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Intellectual Property Alert: Supreme Court Rules Willfulness Not Required to Obtain Profits in Trademark Suits; Increases Risk to Defendants, Potential Recovery to Plaintiffs in Trademark Litigation

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Until now, it was the general rule that plaintiffs could not expect to receive infringer profits in trademark cases, absent a demonstration of willfulness on the part of the infringer, with lower courts over the years disagreeing on the importance the willfulness factor should be accorded. Some courts held it was but one factor to be considered, others required it absolutely before an infringer could be required to disgorge profits from infringing sales.

As Vorys previewed in [January](#), the U.S. Supreme Court took up the matter in a lawsuit between Romag Fasteners and Fossil Inc. Fossil argued that reducing the role of willfulness in a damages analysis would further encourage "baseless" trademark lawsuits. On April 23, 2020, the Court ruled that, while it was an important factor for courts to weigh, willfulness could not be an "inflexible precondition" to recovery in a case of infringement of a federal trademark where the relevant provision in the Lanham Act contained no such language. Writing for the Court, Justice Gorsuch noted that while five other sections of the Act limited remedies to cases of willful, intentional, innocent, or bad faith conduct, the provision in question did not, making its absence in the provision at issue, "all the more telling." Justice Sotomayor concurred in the judgment, but criticized the majority in a concurrence for failing to address the issue of "innocent infringement."