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DELAY IN FILING PRELIMINARY INJUNCTION MOTIONS: 2015 EDITION

By Sandra Edelman and Fara S. Sunderji***

I. INTRODUCTION

This article is the fifth in a series about the effect of delay in filing a preliminary injunction motion in a trademark lawsuit in United States federal district court, with an updated chart of cases and analysis of the issues relevant to delay since the last article was published in 2009.¹ The most noteworthy development since 2009 has been the more extensive impact of the United States Supreme Court's decision in *eBay Inc. v. MercExchange LLC*² on the irreparable harm component of the standard for granting a preliminary injunction. As discussed in Part III, the assessment of whether a movant has unreasonably delayed in filing a motion for expedited relief has remained essentially the same, but the manner in which some courts weigh delay as a factor in the analysis of irreparable injury has changed as a result of the application of the *eBay* decision to trademark cases.

Allegations of ongoing settlement discussions and progressive encroachment by the defendant on the rights of the plaintiff continue to be the most frequent reasons given for delay in seeking preliminary injunctive relief. As discussed in Parts IV and V, these two justifications for delay are likely to be accepted where the facts bear out diligent, credible efforts to resolve a dispute or where there has been a change in the nature of the defendant's infringement that is both material and unforeseeable.

The Appendix includes all of the cases from the prior articles in the series, supplemented by cases decided since 2009, arranged by U.S. Circuit, with appellate court decisions preceding district court cases. Cases were selected for inclusion only if the court's

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1. See Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: 2009 Edition*, 99 TMR 1074 (2009); Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: Update 2002*, 92 TMR 647 (2002); Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: A Five Year Update*, 85 TMR 1 (1995); Robert L. Raskopf & Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: How Long Is Too Long?*, 80 TMR 36 (1990).

2. 547 U.S. 388 (2006).

opinion affirmatively discusses the issue of delay in seeking relief.³ Certain cases were omitted because delay was not raised as a defense to the motion and/or the court did not address the issue in its published opinion, even though it is apparent from the recitation of facts that there was an extended delay by the plaintiff in filing its motion for preliminary relief.⁴ The cases in the Appendix all involve trademark claims, and in some cases also involve related intellectual property or breach of contract causes of action as well.

Measuring the period of delay is not always a straightforward exercise. Judicial opinions can be imprecise about the exact dates when events happened or knowledge was acquired, or the analysis may focus only on the time period between filing the lawsuit and bringing the motion, which tells only part of the story of the delay. The period of delay is properly measured from the time the plaintiff first knew or should have known about the infringing conduct to the date the plaintiff filed the motion for a preliminary injunction.⁵ In many instances, the court is able to determine when a plaintiff gained actual knowledge of a defendant's infringement or first contacted the defendant to object to its conduct. Occasionally, however, a court will determine that a plaintiff should have known about the infringement much earlier. This occurred in *Cutting Edge Solutions, LLC v. Sustainable Low Maintenance Grass, LLC*,⁶ in which the court criticized the plaintiff's failure to thoroughly search the USPTO database or conduct a basic Internet search to determine the full scope of the defendant's use of the disputed mark, after the plaintiff learned about some of the defendant's pending intent to use applications. As the court commented, had the plaintiff conducted a more thorough investigation of publicly accessible information, it "would have easily discovered" the defendant's actual use of the mark and an existing registration for the exact same mark it was now seeking to enjoin.⁷

3. *Wahoo International, Inc. v. Phix Doctor, Inc.*, 2014 WL 2106482 (S.D. Cal. May 20, 2014), included in the Appendix, is an unusual example of where the court itself brought up the plaintiff's 17-month delay in seeking preliminary injunctive relief as a reason for finding a lack of irreparable harm, even though the issue had not been addressed by either party. *Id.* at *3.

4. *See, e.g., Altairia Corp. v. Woodbolt Distrib., LLC*, A-14-CA-471-SS, 2014 WL 3121899 (W.D. Tex. July 7, 2014); *Dao Travels, LLC v. Charleston Black Cab Co.*, 2015 WL 631137 (D. S.C. Feb. 13, 2015).

5. *See Raskopf & Edelman, supra* note 1, 80 TMR at 45-47; Edelman, *supra* note 1, 99 TMR at 1082-83.

