allows for everlasting protection of product designs. Owners of distinct designs can register their marks and maintain ownership of the elements of those designs. The sneaker industry’s biggest companies make use of this system to ensure that their sneaker designs remain unique and are not counterfeited or imitated in a way that reflects poorly on their brand. However, the sneaker industry’s aggressive use of trademarks can exceed these accepted goals of trademark law by stifling competition and limiting consumer choice. For example, Nike recently and controversially acquired a trademark for the silhouette and elements of its Air Jordan 1 sneaker. This sneaker is a popular target for knockoffs and counterfeits. By trademarking its silhouette, Nike sent a message that the brand is looking to increase its already-forceful efforts to limit infringing uses of its mark. Protection of the shoe’s silhouette appears to be a response to the recent wave of high-end bootlegs and knockoffs, which have risen in prominence due to the unavailability of popular sneakers and the promotional effect of the internet and social media. Without change, actions like Nike’s may represent the “death knell” for this emerging market that currently affords consumers greater choice and small designers a chance to compete with sneaker giants like Nike. While trademark law today

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protects trademarks, such as the design of Nike's Air Jordan 1, trademark law should be reformed to provide space for detailed reimaginings of popular shoes to enter the market and increase competition. Such proposals should place a time limit on the protection of designs that do not feature a brand's signature logo or mark to incentivize larger brands to release new designs and maintain their products' quality.

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I. INTRODUCTION

Set the alarm. Check the time. Two minutes left. Log into the app. Check the Wi-Fi. Keep an eye on the time—now 9:59 AM. One minute left. Stare at the screen. Refresh. Refresh. Refresh. Five seconds. Breathe. Go. Only two outcomes: (1) “Got ‘Em”¹ or (2) sold out. If the outcome is the latter, are they really gone? Check social media. Did anyone get them? Back to the app. Sold out. Defeat. Another opportunity lost. Try again next week.

These events detail what is known in the sneaker community as a “drop.”² A “drop” is a high-pressure and unpredictable³ situation that “sneakerheads”⁴ face when preying on the next exclusive pair of sneakers. The gut-wrenching two-minute sequence of events described above does not include the considerable time most sneakerheads spend researching, discussing, and planning for a coveted shoe’s release.⁵ Unfortunately, the outcome for many who enter the race is often disappointing due to the extreme disparity between the number of available pairs and the number of people trying to buy them.⁶ So, where do the multitudes of unlucky sneakerheads subsequently search in order to satisfy their craving for high-quality “kicks”?

There are three alternatives to the drop. The first option is for consumers to turn to the flood of counterfeit products that are “made

¹ “Got ‘Em” is the phrase that appears within Nike’s SNKRS app when a buyer successfully buys a pair of shoes. KENNETH ANAND & JARED GOLDSTEIN, SNEAKER LAW 149 (2020). The SNKRS app is Nike’s smartphone application that allows consumers to purchase sneakers from their phones. *Id.* at 148–49.

² “A *drop* is a limited release of merchandise, often as a marketing technique by fashion brands.” *Drop Culture*, DICTIONARY.COM, <https://www.dictionary.com/e/fashion/drop-culture/> [<https://perma.cc/49SS-ND6Y>] (last visited Sept. 28, 2021).

³ See Mike D. Sykes, II, *Just Did It: My Long Road to Redemption on Nike’s SNKRS App*, USA TODAY: FOR THE WIN (Feb. 12, 2020, 12:00 PM), <https://ftw.usatoday.com/2020/02/just-did-it-my-long-road-to-redemption-on-nikes-snkrs-app> [<https://perma.cc/H58H-M8KF>].

⁴ A sneakerhead is a “person who collects and trades sneakers as a hobby, and who typically is knowledgeable about the history of sneakers.” *Sneakerhead*, DICTIONARY.COM, <https://www.dictionary.com/browse/sneakerhead> [<https://perma.cc/JU82-Y56W>] (last visited Sept. 28, 2021).

⁵ See *id.*

⁶ *Id.*

using cheap and sometimes dangerous materials that can put consumers at risk.”⁷ The second option for consumers is to pay a higher price by buying the coveted sneakers through the inflated resale market.⁸ The third, and the more sensible alternative, is for consumers to look to the growing supply of high-quality knockoff sneakers made by small businesses and individual designers that differ from counterfeits in that they do not merely replicate the shoe, but incorporate other artistic elements.⁹

The sneaker industry is unique in that there is a market for high-quality knockoff versions of sought-after sneakers.¹⁰ These high-end knockoffs can sell at similar prices to the original brand-affiliated sneaker, and consumers are often attracted to their higher quality materials, elaborate theming, and reimagination of the popular shoe.¹¹ Despite consumer appeal, the high-end knockoff market may soon disappear if large brands continue to trademark the elements and silhouettes of their popular sneakers without incorporating the brand’s signature logo.

In response to the latest wave of knockoffs, which resemble the *Air Jordan 1* design, Nike obtained trademark protection for the *Air*

⁷ ANAND & GOLDSTEIN, *supra* note 1, at 380.

⁸ Steve Cameron, *Why Nike Air Jordans Are So Expensive*, INSIDER: BUS., <https://www.businessinsider.com/nike-air-jordans-sneaker-culture-basketball-collectible-expensive-2019-6> [https://perma.cc/S3M8-RKC5] (Dec. 24, 2020, 10:30 AM).

⁹ See Callum McCafferty, *Why We Should Give ‘Bootleg’ Sneakers a Chance*, OUTLANDER MAG.: OUTLANDISH THOUGHTS, <https://www.outlandermag.com/outlandish-thoughts/Bootleg-sneakers-a-chance> [https://perma.cc/ZV7T-X8L4] (last visited Sept. 28, 2021).

¹⁰ See Jacob Gallagher, *‘Satan Shoes,’ Nike Lawsuits and the Booming Sneaker Bootleg Market*, WALL ST. J. (Apr. 12, 2021, 10:58 AM), <https://www.wsj.com/articles/satan-shoes-nike-lawsuits-and-the-booming-sneaker-bootleg-market-11618239494> [https://perma.cc/NLQ6-K8V4].

¹¹ See, e.g., SneakerHeadInTheBay, *FUGAZI One in the Chamber ‘Neutral Grey’ Review + On Feet!*, YOUTUBE (Jan. 10, 2021), https://www.youtube.com/watch?v=usPI1VkPmok&ab_channel=SneakerHeadInTheBay [https://perma.cc/Z38X-9SNT] (discussing the Fugazi sneaker that looks similar to an *Air Jordan 1* but has elevated features such as metallic aglets, high-quality leather, and velvet shoe bags all styled around “wild west” theming).

Jordan 1 silhouette¹²—an action that “was viewed by many as a death knell for the wave of bootlegs borrowing the shoe’s silhouette.”¹³ For this reason, Nike’s trademark faced intense opposition from a smaller designer who claimed the trademark was improperly issued.¹⁴ Accordingly, some have argued that this action by Nike will force smaller designers to discontinue the production of shoes that resemble Nike’s design, as the financial pressures of defending themselves in court against an industry giant like Nike could imperil their businesses.¹⁵

Furthermore, Nike’s acquisition of trademark protection on the silhouette elements of its *Air Jordan 1* has raised questions about the limitations and detriments of current trademark law.¹⁶ Courts have addressed issues involving similar trademarks to that of Nike’s newest trademark and have upheld prominent trademarks against smaller designers.¹⁷ Thus, the current legal status quo of allowing trademarks to last indefinitely¹⁸ can have harrowing impacts on small designers attempting to compete in the industry.

¹² See Dylan Kemp, *The Air Jordan 1 Receives Federal Trademark Protection*, THE SOURCE (June 12, 2021), <https://thesource.com/2021/06/12/the-air-jordan-1-receives-federal-trademark-protection/> [<https://perma.cc/E9EK-QEBG>].

¹³ Brendan Dunne, *Nike’s Air Jordan 1 Trademark Challenged in New Filing*, COMPLEX (June 14, 2021), <https://www.complex.com/sneakers/nike-air-jordan-1-trademark-challenged-fraud> [<https://perma.cc/7G2U-4RJE>] (discussing the impact of Nike’s new *Air Jordan 1* trademark on smaller designers who recreate the shoe’s silhouette but replace Nike logos with other imagery).

¹⁴ See Petition for Cancellation at 4, *Lopez v. Nike, Inc.*, No. 92077357, TTABVUE (T.T.A.B. 2021), <https://ttabvue.uspto.gov/ttabvue/v?pno=92077357&pty=CAN&eno=1> [<https://perma.cc/6BRF-HEMJ>].

¹⁵ See Dunne, *supra* note 13 (citing an argument raised by Robert Lopez that Nike’s actions are “overreaching and detrimental to designers who do not possess the clout or financial backing of the sportswear behemoth”).