6. No. 14-cv-02770, 2014 WL 5361548 (N.D. Cal. Oct. 20, 2014).

7. *Id.* at *6.

II. HOW LONG IS TOO LONG TO WAIT TO MOVE FOR PRELIMINARY INJUNCTIVE RELIEF?

The 2009 article in this series concluded that *outside of the Second Circuit*, plaintiffs who waited three months or fewer could be confident that delay would not undercut a showing of irreparable harm; in the four- to six-month and seven- to twelve-month time periods of delay, there was a reasonable chance that delay would be found excusable, although denials of preliminary relief on the ground of delay were not unusual.⁸ In contrast, expectations of a swift filing were higher in the Second Circuit as of 2009, with increasing difficulties in securing relief after three months, although a motion might be granted with longer periods of delay if the plaintiff's case was very strong on the merits and equities and the plaintiff had a good reason for waiting.⁹

An overview of the cases decided since 2009 shows that about twice as many motions for preliminary injunctive relief were denied as were granted where delay was present as an issue, whether the delay was dispositive of the motion or not. A surprising number of plaintiffs filed a motion for a preliminary injunction where the delay was a year or much longer.¹⁰ One might wonder why so many movants believed that a preliminary injunction might be obtainable when there had been such an extended period of delay in seeking expedited relief. In many of these cases, the plaintiffs argued that the delay should be excused based on settlement discussions or progressive encroachment, but the arguments were rejected. Perhaps, for some plaintiffs, "hope springs eternal," particularly because there are instances where courts do not fault the plaintiff for a delay of a year or more and grant the motion. This even occurred in a district court case in the Second Circuit, *The Marks Organization, Inc. v. Joles*,¹¹ in which the court granted the plaintiff's motion for a preliminary injunction notwithstanding a delay of sixteen months from the time the plaintiff first learned of the defendant's infringement. Importantly in *Marks*, the plaintiff filed suit after three and one-half months, a period the court characterized as involving "good

8. See Edelman, *supra* note 1, 99 TMR at 1075-77.

9. *Id.*

10. See *Voices of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26 (1st Cir. 2011) (10 years); *Berkley Networks Corp. v. InMarket Media, LLC*, 14-cv-5145, 2014 WL 8332290 (S.D.N.Y. Dec. 30, 2014) (more than two years); *King Pharms., Inc. v. Zymogenetics, Inc.*, No. 2:09-cv-244, 2009 WL 4931238 (E.D. Tenn. Dec. 10, 2009) (more than 22 months); *Credit One Corp. v. Credit One Fin., Inc.*, 661 F. Supp. 2d 1134 (C.D. Cal. 2009) (approx. 18 months); *Wahoo Int'l, Inc. v. Phix Doctor, Inc.*, No. 13cv1395, 2014 WL 2106482 (S.D. Cal. May 20, 2014) (17 months).

11. 784 F. Supp. 2d 322 (S.D.N.Y. 2011).

faith efforts to investigate the facts and law.”¹² An additional year was occupied by the defendant’s requested extensions of time to answer the complaint followed by the filing of a meritless motion to dismiss for lack of personal jurisdiction, settlement discussions and then the transfer of the case from one judge to another.¹³ The court held that “[a]lthough Plaintiff’s delay may have permitted some irreparable harm to continue for an unusually long time, under the circumstances in this case, Plaintiff’s delay alone should not defeat the preliminary injunction motion.”¹⁴ The “circumstances” of the case alluded to by the court included the defendant’s “clear awareness of, and evident intent to capitalize on, the good will associated with [the plaintiff’s] name,”¹⁵ a finding that likely assisted the plaintiff’s cause.

Putting aside cases involving more than one year of delay, the cases added to the 2015 Appendix show: (1) a delay of three months or fewer will not impede the grant of a preliminary injunction motion;¹⁶ (2) many cases with a delay of four to six months resulted in a denial of relief, sometimes on grounds relating to the likelihood of success on the merits, rather than delay,¹⁷ but in one case the court described a four-month delay as reflecting an “unhurried” pace.¹⁸ In the seven- to twelve-month time period, there were about as many cases granting the motion as denying it,¹⁹ but none of the cases granting preliminary injunctive relief with a delay of this length were in the Second Circuit.