¹⁶ *Keeping Your Registration Alive*, USPTO, <https://www.uspto.gov/trademarks/maintain/keeping-your-registration-alive> [<https://perma.cc/K93Z-GTHK>] (Mar. 29, 2021, 5:53 PM) (explaining that trademarks can last so long as maintenance documents and fees are received and the mark is continuously used in commerce).

¹⁷ See, e.g., *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1060 (D. Or. 2008).

¹⁸ *Keeping Your Registration Alive*, *supra* note 16.

This Article examines how, despite the sneaker industry's unique high-end knockoff market, which has grown dramatically as consequence of social media and e-commerce, Nike and other sneaker companies have the ability to enforce trademark protection over their sneaker designs. However, this Article argues that to balance ownership of design and to foster competition in the market, trademark law should either adopt time limits for design trademarks, like those of Nike's *Air Jordan 1* and other shoe brands where the brand's signature logo is not included or limit these types of designs to design patent protection only. By implementing time limits on the duration of trademark protection, smaller designers could be afforded the opportunity to readily compete in the market. Similarly, because a design patent system already exists to protect these types of designs, and prominent sneaker companies receive patent protection before obtaining a trademark, limiting these designs to design patent protection makes sense. Either of these solutions would incentivize brands like Nike and other large shoe companies to continue creating new designs, much like how the patent system incentivizes invention and promotes the progression of arts and sciences.¹⁹

Part II provides an overview of the value of the sneaker industry, how e-commerce and social media have increased consumer accessibility to sneakers, and why companies want to protect their designs. Part III explains what is protected under trademark law, Nike's recent trademark, and how courts have dealt with trademark law issues in the sneaker industry. Part IV assesses how trademark law can improve to create a considerate balance between the interests of existing designers in protecting their property and the interests of new designers whose goal is to capitalize and expand upon popular designs. Finally, Part V concludes that, while current trademark law protects the elements claimed on Nike's *Air Jordan 1* trademark, product design protection should move toward a system that either incorporates time limits for trademarks that do not include a company's logo or simply limits these designs to design patent protection.

¹⁹ See U.S. CONST. art. I, § 8, cl. 8.

II. THE RISE OF THE SNEAKER INDUSTRY IN E-COMMERCE AND ITS EFFECT ON TRADEMARK PROTECTION

The sneaker industry has expanded greatly, moving away from mere functionality to “express[ing] individuality and personal identity more than any other fashion item.”²⁰ Due to both a societal shift in fashion sense and the accessibility of sneakers through e-commerce and social media, sneakers are now “a catalyst for accessible style to the masses.”²¹ These technological avenues have changed the way sneakers are purchased and have escalated the shoes’ value to consumers. Due to this growth, sneaker manufacturers are hyper-aware of the value of their products and turn to the aggressive use of legal protections under trademark law to prevent competitors from creating poor-quality imitations and ensuring the popular designs remain associated with the brand.

A. E-Commerce and Social Media Have Expanded Access to Sneakers

Once seen as a necessity for outdoor activities, sneakers have become a staple in fashion and social media,²² partly due to “a major shift in the world of fashion” to a “more casual” culture.²³ Over time, athletes, musicians, and film have increasingly influenced sneaker trends.²⁴ For example, collaborations between sneaker brands and athletes have allowed buyers to “wear the same sneaker as their idol[s].”²⁵ Similarly, hip-hop artists have partnered with sneaker brands—even featuring lyrics related to the shoes in their songs.²⁶ Today, sneaker culture has further expanded because of websites and social media applications that “provide[] a platform that facilitates news, content, discussion, and commerce, all related to

²⁰ See Adrienne Howell, *A History of Sneakers: How They Became Staples of Modern Fashion*, THE COLLECTOR (Jan. 26, 2021), <https://www.thecollector.com/evolution-of-sneakers-modern-fashion-collecting/> [<https://perma.cc/UH7S-YQPP>].

²¹ *Id.*

²² ANAND & GOLDSTEIN, *supra* note 1, at 19.

²³ Áine Cain, *Shoppers Are Now Willing to Drop Hundreds of Dollars on Sneakers – and They Might Need to Spend Even More in the Future*, INSIDER: BUS. (July 29, 2019, 9:42 AM), <https://www.businessinsider.com/sneaker-prices-costs-expensive-shoes-footwear-2019-7> [<https://perma.cc/8PFT-RFX6>].

²⁴ See Howell, *supra* note 20.

²⁵ *Id.*

²⁶ See *id.*

sneakers.”²⁷ By 2025, the sneaker industry will be valued at \$95 billion.²⁸

Mirroring the recent changes to sneaker demand, the ways in which consumers shop for sneakers has also drastically changed due to increased technological advancements in internet accessibility and smartphone applications.²⁹ “E-commerce,” or online shopping, “allows the company to communicate directly with its customer, build a relationship, and control brand messaging and identity.”³⁰ Smartphone applications, specifically Nike’s SNKRS app, allow users to browse and buy sneakers directly on the platform, alert users when certain shoes will drop, and, as described above, can involve a high-pressure “online draw” or “first come, first served” release of the company’s exclusive kicks.³¹

There are two main reasons why users rush to purchase sneakers directly from a company’s app or website. First, shoe companies only “drop” a certain number of pairs for each release, making sneaker shopping a thrilling experience that drives consumer demand.³² Second, purchasing a shoe on resale websites, such as eBay, Stockx, and GOAT, can sometimes end up costing purchasers more than triple the retail price due to the limited supply.³³ For example, Nike’s *Jordan 1 High OG SP Fragment x Travis Scott*

²⁷ ANAND & GOLDSTEIN, *supra* note 1, at 19.

²⁸ *Id.* at 4.

²⁹ *Id.* at 144.

³⁰ *Id.*

³¹ *Id.* at 149.

³² Adding to the uncertainty consumers face is the fact that Nike does not disclose how many shoes will be released, how many people are expected to try to purchase them, or how many people use the app to get the shoes. Sykes, *supra* note 3 (explaining how an ordinary online shopping experience is transformed “into the thrill of a roulette wheel”).

³³ Compare Mario Briguglio, *Official Photos of the Travis Scott x Fragment x Air Jordan High OG*, SNEAKER BAR DETROIT (July 27, 2021), <https://sneakerbardetroit.com/travis-scott-fragment-air-jordan-1-release-date/> [<https://perma.cc/V5YR-S5WF>] (stating the retail price of Nike’s collaboration *Air Jordan 1* is \$200), with *Jordan 1 High OG SP Fragment x Travis Scott*, STOCKX, <https://stockx.com/> [<https://perma.cc/NZ5K-QYUL>] (last visited Sept. 8, 2021) (listing a resale price of the Nike collaboration sneaker at \$3,786 as of Sept. 8, 2021).

initially sold at retail for \$200.³⁴ But, due to the exclusive drop release, the resale price of the shoe was over \$3,000.³⁵

Notably, large sneaker brands are not the only ones capitalizing on the benefits of the internet;³⁶ small designers have utilized technology and social media to market their knockoff sneakers as well.³⁷ In lieu of investing in a traditional, brick-and-mortar property, smaller designers can create accounts on social media platforms, like Instagram and Twitter, and post photos and descriptions of their shoes.³⁸ Through these platforms, small designers can pay for advertising at a low cost and target their ads to specific regions, ages, and people interested in sneakers.³⁹ Additionally, small designers can create their own websites or sell their shoes directly from an app, affording these designers the ability to expand their presence in the sneaker market.⁴⁰ This ease of communication through apps and websites has facilitated the now-booming market for high-end knockoff sneakers,⁴¹ as lesser-known designers can more-easily capitalize on a well-known silhouette design, such as Nike's popular *Air Jordan 1*.⁴²

³⁴ Briguglio, *supra* note 33.

³⁵ *Jordan 1 High OG SP Fragment x Travis Scott*, *supra* note 33.

³⁶ Gallagher, *supra* note 10 (explaining that the “latest boom [of high-quality knockoffs] is entirely made possible by the internet . . . [T]hese [smaller designers] have excelled at marketing themselves through social media”).

³⁷ *Id.*

³⁸ *See id.* (highlighting that social media allows interested sneaker purchasers to “follow” the founders of smaller sneaker businesses and learn more about their brand and who they are).

³⁹ Depending on the advertising model, business owners on Instagram can pay \$0.20 to \$2 for every user that clicks on the ad or \$6.70 for every 1000 people reached. *How Much Does It Cost to Advertise on Instagram?*, WEBFX (Oct. 1, 2021), <https://www.webfx.com/social-media/how-much-does-it-cost-to-advertise-on-instagram.html> [<https://perma.cc/QTN9-NB2C>]. Compared to traditional forms of advertising, such as mail, television, or radio, social media is the least expensive means of advertising. *Traditional Media vs. Social Media Advertising*, LYFE MKTG., <https://www.lyfemarketing.com/traditional-media-versus-social-media/> [<https://perma.cc/G57A-JVC7>] (last visited Oct. 23, 2021).