12. *Id.* at 333-34.

13. *Id.*

14. *Id.*

15. *Id.* at 331.

16. *See* Polar Corp. v. PepsiCo, Inc., 789 F. Supp. 2d 219 (D. Mass. 2011); Boathouse Grp., Inc. v. TigerLogic Corp., 777 F. Supp. 2d 243 (D. Mass. 2011); Juicy Couture, Inc. v. Bella Int’l Ltd., 930 F. Supp. 2d 489 (S.D.N.Y. 2013); Bulman v. 2BKCO, Inc., 882 F. Supp. 2d 551 (S.D.N.Y. 2012); Athleta, Inc. v. Pitbull Clothing Co., Inc., 12-10499, 2013 WL 142877 (C.D. Cal. Jan. 7, 2013); *but see* CLT Logistics v. River West Brands, 777 F. Supp. 2d 1052 (E.D. Mich. 2011) (denial of relief was expressly based on grounds other than delay).

17. *See, e.g.*, BuzzBallz, LLC v. JEM Bev. Co., LLC, Civ. No. 3:15-CV-588-L, 2015 WL 3948757 (N.D. Tex. June 26, 2015).

18. *See* Real-Time Reporters, P.C. v. Sonntag Reporting Servs., No. 13C 5348, 2013 WL 5818460, at *3 (N.D. Ill. Oct. 29, 2013).

19. *See* SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd., 846 F. Supp. 2d 1063 (N.D. Cal. 2012) (granted); Boldface Licensing + Branding v. By Lee Tillett, Inc., 940 F. Supp. 2d 1178 (C.D. Cal. 2013) (granted); Masters Software, Inc. v. Discovery Commc’ns, Inc., 725 F. Supp. 2d 1294 (W.D. Wash. 2010) (granted); Women, Action and the Media Corp. v. Women in the Arts & Media Coalition, Inc., Civ. No. 13-10089, 2013 WL 3728414 (D. Mass. July 12, 2013) (granted); Life Technologies Corp. v. AB Sciex Pte. Ltd., 99 U.S.P.Q.2d 1785 (S.D.N.Y. 2011) (denied); Am. Beverage Corp. v. Diageo N. Am., Inc., 936 F. Supp. 2d 555 (W.D. Pa. 2013) (denied); Kerr Corp. v. N. Am. Dental Wholesalers, Inc., 11-03132011, 2011 WL 2269991 (C.D. Cal. June 9, 2011) (denied); ConocoPhillips Co. v. Gonzalez, 5:12-cv-00576, 2012 WL 538266 (N.D. Cal. Feb. 17, 2012) (denied).

III. APPLICATION OF *EBAY* IN TRADEMARK CASES

As a result of the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange LLC*, patent owners can no longer rely on a presumptive entitlement to permanent injunctive relief after proving infringement.²⁰ Instead, the Supreme Court held that patentees must meet the traditional four-factor test to obtain a permanent injunction, which requires that a plaintiff establish irreparable injury.²¹ Prior to the Supreme Court's decision in *eBay*, trademark plaintiffs in all circuits also enjoyed a presumption of irreparable harm upon a showing of a likelihood of successes on the merits on a motion for a preliminary injunction.²² However, a defendant could rebut this presumption by demonstrating that the plaintiff unreasonably delayed in seeking expedited relief.²³ In practice, a finding of unreasonable delay could prove fatal to a motion for preliminary injunction under this standard, in part because many plaintiffs did not proffer much, if any, affirmative evidence of irreparable harm beyond the presumption that confusion would harm their business and goodwill.²⁴

Since 2006, courts have struggled to decide whether *eBay* applies to a plaintiff seeking a preliminary injunction on a trademark claim, with mixed results.²⁵ Some district courts have maintained that the presumption of irreparable harm still applies in trademark cases notwithstanding the *eBay* decision, concluding that the case is distinguishable on various grounds, notably the involvement of patent, not trademark claims.²⁶ Many other district courts have declined to rule on whether *eBay* applies to trademark cases absent a controlling circuit court decision on the issue where the plaintiff made a specific showing of irreparable harm that