⁴⁰ *See So What is Instagram Shopping?*, INSTAGRAM, <https://business.instagram.com/shopping/> [<https://perma.cc/UT37-9V7H>] (last visited Oct. 23, 2021).

⁴¹ Gallagher, *supra* note 10.

⁴² *See id.*

While advancements in technology have benefited the sneaker industry in certain ways, technology has also led to new challenges regarding the sale of both knockoffs and brand-name sneakers due to the existence of “bots.”⁴³ Bots are automated software programs that save consumers time when purchasing limited-release sneakers.⁴⁴ In situations like a “drop”, where mere seconds determine whether the sneakers are either purchased or sold out, bots help secure a released pair of shoes by circumventing the need for a customer to manually enter shipping and contact information at checkout.⁴⁵ However, the existence of bots also means that one customer can purchase multiple bots and stockpile pairs of the coveted sneakers.⁴⁶ Thus, bots are useful to someone seeking to purchase as many shoes as possible and resell them at an increased resale price; nevertheless, the purchasing technology is viewed by many sneakerheads as a way of gaming the system.⁴⁷ Bots make it more difficult for the average consumer to purchase the shoes at retail price.⁴⁸ Therefore, consumers are competing against the collective forces of software that facilitates the depletion of the sneaker’s inventory and the existence of an already limited supply. In sum, social media, the internet, and bots have driven demand for high-end knockoffs and large-brand sneaker manufacturers’ shoes by increasing purchasing accessibility in a market that feeds off of the limited supply of “dropped” sneakers,⁴⁹ thereby increasing

⁴³ See ANAND & GOLDSTEIN, *supra* note 1, at 366.

⁴⁴ See *id.*

⁴⁵ Shoshy Ciment, *How to Get Sneaker Bots: The Controversial Tech That Helps Resellers Flip Hundreds of Hyped Pairs of Jordans, Dunks, and Yeezys*, INSIDER: BUS. (Sept. 7, 2021, 4:00 PM), <https://www.businessinsider.com/sneaker-bots-how-to-buy-make-and-run-the-tech-2021-1> [<https://perma.cc/56K3-2BQF>].

⁴⁶ *Id.* (“The software also gets around ‘one pair per customer’ quantity limits placed on each buyer on release day.”); see also ANAND & GOLDSTEIN, *supra* note 1, at 366 (“Elite sneaker bots can purchase hundreds or even thousands of pairs during a given release.”).

⁴⁷ See ANAND & GOLDSTEIN, *supra* note 1, at 366.

⁴⁸ See *id.* (explaining that in order to purchase shoes at retail price, “it is imperative nowadays to have an effective sneaker bot”).

⁴⁹ See Daisuke Wakabayashi, *The Fight for Sneakers*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/interactive/2021/10/15/style/sneaker-bots.html> [<https://perma.cc/F3V7-UBXA>] (discussing the upward trend of resale prices

manufacturers' desire to protect their designs so that the thrill of the "drop" remains.

B. A Trademark Law Primer: How Sneaker Companies Use Trademarks to Protect Their Designs from Imitation

Trademark law has two goals: (1) to protect trademark owners' proprietary interests and (2) to protect consumers from confusion.⁵⁰ Accordingly, the first goal provides the basis for manufacturers—aware of the increasing market value of their products based on consumer demand—to aggressively utilize trademark law protection to ensure their distinct designs retain the same value, even as “colorways,”⁵¹ collaborations, and customer interests change over time.⁵²

Trademarks include, among other things, words, phrases, and logos.⁵³ Companies can seek legal protection for these types of identifiers through registration with the United States Patent and Trademark Office (“USPTO”); however, trademarks need not be registered per se to receive protection. A trademark can also be claimed as soon as the trademark is used in interstate commerce.⁵⁴ While registration is not necessary, registration makes it easier to enforce the trademark against parties who infringe on the mark.⁵⁵ Using the trademark in commerce and registering it helps ensure that the claimed trademark remains affiliated only with that company's

when fewer sneaker pairs are available and that retailers do not take issue with bots because the bots “generate demand for their products”).

⁵⁰ 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:2 (5th ed. 2021).

⁵¹ Colorways are a “unique combination of colors found on a sneaker that differentiate it from other styles of the same model.” Stephen Yu, *The FARFETCH Guide to Sneaker Terms*, FARFETCH: FASHION FEED (Sept. 15, 2020), <https://www.farfetch.com/style-guide/how-to/sneaker-terms-urban-dictionary/> [https://perma.cc/E483-CFXW].

⁵² See ANAND & GOLDSTEIN, *supra* note 1, at 270–76.

⁵³ *Id.* at 270.

⁵⁴ See *What Is a Trademark?*, USPTO (Mar. 31, 2021, 12:00 PM), <https://www.uspto.gov/trademarks/basics/what-trademark> [https://perma.cc/5F2N-TC3N].

⁵⁵ *Id.*

brand.⁵⁶ Most importantly, trademarks are the mechanism by which consumers distinguish between different brands, which is where the second goal—to protect consumers from confusion—comes into play.⁵⁷

“Trade dress” is a type of trademark⁵⁸ and specifically refers to non-verbal elements of a product or logo, such as color, shape, and appearance.⁵⁹ Trade dress is particularly relevant in the sneaker industry, as a sneaker’s shape and design are often just as important to a company as its signature logo. Thus, prominent shoe companies are not solely registering their brand name or logos.⁶⁰ Companies are likewise trademarking the design elements, i.e., the trade dresses, of their shoes.⁶¹

Beyond protecting their property, trademark owners also seek to maintain a “good reputation,” which can be difficult when trademarked products are imitated and the public misattributes the imitated sneakers to the trademark owner.⁶² This desire to limit consumer confusion points to the second goal of trademark law. Consumers choose products or services based on their prior satisfaction with a brand, and trademark owners are incentivized to “keep up a good reputation for a predictable quality of goods.”⁶³ Trademarks and trade dress act as source-identifiers, meaning that consumers can look at the features of a product and recognize the product as coming from a particular source.⁶⁴ Thus, when a company has developed a good reputation and consumers recognize the company through its well-known trademark, the company seeks to protect that brand association.

⁵⁶ See ANAND & GOLDSTEIN, *supra* note 1, at 270–71.

⁵⁷ *Id.* at 270.

⁵⁸ See *id.* at 276.

⁵⁹ *Id.*

⁶⁰ See *Nike Nabs a Number of New Trademark Registrations, While It Sets Its Sights on More*, FASHION L. (June 11, 2021), <https://www.thefashionlaw.com/nike-nabs-a-number-of-new-trademark-registrations-while-it-sets-its-sights-on-more/> [https://perma.cc/BD3X-Q6P4].

⁶¹ See *id.*

⁶² MCCARTHY, *supra* note 50, § 2:4.

⁶³ *Id.* §§ 2:3–2:4.

⁶⁴ See *Nike Nabs a Number of New Trademark Registrations, While It Sets Its Sights on More*, *supra* note 60.

The counterfeit industry causes significant confusion in the sneaker marketplace, which is problematic for well-established sneaker companies—considering that counterfeits totaled \$509 billion in 2016 and made up 3.3% of all global trade in 2019.⁶⁵ A product constitutes a counterfeit when it is a “spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”⁶⁶ Counterfeit goods are usually comprised of lower-quality materials that could be harmful to purchasers.⁶⁷ Thus, since popular sneakers can be difficult to purchase at retail value⁶⁸ and counterfeits offer poor-quality imitations, consumer demand has sparked a market for high-quality knockoffs—or, reimaginings—of popular shoe designs⁶⁹ like Nike’s *Air Jordan 1* silhouette.⁷⁰

III. CURRENT TRADEMARK LAW AND COURTS’ ANALYSIS OF TRADEMARK ISSUES

Given the increasing popularity of high-quality sneaker knockoffs, Nike took action and trademarked elements of its *Air Jordan 1* silhouette in an effort to protect Nike’s property interest in its design, as well as the company’s reputation.⁷¹ Notably, the *Air Jordan 1* trademark does not contain the brand’s “swoosh” logo, which, in effect, allows Nike to have broader enforcement of its trademark.⁷² Claiming the sneaker without the “swoosh” allows Nike to pursue infringement lawsuits against knockoffs that do not utilize the “swoosh” but nonetheless incorporate the *Air Jordan 1*’s elements and silhouette.⁷³ Though this registration is not the first time Nike has claimed a trademark without the “swoosh,”⁷⁴ the timing of this trademark reflects the brand’s likely concern over the latest wave of knockoff sneaker designers who have benefitted from

⁶⁵ ANAND & GOLDSTEIN, *supra* note 1, at 380.

⁶⁶ 15 U.S.C. § 1127.

⁶⁷ ANAND & GOLDSTEIN, *supra* note 1, at 380.

⁶⁸ *See* Sykes, *supra* note 3.

⁶⁹ *See* Gallagher, *supra* note 10.

⁷⁰ *See* Dunne, *supra* note 13.