20. See 547 U.S. 388, 390-91 (2006).

21. *Id.*

22. See Raskopf & Edelman, *supra* note 1, 80 TMR at 39 & n.11.

23. See *id.* at n.12.

24. See, e.g., GTE Corp. v. Williams, 731 F.2d 676, 679 (10th Cir. 1984) (holding that delay by a plaintiff that offers no specific evidence of harm beyond that which is presumed to exist from likelihood of confusion can be key in determining lack of irreparable harm); see also Helena Rubenstein, Inc. v. Frances Denney, Inc., 286 F. Supp. 132, 134 (S.D.N.Y. 1968) (“Delays in seeking preliminary injunctions have, without more, been held grounds for barring that relief.”)

25. In the Ninth Circuit alone, at least one district court held that *eBay* applied, at least one held that it did not, and others remained undecided prior to the Court of Appeals decision in *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, which confirmed that *eBay* did apply. 736 F.3d 1239 (9th Cir. 2013).

26. See, e.g., Rebel Debutante LLC v. Forsythe Cosmetic Grp., Ltd., 799 F. Supp. 2d 558, 579 (M.D.N.C. 2011) (distinguishing *eBay* because (1) it involved a permanent injunction, (2) damages are more central to patent and copyright cases and (3) “several district courts in the Fourth Circuit continue to recognize the presumption”); *Wetzel's Pretzels, LLC v. Johnson*, 797 F. Supp. 2d 1020, 1024, 1028 (C.D. Cal. 2011).

would be sufficient even if *eBay* applied²⁷ or where the plaintiff was unable to demonstrate a likelihood of success on the merits, making the issue of the presumption moot.²⁸ In these courts, the delay analysis has not changed.

A handful of appellate courts have suggested that they will apply *eBay* to preliminary injunction motions in trademark cases if and when the issue is squarely presented.²⁹ For example, the Second Circuit has not yet held that the presumption of irreparable harm is no longer valid in trademark cases, but in *Salinger v. Colting*,³⁰ it applied the Supreme Court's decision in *eBay* to a motion for a preliminary injunction in a copyright case.³¹ In *dicta*, the Court of Appeals noted that "although today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in *any* type of case."³² Following the appellate court's logic in *Salinger*, many district courts in the Second Circuit have expressly held that there is no longer a presumption of irreparable harm upon a showing a likelihood of success on the merits on a motion for a preliminary injunction in a trademark case.³³

Other district courts³⁴ as well as the Third³⁵ and Ninth Circuits have expressly applied *eBay* to preliminary injunction

27. See, e.g., *Boldface Licensing + Branding v. By Lee Tillett, Inc.*, 940 F. Supp. 2d 1178, 1196 (C.D. Cal. 2013).

28. See, e.g., *CLT Logistics v. River West Brands*, 777 F. Supp. 2d 1052, 1072 (E.D. Mich. 2011); *Real-Time Reporters, P.C. v. Sonntag Reporting Servs.*, No. 13C 5348, 2013 WL 5818460, at **4-6 (N.D. Ill. Oct. 29, 2013); *ProFoot, Inc. v. MSD Consumer Care, Inc.*, Civ. No. 11-7079, 2012 WL 2262904, at *13 (D.N.J. June 14, 2012) (not for publication).

29. See *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008) (noting that "a strong case can be made that *eBay*'s holding necessarily extends to the grant of preliminary injunctions under the Lanham Act."); *Swarovski Aktiengesellschaft v. Bldg. #19, Inc.*, 704 F.3d 44, 54 (1st Cir. 2013) (noting "there is no principled reason why *eBay* should not apply" in trademark cases); *but see Abraham v. Alpha Chi Omega*, 708 F.3d 614 (5th Cir.), *cert. denied*, 134 S. Ct. 88 (2013) (continuing to presume harm from a showing of trademark infringement).

30. 607 F.3d 68 (2d Cir. 2010).

31. *Id.* at 76.

32. *Id.* at 78 n.7 (emphasis in original).

33. See, e.g., *New York City Triathlon v. NYC Triathlon Club Inc.*, 704 F. Supp. 2d 305, 328 (S.D.N.Y. 2010); *Juicy Couture, Inc. v. Bella Int'l Ltd.*, 930 F. Supp. 2d 489, 503-04 (S.D.N.Y. 2013); *The Marks Organization, Inc. v. Joles*, 784 F. Supp. 2d 322, 333 (S.D.N.Y. 2011).