⁷¹ *See Nike Nabs a Number of New Trademark Registrations, While It Sets Its Sights on More*, *supra* note 60.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

the ability to reach consumers easily through e-commerce and social media.⁷⁵

Nike's concern appears valid, considering that its recent *Air Jordan 1* trademark faced opposition when Robert Lopez, an intellectual property consultant known as TradeMarkRob®,⁷⁶ claimed the trademark was improperly issued and petitioned for cancellation.⁷⁷ Lopez's petition for cancellation of the trademark was dismissed with prejudice due to his "failure to participate in the required discovery and settlement conference;"⁷⁸ however, the legal analysis of Lopez's claims below can extend to other individuals seeking to challenge trademarks like Nike's *Air Jordan 1* trademark in the future.

Lopez claimed, among other things,⁷⁹ that Nike's *Air Jordan 1* trademark was improper because it "is a common design in the public domain that has consistently and continuously been utilized by various third-party sneaker and apparel designers."⁸⁰ While not explicitly using the term "secondary meaning," Lopez argued that Nike's *Air Jordan 1* silhouette has not acquired distinctiveness through secondary meaning throughout the sneaker industry because it is not recognizable as coming from a particular source.⁸¹

For a design like the *Air Jordan 1*, trademark protection requires a showing of a secondary meaning.⁸² The factors central to the secondary meaning analysis likely lean in Nike's favor given the popularity of the *Air Jordan 1*. Beyond Lopez's argument, however, is the need for Nike to successfully assert its *Air Jordan 1* as a claimed trademark against knockoff designers. To do so, Nike must

⁷⁵ See Gallagher, *supra* note 10.

⁷⁶ TRADEMARKROB, <https://www.trademarkrob.com/> [<https://perma.cc/73HX-T5T5>] (last visited Sept. 28, 2021).

⁷⁷ Petition for Cancellation, *supra* note 14, at 4.

⁷⁸ Lopez v. Nike, Inc., No. 92077357, TTABVue (T.T.A.B. 2021).

⁷⁹ Lopez also alleged that Nike has never used the design it is claiming in commerce because the design claimed does not contain a "swoosh." See Petition for Cancellation, *supra* note 14, at 4–5. However, in 2012 and 2016, Nike released *Jordan 1s* without the "swoosh," and its "subsidiary Jordan Brand has in fact occasionally removed the symbol from retail offerings." Dunne, *supra* note 13.

⁸⁰ Petition for Cancellation, *supra* note 14, at 5.

⁸¹ See *id.*

⁸² See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 216 (2000).

prove that a likelihood of confusion exists in the marketplace between the brand-name product and the knockoff.⁸³ A potential obstacle to this analysis is that a court could find that the sneakerhead audience is not confused and actively seeks out knockoffs, thereby hindering Nike's efforts to prove likelihood of confusion. However, another form of trademark law protection, trademark dilution, could overcome this obstacle. Hence, based on the success of the *Air Jordan 1* shoe and its prominence among consumers, it is likely that the trademark will be upheld and can be asserted against infringers—those knockoff sneaker designers.

A. Introduction to Trademark Law

The primary statute that defines trademarks is 15 U.S.C. § 1127.⁸⁴ The Lanham Act, passed in 1946 and comprised of section 1127 and other statutes, expanded on previous trademark legislation by “creat[ing] a national trademark registration system.”⁸⁵ The Lanham Act sets forth the requirements for owners and potential owners of trademarks to seek trademark protection, the steps required for registration, and what constitutes infringement of a trademark.⁸⁶ The Lanham Act defines a trademark as “any word, name, symbol or device, or any combination thereof” that the owner of the trademark is using or intends to use in commerce to create a distinction between the owner's goods and the goods of others.⁸⁷

Similarly, an owner can seek to register specific elements of a product—a trade dress.⁸⁸ As briefly explained above, “[t]rade dress is the form or manner of display in which a product or service is offered to the market.”⁸⁹ Trade dress is a type of trademark that can include packaging, color, or—as is the case with Nike's *Air Jordan*

⁸³ See *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1051 (D. Or. 2008).

⁸⁴ See 15 U.S.C. § 1127.

⁸⁵ *Lanham Act: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/lanham-act> [<https://perma.cc/6QK7-4UUJ>] (last visited Sept. 28, 2021); see also Trademark (Lanham) Act of 1946, Pub. L. No. 79-489, 60 Stat. 427 (1946).

⁸⁶ See *id.*

⁸⁷ 15 U.S.C. § 1127.

⁸⁸ ANAND & GOLDSTEIN, *supra* note 1, at 276.

⁸⁹ *Id.*

I trademark—product configuration (also called product design).⁹⁰ Items such as the “shape of the Coca-Cola bottle, Tiffany & Co.’s blue box, [and] the McDonald’s Golden Arches” are examples of trade dress that have received trademark protection.⁹¹ In the United States, trademark registration, which includes trade dress, is not required for owners to enforce trademark rights; however, the benefits that come with obtaining registration make it easier for owners to assert the trademark against infringement.⁹² Importantly, registration “gives the mark a presumption of validity.”⁹³ Thus, obtaining trademark registration can reduce an owner’s burden in court when defending its trademark against an infringer.

Much like the aforementioned examples, the elements Nike claims on its *Air Jordan I* trademark are trade dress because the elements relate to the product’s design.⁹⁴ Specifically, Nike’s trademark claims:

The design of the material panels that form the exterior body of the shoe, the design of the panel on top of the shoe that includes the eyelets for the shoe laces, the design of the ridge pattern on the sides of the sole of the shoe, the design of a stitched line running along the midsole of the shoe, and the relative position of these elements to each other.⁹⁵

For the trade dress elements of a product’s configuration to be protected, two criteria must be met; the elements must be distinctive and nonfunctional.⁹⁶ The functionality assessment of the trademark is beyond the scope of this Article because “functionality” was not raised as an issue by Lopez.⁹⁷ The focus of the *Air Jordan I* trademark is the sneaker’s distinctiveness—the first element for a

⁹⁰ See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 213–15 (2000) (explaining that trade dress protection exists for product packaging, which can be inherently distinctive, and product design or configuration, which requires secondary meaning).

⁹¹ ANAND & GOLDSTEIN, *supra* note 1, at 276.

⁹² See *id.* at 274.

⁹³ *Id.*

⁹⁴ See *id.* at 276.

⁹⁵ The mark consists of Nike’s *Air Jordan I* silhouette with details as to what features of the shoe are claimed. See Registration No. 6,368,694.

⁹⁶ ANAND & GOLDSTEIN, *supra* note 1, at 277.

⁹⁷ See generally Petition for Cancellation, *supra* note 14 (listing the various claims made by Lopez as to why Nike’s trademark should be cancelled).

configuration trade dress to be protected. A trademark (or a trade dress more specifically) “is distinctive and capable of being protected if it *either* (1) is inherently distinctive *or* (2) has acquired distinctiveness through secondary meaning.”⁹⁸ The Supreme Court has held that product design cannot be inherently distinctive; and therefore, designs like Nike’s *Air Jordan 1* shoe must establish secondary meaning to constitute a trademark.⁹⁹

B. The Secondary Meaning Requirement for Non-Inherently Distinctive Trademarks

Secondary meaning is established when consumers develop an association between a trademark and a particular source due to a brand’s use of the trademark in commerce, such that when consumers see the mark in commerce, consumers mentally link it to one source.¹⁰⁰ Accordingly, the design must have secondary meaning to be protected.¹⁰¹ To decide whether a trademark has established secondary meaning, courts consider certain factors that vary depending on the jurisdiction.¹⁰² These factors typically include: “(1) direct consumer testimony, (2) consumer surveys, (3) exclusivity, length, and manner of use, (4) amount and manner of advertising, (5) amount of sales and number of customers, (6) established place in the market, and (7) proof of intentional copying.”¹⁰³ The Federal Circuit Court in *Converse, Inc. v. ITC*¹⁰⁴ specified a similar list of factors necessary to perform a secondary meaning analysis for a registered trademark.¹⁰⁵ However, the court also discussed the most relevant time period for analyzing the third factor above, exclusivity of use, for disputed trademarks post-registration.¹⁰⁶

⁹⁸ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992).

⁹⁹ *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 216 (2000).

¹⁰⁰ *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (5th ed. 2021).

¹⁰¹ *See e.g., Wal-Mart Stores, Inc.*, 529 U.S. at 216.

¹⁰² ANAND & GOLDSTEIN, *supra* note 1, at 277.

¹⁰³ *Id.*

¹⁰⁴ *Converse, Inc. v. ITC*, 909 F.3d 1110 (Fed. Cir. 2018).

¹⁰⁵ *Id.* at 1120.

¹⁰⁶ *See id.* at 1120–21.

The third factor is relevant to Nike's current *Air Jordan 1* trademark because Lopez disputed it shortly after registration, arguing that the mark had not acquired secondary meaning prior to registration.¹⁰⁷ According to the court in *Converse v. ITC*, the third factor, exclusivity of use, looks primarily to the five years before registration to assess whether the trademark acquired distinctiveness before being registered.¹⁰⁸ Although registered trademarks receive the benefit of a presumption of validity, the court's analysis in *Converse v. ITC* states that prior uses that allegedly infringe on the claimed trademark in the five years before registration are most relevant, meaning the presumption does not apply.¹⁰⁹ Thus, "[t]he critical issue . . . is whether prior uses impacted the perceptions of the consuming public as of the relevant date."¹¹⁰ But, older uses can be relevant "if there is evidence that such uses were likely to have impacted consumers' perceptions of the mark as of the relevant date."¹¹¹ The court held that only "substantially similar" uses of Converse's trade dress could be used to assess secondary meaning within this five-year time frame.¹¹²

The analysis from *Converse v. ITC* suggests that a challenger to Nike's *Air Jordan 1* design, like Lopez, would need to provide evidence of "substantially similar" uses of the *Air Jordan 1*'s trademarked elements primarily in the five years before registration to aid the argument that the mark did not in fact acquire secondary meaning prior to registration. However, exclusivity of use is only one of seven factors of the secondary meaning analysis; the ability of the *Air Jordan 1*'s design to satisfy other factors suggests that the design likely has secondary meaning. Specifically, the shoe design was released in 1985, and, to this day, the brand continues to rerelease the product by varying colorways and other minor features.¹¹³ Moreover, to some, the *Air Jordan 1* is "the shoe that

¹⁰⁷ Petition for Cancellation, *supra* note 14, at 5.

¹⁰⁸ *Converse, Inc.*, 909 F.3d at 1121.

¹⁰⁹ *See id.* at 1118, 1120–21 (citing 15 U.S.C. § 1052(f)).

¹¹⁰ *Id.* at 1121.

¹¹¹ *Id.*

¹¹² *Id.* at 1122.

¹¹³ *See Dunne, supra* note 13.

catapulted sneakers to where they are today,”¹¹⁴ indicating that the factors in the inquiry weigh in favor of the *Air Jordan 1* establishing a secondary meaning.

The recent increase in popularity of the *Air Jordan 1* through social media and knockoff designers also suggests that Nike does not “need to market a Jordan product, and so it becomes a pull market. The idea is that the product is so sensational, so wanted by the consumer, that it’s pulling them into the store.”¹¹⁵ Today, Nike’s *Jordan* brand, which includes other *Jordan* shoes, is worth \$42.3 billion, demonstrating that the brand has successfully marketed and sold items affiliated with the brand, including the *Air Jordan 1* shoe.¹¹⁶ Therefore, even “substantially similar” uses within the five-year time period described in *Converse v. ITC*, or prior uses, may not be enough to overcome the affiliation of the shoe’s design with Nike as its source.¹¹⁷

Nike, and other sneaker brands facing similar trademark challenges, would also likely rely on cases like *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*¹¹⁸ In this case, the Second Circuit held that a color on a particular part of a shoe, specifically the Red Sole trade dress of Christian Louboutin shoes, could constitute a protectable trademark.¹¹⁹ The court pointed out that Louboutin’s investment in marketing the shoes with red soles led to the creation of a “symbol” that is “associated with the Louboutin brand.”¹²⁰ However, the court also placed a limitation on the symbol.¹²¹ The Red Sole mark only has secondary meaning when it is in contrast with the rest of the shoe, and secondary meaning

¹¹⁴ Cameron, *supra* note 8.

¹¹⁵ *Id.*

¹¹⁶ See Brendan Coffey & Kurt Badenhausen, *Jordan Brand Leads Nike Resurgence in Sales and Shares*, YAHOO! (June 24, 2021), <https://www.yahoo.com/now/jordan-brand-leads-nike-resurgence-215515624.html> [<https://perma.cc/JP6A-U225>].

¹¹⁷ *Converse, Inc.*, 909 F.3d at 1121.

¹¹⁸ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

¹¹⁹ *Id.* at 227.

¹²⁰ *Id.* at 226.

¹²¹ See *id.* at 227.

does not extend to monochromatic shoes where the shoe's upper portion is the same color as its outsole.¹²²

Because the elements of the *Air Jordan 1* trademark are trade dress, it is possible that a court could place a limitation, similar to Louboutin's Red Sole, on the protection of the mark, which would favor Lopez and other potential trademark challengers. For example, a court could decide that the trademark extends only so long as all the elements claimed are present on the alleged infringing shoe and that the alleged infringement contains a symbol that resembles the "swoosh." This limitation would allow designers to use the elements of the shoe without risking infringement if designers differentiate their logos from Nike's "swoosh." Yet, Nike would likely argue that the silhouette of the shoe is the symbol. Moreover, Nike would also likely assert that this limitation would not work well because it would not protect Nike from what is occurring in the high-end knockoff industry: brands already use the familiarity of the *Air Jordan 1* silhouette but replace the "swoosh" with their own logos¹²³ Thus, a limitation, such as that in *Christian Louboutin v. Yves Saint Laurent*, seems unlikely.

Overall, because of the shoe's significance in the sneaker industry, it is unlikely that Nike will have difficulty supporting its argument that the shoe's design—even without the company's "swoosh" logo—has secondary meaning. Some sneaker designers that have utilized the *Air Jordan 1*'s elements have even alluded to taking inspiration from Nike's designs.¹²⁴ Further, consumers make

¹²² *Id.* at 228.

¹²³ Kemp, *supra* note 12.

¹²⁴ An article addressing a knockoff of Nike's *Air Force 1* includes a screenshot of a social media comment that highlights the point that many knockoff designers are trying to create similar shoes to Nike's silhouette. See *Nike Adds John Geiger to Existing Suit, Accusing It of Trademark Infringement, Dilution*, FASHION L. (Aug. 30, 2021), <https://www.thefashionlaw.com/nike-adds-john-geiger-to-existing-suit-accusing-it-of-trademark-infringement-dilution/> [<https://perma.cc/S2TP-QG67>]. In this screenshot, a user questioned why the knockoff resembled Nike's design to which the accused infringer replied "'that's the point.'" *Id.* Similarly, online videos that describe characteristics of high-quality knockoff shoes have comment sections where users compare a high-quality knockoff with the *Air Jordan 1* by saying things, such as "[i]t's so sad a small designer can give us way better quality then [sic] Jordan brand." Family Life with A & J, Comment to

comparisons between the knockoffs and Nike’s silhouettes.¹²⁵ Even Lopez admitted that he feared the *Air Jordan 1* trademark registration would inhibit his ability to use features similar to the *Air Jordan 1* silhouette in a sneaker he is currently designing.¹²⁶

C. Likelihood of Confusion Analysis to Assert Trademarks Against Infringement

Although a secondary meaning challenge is unlikely to change the registration status of the trademark, Nike could reach a hurdle enforcing the trademark against infringing competitors, especially those in the high-end knockoff industry. To prove infringement, the plaintiff (in this situation, Nike), needs to show that the alleged infringer made use of Nike’s “validly registered trademark or trade dress ‘in commerce,’ and that the use is ‘likely to cause confusion, or to cause mistake, or to deceive consumers.’”¹²⁷ Thus, the likelihood of confusion element could become an issue for Nike when “sneakerheads”—frequent and experienced sneaker purchasers—are not actually confused about the origin (as in, the producer) of the sneakers and purposely seek out high-end knockoffs.

Previous cases that have dealt with sneaker trade dress and trademark infringement have often addressed “likelihood of confusion” issues concerning the use of the infringed company’s logo.¹²⁸ For example, in the recent case of *Nike, Inc. v. Lotas*,¹²⁹ Nike sued Warren Lotas for infringing on Nike’s *Dunk* sneaker after Lotas designed two shoes—each of which incorporated a modified logo resembling Nike’s “swoosh.”¹³⁰ To determine if Lotas’ designs

SneakerHeadInTheBay, *FUGAZI One in the Chamber ‘Neutral Grey’ Review + On Feet!*, YOUTUBE (Jan. 10, 2021), https://www.youtube.com/watch?v=usPI1VkPmok&ab_channel=SneakerHeadInTheBay [<https://perma.cc/Z38X-9SNT>].

¹²⁵ See SneakerHeadInTheBay, *supra* note 11.

¹²⁶ Petition for Cancellation, *supra* note 14, at 6.

¹²⁷ *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1051 (D. Or. 2008) (citation omitted).

¹²⁸ See, e.g., *id.* at 1042; *Nike, Inc. v. Lotas*, No. 2:20–CV–09431–MCS–PVC, 2020 U.S. Dist. LEXIS 236432, at *6–7 (C.D. Cal. Nov. 18, 2020).

¹²⁹ See *Nike, Inc.*, 2020 U.S. Dist. LEXIS 236432.