34. See, e.g., *Nat'l Fin. Partners Corp. v. Paycom Software, Inc.*, No. 1:14-CV-07424, 2015, WL 3633987, at *11 (E.D. Ill. June 10, 2015); *Am. Beverage Corp. v. Diageo N. Am., Inc.*, 936 F. Supp. 2d 555, 614 (W.D. Pa. 2013) ("*eBay* precludes the application of a presumption of irreparable harm").

35. In *Ferring Pharmaceuticals, Inc. v. Watson Pharmaceuticals, Inc.*, a Lanham Act false advertising case, the Third Circuit held that "a party bringing a claim under the Lanham Act is not entitled to a presumption of irreparable harm when seeking a preliminary injunction and must demonstrate that irreparable harm is likely." 765 F.3d 205, 206 (3d Cir. 2014). As this case does not deal with the issue of delay in filing a preliminary injunction motion, it is not included in the appendix.

motions in Lanham Act cases. In *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*,³⁶ the Ninth Circuit Court of Appeals held that “the *eBay* principle—that a plaintiff must establish irreparable harm—applies to a preliminary injunction in a trademark case.”³⁷ As a result, “[t]hose seeking injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm.”³⁸

While the Ninth Circuit’s decision in *Herb Reed Enterprises* confirmed the applicability of *eBay* to preliminary injunction motions in trademark cases within the circuit, the court did not address how the issue of delay should factor into the new analysis of irreparable harm. However, in the Second Circuit, a number of district court judges have acknowledged that it is important to clarify the nature of the interaction between the issue of delay and proof of irreparable harm, noting that the application of *eBay* “leaves open the question of what effect Plaintiff’s delay should have on the Court’s determination of irreparable injury.”³⁹ Many of these courts have “decline[d] to take the position that delay alone requires denial of a preliminary injunction motion” and instead, have held that without a presumption of irreparable harm, “[d]elay is just one of several factors to consider.”⁴⁰

Similarly, district courts outside of the Second Circuit that have applied *eBay* now analyze delay as just one of many factors in the irreparable harm analysis. For example, in *National Financial Partners Corp. v. Paycom Software, Inc.*,⁴¹ the court began its discussion of irreparable harm by holding that *eBay* is applicable to preliminary injunction motions in trademark cases despite the lack of specific guidance on the issue from the Court of Appeals for the Seventh Circuit.⁴² The court then found, based on the evidence, that the plaintiff would suffer irreparable harm without an injunction.⁴³ With respect to delay, the court observed that it “is only one among several factors to be considered” and that there is

36. 736 F.3d 1239 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 57 (Oct. 6, 2014).

37. 736 F.3d at 1249.

38. *Id.* at 1251.

39. *The Marks Organization, Inc. v. Joles*, 784 F. Supp. 2d 322, 333 (S.D.N.Y. 2011); *see also Juicy Couture, Inc. v. Bella Int’l Ltd.*, 930 F. Supp. 2d 489, 504 (S.D.N.Y. 2013) (“Now that courts may not presume irreparable harm, however, the effect of delay is uncertain”); *Saint Laurie Ltd. v. Yves Saint Laurent Am., Inc.*, 13 Civ. 6857, 2014 U.S. Dist. LEXIS 143441, at *12 (S.D.N.Y. Sept. 30, 2014).

40. *The Marks Organization*, 784 F. Supp. 2d at 333 (internal quotations and citations omitted); *see also Juicy Couture*, 930 F. Supp. 2d at 504 (citing *The Marks Organization*); *Saint Laurie Ltd. v. Yves Saint Laurent America, Inc.*, 13 Civ. 6857, 2014 U.S. Dist. LEXIS 143441 (S.D.N.Y. Sept. 30, 2014) (citing *Juicy Couture* and other cases).

41. *Nat’l Fin. Partners Corp. v. Paycom Software, Inc.*, No. 1:14-CV-074242015, WL 3633987 (E.D. Ill. June 10, 2015).

42. *Id.* at * 11.