¹³⁰ See *id.* at *2, *5–6.

infringed on Nike's validly trademarked "swoosh," the court used an eight-factor test developed by the Ninth Circuit, known as the *Sleekcraft* factors, to assess whether confusion between goods existed.¹³¹ These eight factors are:

1. strength of the mark; 2. proximity of the goods; 3. similarity of the marks; 4. evidence of actual confusion; 5. marketing channels used; 6. type of goods and the degree of care likely to be exercised by the purchaser; 7. defendant's intent in selecting the mark; and 8. likelihood of expansion of the product lines.¹³²

The court, in applying the factors to Lotas' knockoff *Dunks*, noted that:

1. Nike's "swoosh" design is strong due to its history and use in commerce;

2. The goods are proximate because "both products are sneakers, and comments on Instagram already show potential consumer confusion";

3. The "minimal markings inside the shape" of Lotas' similar swoosh were "not enough to create a meaningful distinction between the marks";

4. There was significant evidence of confusion in the form of social media comments by users thinking "Lotas was collaborating with Nike";

5. The use of online marketing channels did not weigh in favor of either party;

6. Neither of the parties brought forth enough evidence to illustrate the degree of care likely to be exercised by consumers;

7. Lotas "seemingly admitted" an intent to "pay homage" to Nike's design; and,

8. There was insufficient evidence to demonstrate a strong possibility that the parties would expand their product lines to compete with one another.¹³³

¹³¹ See *id.* at *7 (citing *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979)).

¹³² *Id.*

¹³³ *Id.* at *7–11.

Though the court found that three factors (factors five, six, and eight) did not favor either party or the evidence was insufficient for the court to lean one way or the other, the court reasoned that Nike would be “likely to succeed on the merits of trademark infringement.”¹³⁴

Similarly, *Adidas Am., Inc. v. Payless Shoesource, Inc.*¹³⁵ explored infringement, specifically addressing the likelihood of confusion as it related to the use of the company’s signature logo—three parallel stripes.¹³⁶ In *Adidas v. Payless*, adidas sued Payless for using two and four stripes on Payless sneakers that were already similar in shape and design to adidas’ shoes.¹³⁷ The court applied the Ninth’s Circuit’s *Sleekcraft* factors and, like in *Nike v. Lotas*, found that there was “substantial evidence of the likelihood of confusion” between the goods even though adidas’ logo has three stripes rather than two or four.¹³⁸ *Adidas v. Payless* emphasizes that the “central inquiry is whether a ‘reasonably prudent customer in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks’ because of the similarities between the two marks.”¹³⁹ The clarification that Nike needs is: what constitutes a “reasonably prudent customer in the marketplace.”¹⁴⁰

In *Nike v. Lotas*, the court pointed out that social media comments regarding the alleged infringing shoes illustrated a sense of confusion regarding Nike’s involvement in the sneaker.¹⁴¹ However, and to Nike’s concern, there are instances where sneakerheads willingly seek out knockoffs of Nike’s shoes and are aware that Nike has no affiliation with those sneakers.¹⁴² “Why not, fans ask, try a different kind of Swoosh or add a new form of

¹³⁴ *Id.* at *14.

¹³⁵ *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029 (D. Or. 2008).

¹³⁶ *See id.* at 1043.

¹³⁷ *See id.* at 1053.

¹³⁸ *Id.* at 1060.

¹³⁹ *Id.* at 1051 (citation omitted).

¹⁴⁰ *Id.*

¹⁴¹ *Nike, Inc. v. Lotas*, No. 2:20–CV–09431–MCS–PVC, 2020 U.S. Dist. LEXIS 236432, at *9 (C.D. Cal. Nov. 18, 2020).

¹⁴² *See* Gallagher, *supra* note 10.

perforation?”¹⁴³ Many sneakerheads seek something different while sticking to the familiar design, and “small-time sneaker-smiths . . . provide a playfulness that mainstream brands lack.”¹⁴⁴ Moreover, sneakerheads might exhibit higher care when purchasing shoes since these sneaker fans are seeking a particular take on a familiar design, colorway, or limited edition version knowing that the original version already exists.¹⁴⁵

Nonetheless, because of the overall accessibility of sneakers to the general public, courts are unlikely to limit the definition of consumers to a highly knowledgeable consumer-base, such as sneakerheads. If the relevant consumer was limited to sneakerheads, then, unlike in *Nike v. Lotas*, it would be difficult to establish actual confusion since consumers would be purposefully exploring non-Nike options that reimagine the iconic silhouette.¹⁴⁶ Even so, the expansion of social media and its ability to engage or confuse all types of consumers with sneaker content would likely lead to successful likelihood of confusion claims for Nike as it asserts its trademark.

D. Trademark Dilution: A Form of Protection Available for Famous Trademarks

Even if courts limit the relevant consumer for their likelihood of confusion analysis to sneakerheads, brands like Nike can also bring forth trademark dilution claims.¹⁴⁷ While a full analysis of trademark dilution is not within the purview of this Article, it is important to note that owners of “famous” marks can prevent others from using the mark “regardless of the presence or absence of actual or likely confusion.”¹⁴⁸ Whether a trademark is famous depends on a variety of factors that contribute to the mark being “widely recognized by the general consuming public of the United States as a designation of source.”¹⁴⁹ Such factors include the “geographic reach,” the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See Nike, Inc.*, 2020 U.S. Dist. LEXIS 236432, at *6–14.

¹⁴⁷ 15 U.S.C. § 1125(c).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

volume of sales, and the “extent of actual recognition of the mark.”¹⁵⁰ Based on the above analyses establishing the long-standing popularity of the *Air Jordan 1* silhouette, it is likely that a brand like Nike, seeking to protect a successful trademark similar to the *Air Jordan 1* silhouette, could prove these factors.

IV. REFORMS: BALANCING THE GOALS OF TRADEMARK AND PATENT LAW

Two reforms could be made to the current legal regimes protecting product design elements that would balance and maintain the separation between trademark and patent law goals. First, trademark law could impose time limits on design trademarks that do not incorporate a brand’s signature logo. Second, protection of designs like Nike’s *Air Jordan 1* could be limited to design patent protection, which is a system that already has time limits in place.¹⁵¹ These two suggestions would allow brands to profit from their unique designs and, after a certain amount of time, would also allow smaller designers to infiltrate the industry utilizing designs consumers enjoy. Though larger brands may worry that consumers will be unable to accurately affiliate a design to its source, such a worry may be alleviated because the time-limit policy would only apply to designs that do not feature a brand’s logo or other brand-name markings.

A. *Time Limits for Trademarks That Do Not Feature a Brand’s Signature Logo*

A trademark lasts as long as the mark is continuously used in interstate commerce.¹⁵² This key feature differs from patent law, which only protects design patents and utility patents for fifteen years¹⁵³ and twenty years,¹⁵⁴ respectively. Because trademarks can last indefinitely, smaller companies can struggle to compete with established brands.¹⁵⁵ Surely, indefinite ownership is efficient for

¹⁵⁰ *Id.* § 1125(c)(i)–(iii).

¹⁵¹ 35 U.S.C. §§ 173, 154(a)(2).

¹⁵² *Keeping Your Registration Alive*, *supra* note 16.

¹⁵³ 35 U.S.C. § 173.

¹⁵⁴ *Id.* § 154(a)(2).

¹⁵⁵ *See Keeping Your Registration Alive*, *supra* note 16.

established brands, as these brands are able to garner a reputation and maintain prominence with repeat customers.¹⁵⁶ But, in situations where a smaller competitor loses out due to unfamiliarity, consumers could miss products that are of equal quality, or even better quality, than those of larger brands.

Therefore, trademark law could benefit from imposed time limits much like those for patents.¹⁵⁷ The purpose of time limits in patent law is to allow inventors to profit from their invention by giving the inventor a lawful monopoly for a certain period of time, after which the invention becomes available to the public to foster growth and improvement.¹⁵⁸ Even though “[t]he encouragement of innovation and design” is not a goal of trademark law, time limits on certain trademarks that do not include a brand’s signature logo (such as Nike’s *Air Jordan I* trademark) could nonetheless increase competition and incentivize larger brands to improve their designs and product quality.¹⁵⁹

In the sneaker industry, a market clearly exists for high-quality *Air Jordan I* knockoffs and other famous Nike silhouettes.¹⁶⁰ By implementing a time limit on Nike’s ability to monopolize these silhouettes, new designers would benefit, and Nike would not be substantially harmed. Nike would have already profited from those designs during the time period allotted, thereby affording new designers the opportunity to attract Nike’s customers by utilizing Nike’s familiar designs. While a time limit on designs would not allow a non-Nike designer to use the “swoosh” or other Nike logos, for example, the time limit would allow the designer to market its brand utilizing the elements of the *Air Jordan I* that sneakerheads find most appealing. Nike would still have the opportunity to sell its *Air Jordan I* using the “swoosh” and other features that attract people to purchase Nike’s products in the first place, but consumers would have the choice to take a chance on a new designer before the

¹⁵⁶ See MCCARTHY, *supra* note 50, § 2:4.

¹⁵⁷ See 35 U.S.C. §§ 173, 154(a)(2).

¹⁵⁸ See MCCARTHY, *supra* note 50, § 6:10.

¹⁵⁹ *Id.*

¹⁶⁰ See Gallagher, *supra* note 10.

shoes suffer the “wrath of the Swoosh”¹⁶¹ and are forcibly shut down. By creating space for new designers to enter the market after a certain period of time has lapsed, large brands are incentivized to either “drop” new designs or improve the quality of their existing designs in order to maintain their place among competing products.

B. Limiting Designs to the Design Patent System

A simpler solution to increase competition while also allowing designers to recoup their investment from their designs is to limit designs that do not incorporate a brand’s logo to the design patent system. Doing so would properly balance the goals of trademark and patent law while fostering competition and innovation. To obtain a design patent, the patent applicant must, among other things, provide a design that is nonobvious, novel, ornamental, and original.¹⁶² Such designs can be a “two-dimensional decoration, three-dimensional configuration, or a combination of both.”¹⁶³ Hence, sneaker designs that can satisfy the requirements of a design patent are eligible for protection.

Large shoe companies already make use of the design patent system.¹⁶⁴ Acquiring a design patent helps companies establish trademark registration since design patent registration provides the company with the benefit of a fifteen-year exclusionary period during which competitors cannot use the patented design.¹⁶⁵ During this time, the company holding the design patent can restrict

¹⁶¹ Maya Ernest, *Nike Sues John Geiger Claiming He Copied Its Iconic Air Force 1 Sneaker*, INPUT (Aug. 30, 2021, 1:11 PM), <https://www.inputmag.com/style/nike-sues-john-geiger-gf-01-air-force-01-copy-sneakers-shoes-lawsuit> [<https://perma.cc/E2H3-375Q>] (discussing how Nike “has gone after—and shut down—plenty of independent sneaker designers, with very few surviving Nike’s legal influence”).

¹⁶² Sarah Burstein, *The Patented Design*, 83 TENN. L. REV. 161, 171 (2015).

¹⁶³ *Id.* at 172–73.

¹⁶⁴ Nike, for example, has filed for numerous design patents for portions of its designs, such as that of the *Air Jordan 23* sneaker. *See, e.g.*, U.S. Patent No. D570,592 (issued June 10, 2008).

¹⁶⁵ *See* Elizabeth D. Ferrill & Sydney N. English, *Yin and Yang: Design Patents and Trade Dress Rights*, FINNEGAN (July 27, 2015), <https://www.finnegan.com/en/insights/articles/yin-and-yang-design-patents-and-trade-dress-rights.html> [<https://perma.cc/N9WQ-7ZHT>].

competitive use while also advertising, marketing, and selling the designed product.¹⁶⁶ Accordingly, consumers are likely to develop an association between the designed product and the product's source because the designs are only legally allowed to come from one source.¹⁶⁷ Therefore, by the time the design patent expires, and sometimes even before then, the company can show years' worth of evidence of secondary meaning.¹⁶⁸

Obtaining patents as a preemptive tool, with the purpose of eventually acquiring trademark protection on a successful design, can have an anti-competitive effect in the marketplace—especially in the sneaker industry where high-quality knockoffs are sought after. On one hand, the ability to obtain a design patent and then later, a trademark, allows owners of a successful design to protect their innovative design.¹⁶⁹ On the other hand, obtaining a design patent prior to trademark registration can circumvent some of the difficulties designers face when trying to establish secondary meaning.¹⁷⁰ Such difficulties can arise in a market like the sneaker industry where many successful designs exist and are owned by large, powerful companies.¹⁷¹ The existence of prominent designs and brands can make it harder for consumers to notice a new design and develop the association necessary to establish secondary meaning. While a registered trademark for a design is not required for its enforceability, obtaining a design patent prior to trademark registration can grant companies a legal basis to prevent competitive

¹⁶⁶ See Robert S. Katz & Alisa S. Abbott, *Protecting and Enforcing Design Rights: United States*, WORLD TRADEMARK REV. (Dec. 11, 2017), <https://www.worldtrademarkreview.com/portfolio-management/protecting-and-enforcing-design-rights-united-states> [<https://perma.cc/7G73-EZM8>].

¹⁶⁷ See Ferrill & English, *supra* note 165 (explaining that a design patent can be helpful to eventually establish trademark rights because the patent would protect the product until the requirement of secondary meaning is established).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* (“[Y]ou might need the design patent to protect your product while the trade dress rights mature.”).

¹⁷¹ See generally ANAND & GOLDSTEIN, *supra* note 1, at 23–30 (discussing several of the biggest sneaker brands and how they have influenced sneaker culture).

use.¹⁷² Such a legal basis is more difficult to assert with an unregistered trademark.¹⁷³ In effect, the current U.S. legal framework seems to benefit large sneaker companies with the monetary resources to invest in successful designs and pursue both a design patent, and later, a registered trademark.¹⁷⁴

Moreover, the system of obtaining a design patent and then a trademark is incongruent with the goal of patents: to foster innovation, rather than allow everlasting monopolies.¹⁷⁵ The intent behind providing patent holders a period of exclusivity is to allow inventors to recover the investment put toward developing the patented design.¹⁷⁶ In the situation described here, where larger sneaker companies use design patents as a means to eventually obtain trademark rights, the intended purpose of the limited monopoly is not served because the same design is later provided a permanent monopoly if trademark protection is granted. Therefore, limiting designs that do not incorporate a brand's signature logo to solely design patent protection could maintain a separation between the goals of patents and trademarks and deter brands from using the design patent system to eventually get a lawful, everlasting monopoly under the trademark system.

C. Concerns Over Brand Reputation If Time Limits Are Put in Place

Though a time-limit suggestion incentivizes design innovation and makes room for new designers, time limits could also have a negative impact on the brand that initially created the designs. Such a negative impact could arise in two ways: (1) reputational harm based on public perception of the brand's values and (2) reputational harm based on the perceived quality of the brand's products.

¹⁷² See Ferrill & English, *supra* note 165.

¹⁷³ See Katz & Abbott, *supra* note 166.

¹⁷⁴ See Ferrill & English, *supra* note 165 (explaining that when budgets are limited, companies may need to choose between the design patent or trademark protection even though both forms of protection can be beneficial).

¹⁷⁵ See *id.* (stating that the goal of protection under a design patent is to "encourage innovation by protecting the ornamental design for a product").

¹⁷⁶ See *id.*

1. *Reputational Harm Based on Public Perception of a Company's Values*

It is possible that, even with time limits under trademark law or through a design patent, the original trademark owner's "good reputation" and goodwill could suffer if a product utilizing the no-longer-protected elements causes confusion in the marketplace. For example, Nike's company values came into question when MSCHF¹⁷⁷ sold modified *Nike Air Max 97s* adorned with a pentagram and, supposedly, a drop of human blood.¹⁷⁸ The "Satan Shoe" sparked controversy on social media, with many believing Nike supported Satanic imagery and symbols.¹⁷⁹ This type of confusion could be a problem even if time limits on designs exist because a trademark acts as a source identifier for a brand. Yet, the fact that the "Satan Shoe" was a "custom," meaning that the shoe was an edited Nike product, may have been the reason for the widespread confusion.¹⁸⁰ The shoe was a Nike sneaker with the "swoosh" and other Nike logos.¹⁸¹ Trademarks with time limits alluded to in this section would not be able to include a brand's signature logo or mark. Nonetheless, a company's reputation may suffer even when the company's signature logo is not on the shoe.

¹⁷⁷ MSCHF, aptly pronounced "mischief," is a company that "has been behind the internet's most viral stunts, stories, and products that have spread throughout the meme-laden, cynical internet community for years." Paige Leskin & Allana Akhtar, *Inside the Company Behind Lil Nas X's 'Satan Shoes,' Which Has Gone Viral For Products Like Toaster-shaped Bath Bombs and AI-generated Feet Photos*, INSIDER: BUS. (Jan. 23, 2020, 12:28 PM), <https://www.businessinsider.com/mschf-company-behind-viral-jesus-shoes-feet-generator-bull-moon-2020-1> [<https://perma.cc/9M4Z-WMAD>].

¹⁷⁸ Bryan Alexander, *Lil Nas X's Satan Shoes Sales Temporarily Blocked After Nike Sues MSCHF For Trademark Infringement*, USA TODAY, <https://www.usatoday.com/story/entertainment/celebrities/2021/03/29/satan-shoes-lil-nas-x-responds-outraged-critics-controversy/7042411002/> [<https://perma.cc/E2YN-2WND>] (Apr. 1, 2021, 8:19 PM).

¹⁷⁹ The article contrasts Tweets by public figures such as the Governor of South Dakota, Kristi Noem, and former Clemson University quarterback, Trevor Lawrence, both showing disapproval of the shoe, and Miley Cyrus wearing the shoes with approval. *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

Perceptions of companies' ideals and values can be harmed if their designs are utilized by others who do not uphold those same values.