43. *Id.* at * 12.

no “general rule that irreparable injury cannot exist if the plaintiff delays in filing its motion for a preliminary injunction.”⁴⁴ Ultimately, the court held that the plaintiff’s four-month delay “[did] not conflict with the Court’s conclusion that [plaintiff’s] harm [was] irreparable.”⁴⁵

The case of *Kerr Corp. v. N. Am. Dental Wholesalers, Inc.*,⁴⁶ which preceded the Ninth Circuit’s decision in *Herb Reed Enterprises*, suggests that even before an appellate court has determined the applicability of *eBay*, a plaintiff should be cautious about relying on the presumption of irreparable harm, as delay alone could prove fatal absent affirmative evidence of irreparable injury. The court in *Kerr* criticized the plaintiff for “relying heavily on the idea that a plaintiff who demonstrates a likelihood of success on the merits of a trademark infringement claim is entitled to a presumption of irreparable harm.”⁴⁷ After concluding that *eBay* applied, the court found that the plaintiff’s delaying actions, totaling eight months, “necessarily suggest that a lack of urgency exists.”⁴⁸ Without any evidence of irreparable injury to counter this inference, the court denied the plaintiff’s motion.

These cases show that while the application of *eBay* requires plaintiffs to present a stronger case for preliminary injunctive relief because of the need to demonstrate the likelihood of irreparable harm, plaintiffs who have delayed may fare better under *eBay* because delay is now just one element in a multi-factor analysis that can be outweighed by an otherwise strong showing of irreparable harm. Prior to *eBay*, plaintiffs certainly could have chosen to proffer evidence of likely irreparable harm, but many simply relied on the presumption and therefore did not have any actual evidence of irreparable injury to overcome a delay in seeking relief.⁴⁹

IV. PRE-LITIGATION ENFORCEMENT AND SETTLEMENT EFFORTS

When assessing the extent and reasons for delay in seeking preliminary injunctive relief, courts continue to value “the goal of voluntary resolutions of disputes without the need for litigation.”⁵⁰

44. *Id.* at * 13 (internal quotation and citation omitted).

45. *Id.*

46. 11-03132011, 2011 WL 2269991 (C.D. Cal. June 9, 2011).

47. *Id.* at *2.

48. *Id.* at *3.

49. *See, e.g., American Int’l Grp. v. Am. Int’l Airways Inc.*, 726 F. Supp. 1470, 1481-82 (E.D. Pa. 1989) (holding “no factual basis” to support a finding of irreparable harm after plaintiff’s delay undermined the presumption of irreparable harm and it failed to proffer any evidence in support of harm).

50. *Rebel Debutante LLC v. Forsythe Cosmetic Grp., Ltd.*, 799 F. Supp. 2d 558, 580 (M.D.N.C. 2011).

As the court observed in *Rebel Debutante LLC v. Forsythe Cosmetic Group, Ltd.*,⁵¹ “[t]he law encourages conciliation efforts to avoid the expense and time of litigation. . . .”⁵² Thus, a plaintiff that takes the time to write a cease and desist letter or engage in settlement negotiations before initiating a lawsuit will not necessarily be penalized with a finding that its conduct demonstrates the lack of urgency necessary for expedited relief.⁵³ However, a court will find that such efforts constitute excusable delay only if the pre-litigation enforcement efforts are pursued diligently and the plaintiff initiates legal proceedings reasonably soon after it becomes apparent that a settlement cannot be achieved.⁵⁴

For example, the delay in seeking preliminary injunctive relief was found excusable in *Bulman v. 2BKCO, Inc.*,⁵⁵ where the plaintiff sought to resolve the dispute by sending a cease and desist letter to the defendant two days after the latter publicly announced its marketing plans under the mark in dispute. The parties then agreed to talk. Ultimately, the plaintiff brought the preliminary injunction motion within “several months,” and the court granted the motion.⁵⁶

Likewise, in *PIU Management, LLC v. Inflatable Zone Inc.*,⁵⁷ the plaintiff sent a protest letter to the defendant within a month of the defendant’s opening of a children’s entertainment center under an infringing name. The parties attempted to resolve the problem for approximately seven months, during which time the parties actively discussed a merger, a buyout, and a franchise as a method for settling the dispute.⁵⁸ But when the defendant sent an email saying that it was “not interested” in changing its name, the plaintiff filed suit nineteen days later. The court held that “[u]nder these circumstances . . . the Plaintiffs have established ‘a good

51. *Id.*

52. *Id.*

53. A less understanding approach to cooperative efforts in litigation was taken in *Two Kids from Queens, Inc. v. J&S Kidswear, Inc.*, 2009 WL 5214497, Civil Action No. 09-3690 (E.D.N.Y. Dec. 30, 2009), in which the court faulted the plaintiff for having granted the defendants a one-month courtesy extension of time to answer the complaint. Even though the stipulation to the extension specifically provided that defendants would not assert that the consent prejudiced any rights or remedies available to the plaintiff, the court found that granting an extension while the infringing conduct is ongoing “is antithetical to a claim of irreparable harm independent of any promise of no prejudice by defendants.” *Id.* at *3.

54. The court in *Rebel Debutante* excused a six-month delay in filing the motion for preliminary relief, crediting plaintiff’s explanation that it had “immediately” sent a letter to the defendant upon learning of its infringing conduct, and concluding that “the delay, if any, was in [defendant’s] failure to respond promptly.” *Id.*

55. 882 F. Supp. 2d 551 (S.D.N.Y. 2012).

56. *Id.* at 556-57, 565.

57. 2010 WL 681914, Civil Action No. H-08-2719 (S.D. Tex. Feb. 25, 2010).

58. *Id.* at *6.

explanation' for delaying the filing of their request for preliminary relief."⁵⁹ Interestingly, what appears to have been important to the court in *PIU Management* is not how long the parties were engaged in settlement negotiations (seven months) but that the dialogue appeared to be active and that the plaintiff brought suit promptly after it became clear the defendant was not, in fact, interested in reaching a settlement.

A similar scenario occurred in *Wetzel's Pretzels, LLC v. Johnson*,⁶⁰ where the court held that "a lapse of a full year" in seeking expedited relief did not bar the issuance of a preliminary injunction because the plaintiff was "actively engaged in good faith settlement negotiations" during this time period.⁶¹ In another case, *National Financial Partners Corp. v. Paycom Software, Inc.*,⁶² the court excused a delay of three to four months where the plaintiff initially decided not to contact the defendant because the defendant was one of the biggest clients of a company the plaintiff was about to acquire; once the plaintiff did communicate with the defendant and determined that a negotiated resolution was not achievable, it filed suit the same day.⁶³

Not all plaintiffs are so diligent. In many cases, courts reject the purported justification that the plaintiff was engaged in settlement negotiations because the facts do not bear out diligent, credible efforts to resolve the dispute. For example, the district judge in *Berkley Networks Corp. v. InMarket Media, LLC*⁶⁴ pointedly referred to the "languid pace" at which the dispute proceeded to litigation.⁶⁵ As the court noted, after one exchange of lawyer's letters—characterized as "puffery and counter-puffery"⁶⁶—"radio silence ensued. Given the sophistication of the parties, their attorneys, and the acknowledgement that each side was monitoring the other, it's hard to understand why neither side followed through on its litigation mongering. Perhaps something else was in play but that remains opaque at this time."⁶⁷ In light of

59. *Id.* at *6-7. The court also noted that the defendant had avoided service of process, which "contributed to the delay upon which Defendant now wants to rely in defense against this Motion." *Id.*

60. 797 F. Supp. 2d 1020 (C.D. Cal. 2011).

61. *Id.* at 1029 n.4; *see also* *Women, Action and the Media Corp. v. Women in the Arts & Media Coalition, Inc.*, Civ. No. 13-10089, 2013 WL 3728414, at *11 (D. Mass. July 12, 2013) (nine-month delay in filing suit and an additional two-month delay in moving for a preliminary injunction was not unreasonable "given that the parties spent several months attempting to negotiate an amicable solution before plaintiff filed suit.")

62. No. 1:14-CV- 7424, 2015 WL 3633987 (E.D. Ill. June 10, 2015).

63. *Id.* at **42-43.

64. 2014 WL 8332290 (S.D.N.Y. Dec. 30, 2014).

65. *Id.* at *3.