2. *Reputational Harm Based on Perceived Quality of Products*

In addition to reputational harm stemming from misappropriated values, a large sneaker company could face similar harm if a counterfeit product's poor quality is misassigned to the company. Counterfeits are near-replicas of the name-brand sneaker that are usually cheaply made and purport to be a product of the larger brand.¹⁸² Because the sneaker's design could become closely aligned with the brand, it is possible that, after a time limit has passed, consumers would misassign a counterfeited product to the original brand owner of the design. This is especially relevant given that the internet and social media are prominent methods through which consumers access sneakers; therefore, the potential for confusion is high.¹⁸³

A potential hurdle to a time-limit proposal is the need for Nike and other similar brands to have broader protection against counterfeits as the internet and e-commerce evolve. Although websites and social media apps have increased consumer accessibility to large sneaker companies' products, these modes of e-commerce have also provided counterfeit manufacturers with an avenue to confuse consumers and flood the market.¹⁸⁴ In fact, Nike recently sued "589 websites, the owners of 676 social media accounts and more than 100 unidentified companies and individuals for allegedly selling counterfeit versions of its Nike and Converse shoes online."¹⁸⁵ These lawsuits show that Nike is heavily patrolling the internet for counterfeit products that undermine the company's values, and Nike is succeeding in finding hundreds of harmful uses.

¹⁸² ANAND & GOLDSTEIN, *supra* note 1, at 379.

¹⁸³ See Gallagher, *supra* note 10.

¹⁸⁴ See ANAND & GOLDSTEIN, *supra* note 1, at 382 ("In addition to online marketplaces, brands are having an increasingly hard time fighting and stopping rampant counterfeiting on social media.").

¹⁸⁵ *Nike Sues More Than 1,000 Websites and Other Parties Over Alleged Counterfeiting*, PYMNTS (Jan. 14, 2021), <https://www.pymnts.com/news/retail/2021/nike-sues-websites-other-parties-over-alleged-counterfeiting/> [<https://perma.cc/8V6P-XFE5>].

Due to the ease with which counterfeiters can sell their products on similar internet platforms as large sneaker companies, limiting design protection either through trademark law or through a design patent may end up subjecting a brand-name company to reputational harm because it can be difficult for large brands to monitor counterfeits, especially online. Once the fifteen-year time limit expires, consumers may still associate the design of a shoe with the original brand, and the larger brand would have limited ability to restrict poorly constructed versions of the product. For example, a consumer unhappy with the quality of a counterfeit product may direct harsh criticisms toward the large company—not understanding that the company no longer owns the elements that caused the consumer’s frustration. Thus, time-limit proposals may cause more damage to the original brand and put too high a burden on consumers to keep up with the ownership rights of designs.

Notably, prominent companies have made efforts to combat counterfeiting, suggesting that, a time limit would be a feasible solution to upholding the goals of patent and trademark law without harming the reputation of the brand that first had proprietary rights to the design.¹⁸⁶ In 2017, for instance, Nike made an agreement with Amazon¹⁸⁷ that allowed Nike to sell its products on Amazon’s e-commerce platform, and in exchange, Amazon would work with Nike to limit counterfeiting on Amazon’s website.¹⁸⁸ Though this relationship did not accomplish its initial purpose, and Nike terminated the agreement,¹⁸⁹ the business relationship likely incentivized Amazon to launch its own “Counterfeit Crimes Unit” in 2020.¹⁹⁰ Likewise, eBay, a popular resale website, has taken steps on its own to authenticate goods before the goods are resold on its

¹⁸⁶ ANAND & GOLDSTEIN, *supra* note 1, at 381 (explaining that sneaker brands often put resources toward use of the legal system, authorities, and investigators to prevent the sale of counterfeit goods).

¹⁸⁷ Joe Kaziukenas, *One Year After Nike Stopped Selling on Amazon*, FASHION L. (Oct. 28, 2020), <https://www.thefashionlaw.com/one-year-after-nike-stopped-selling-on-amazon/> [<https://perma.cc/XB2R-PTZF>].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ ANAND & GOLDSTEIN, *supra* note 1, at 382.

website.¹⁹¹ This industry-wide initiative illustrates that the fight against counterfeiting is not just in the interest of the brand whose product is being counterfeited but is also an interest of the e-commerce platforms that want to remain in good standing with consumers who use their platform to purchase goods.

Action against counterfeiting is also present at the federal level.¹⁹² The government has recently taken steps to address the legitimacy of goods on e-commerce platforms. In 2020, former President Trump issued Executive Order No. 13904, “Ensuring Safe & Lawful E-Commerce for U.S. Consumer, Businesses, Government Supply Chains, and Intellectual Property Rights,” aiming to combat counterfeiting on e-commerce platforms.¹⁹³ The amalgamation of these initiatives from different areas of the e-commerce industry, as well as the government, suggests an interest in limiting counterfeiting and indicates a strong likelihood that the United States will successfully limit counterfeiting on e-commerce platforms in the near future, thereby limiting reputational harm to sneaker manufacturers.

Altogether, time-limit reforms have the potential to increase competition and incentivize established brands to continue to improve their product’s quality. However, the possibility of reputational harm because a design often becomes closely aligned to the original trademark’s owner can be a hurdle for these proposals. Further, although the expansion of e-commerce has given large brands the ability to communicate and interact with a broader consumer base, e-commerce has also been a gateway for counterfeit products to flood the market. The e-commerce expansion makes it easier for consumers to be confused as to the source of the products they are purchasing and thus could lead to reputational harm based on frustration with a poor-quality replica of a name-brand sneaker. Because efforts are being made to curb counterfeiting, it is possible that time-limit proposals would be more realistic in the future as those efforts become more solidified and prominent in the industry.

¹⁹¹ *Authenticity Guarantee*, EBAY, <https://pages.ebay.com/authenticity-guarantee-sneakers-seller/> [<https://perma.cc/8EBL-GXTQ>] (last visited Oct. 24, 2021).

¹⁹² ANAND & GOLDSTEIN, *supra* note 1, at 381.

¹⁹³ Exec. Order No. 13904, 85 Fed. Reg. 6725 (Jan. 31, 2020).

V. CONCLUSION

Trademark owners in the sneaker industry should not be deprived of ownership of their designs due to the existence of high-quality knockoffs flooding online platforms that attract consumer attention. Courts have guarded against trade dress and trademark infringement of shoes and sneakers to protect brand owners' proprietary interest in their marks and decrease consumer confusion,¹⁹⁴ which are the goals of trademark law.¹⁹⁵

Although it faced recent opposition, Nike's latest trademark registration for its *Air Jordan 1* silhouette has likely acquired secondary meaning such that consumers recognize the trademarked elements as coming from a particular source rather than as a standalone product. This determination is due to Nike's success in selling the shoe since 1985,¹⁹⁶ evidence of consumers comparing the knockoffs to Nike's sneakers,¹⁹⁷ and the stamp the shoe has left on the history of the sneaker industry.¹⁹⁸ The latest wave of internet and social media designers that make use of the familiar design should not stand in the way of Nike protecting its iconic design.

While current trademark law protects Nike's recent registration, the goals of trademark law could be better met either by introducing time limits on certain trade dress that do not make use of a brand's signature logo or by limiting these types of designs to design patent protection. Even though large, established brands have succeeded in maintaining a certain level of quality that attracts consumers, the many established sneaker brands make it difficult for new products to break into the industry. Time limits, either under trademark law or from the existing design patent system on designs like Nike's *Air Jordan 1*, could allow new designers to make use of the familiar silhouette that appeals to consumers and therefore create more competition in the sneaker industry. Both solutions would allow original designers to hold a monopoly over and profit from their

¹⁹⁴ See, e.g., *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1060 (D. Or. 2008).

¹⁹⁵ See MCCARTHY, *supra* note 50, § 2:2.

¹⁹⁶ Dunne, *supra* note 13.

¹⁹⁷ See SneakerHeadInTheBay, *supra* note 11.

¹⁹⁸ See Howell, *supra* note 20.

designs temporarily, and subsequently allow the public to use the designs.¹⁹⁹

Some potential obstacles to both suggestions are that the original brand could suffer reputational harm if consumers are confused as to the current owner of the design.²⁰⁰ However, the presence of efforts to curb consumer confusion both within the industry and at the federal level signal that a time-limit suggestion could have a place in the sneaker industry in the future when these efforts materialize. If time-limit considerations are not taken into account and large brands continue to register trademarks for designs that do not include a logo or signature mark, there could be a chilling effect on the creativity that comes from high-quality reimaginings of popular sneakers and on the culture of the sneaker industry as a whole.

¹⁹⁹ See MCCARTHY, *supra* note 50, § 6:10 (referring to the Supreme Court's opinion in *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 164–65 (1995), that patents expire because they are meant to incentivize invention).

²⁰⁰ See Alexander, *supra* note 178.