66. *Id.* at *2.

67. *Id.*

this judicial characterization of events, preliminary injunctive relief was denied where two years of co-existence followed the first exchange of letters, a complaint was filed, and a motion for a preliminary injunction motion was not brought until four months later.⁶⁸

In many instances, courts reject the excuse of delay on the ground of settlement negotiations where it is clear from the evidentiary record that the defendant has communicated its unwillingness to resolve the dispute and the plaintiff does nothing for an extensive period of time thereafter. For example, a long delay was at issue in *Interactive Media Corp. v. Imation Corp.*,⁶⁹ where the plaintiff sent a cease and desist letter to defendant Imation in May 2010; Imation “rejected the letter,” and the plaintiff delayed bringing the lawsuit for more than two years from that point in time.⁷⁰

Waiting five months after an impasse in year-long settlement discussions doomed the motion for preliminary injunctive relief in *Grout Shield Distributors, LLC v. Salvo*.⁷¹ The plaintiff there sent a cease and desist letter to the defendant in February 2010 and engaged in settlement negotiations for a year. According to the court, “it is apparent that negotiations broke down in February 2011, but plaintiff did not file its complaint and motion for a preliminary injunction until July 22, 2011.”⁷² Even shorter periods of inaction (after settlement is no longer a realistic prospect) led to the denial of preliminary injunctive relief in *Life Technologies Corp. v. AB Sciex PTE. Ltd.*,⁷³ where the plaintiff did not file its motion until three months after the last settlement correspondence,⁷⁴ and in *CORD: USE Cord Blood Bank, Inc. v. CBR Systems, Inc.*,⁷⁵ where the plaintiff “waited over two months

68. *Id.* at **5-6, 8.

69. 2012 WL 4058064, Civil Action No. 12-11364 (D. Mass. 2012).

70. *Id.* at *1; *see also* *AK Metals, LLC v. Norman Industrial Materials, Inc.*, 2013 WL 417323, No. 12cv2595 (S.D. Cal. 2013) (court did not excuse a delay attributable to settlement negotiations because plaintiff “could not have assumed that settlement negotiations would be successful, thereby negating the need for a TRO and preliminary injunction”); *Two Kids from Queens, Inc. v. J&S Kidswear, Inc.*, 2009 WL 5214497, Civil Action No. 09-3690 (E.D.N.Y. Dec. 30, 2009) (delay based on alleged settlement negotiations not excused where the active negotiations were with other defendants who were dismissed from the litigation and the defendants to the motion had “refused to meet, and in fact, engaged in alleged dilatory tactics”).

71. 824 F. Supp. 2d 389 (E.D.N.Y. 2011).

72. *Id.* at 403; *see also* *FC Online Mktg., Inc. v. Burke’s Martial Arts, LLC*, 2:14-cv-03685, 2015 WL 4162757, at *33 (E.D.N.Y. July 8, 2015) (motion for preliminary injunction denied where plaintiffs “failed to seek injunctive relief for approximately eight (8) months after their settlement negotiations broke down, thereby undermining their claim of irreparable harm”).

73. 2011 WL 19612, No. 11 Civ. 325 (S.D.N.Y. Apr. 11, 2011).

74. *Id.* at *7.

75. 2012 WL 8745157, No. 6:11-cv-893-Orl-36KRS (M.D. Fla. Nov. 5, 2012).

after mediation failed” to file its motion for preliminary injunctive relief.⁷⁶

V. PROGRESSIVE ENCROACHMENT

Over the years, many plaintiffs have tried to excuse their delay in filing a motion for preliminary injunction based on an alleged change in the nature of the defendant’s infringement.⁷⁷ Prior cases have shown that courts are often unwilling to excuse delay based on the doctrine of progressive encroachment⁷⁸ unless the new infringement is “qualitatively different.”⁷⁹ More recent cases show that a plaintiff may also be required to demonstrate that the defendant’s new behavior was unforeseeable.

In *American Beverage Corp. v. Diageo North American, Inc.*,⁸⁰ the court firmly stated that the doctrine of progressive encroachment “does not apply to situations involving normal business growth.”⁸¹ There, the plaintiff learned about Diageo’s products during test marketing, but waited to move for a preliminary injunction until after the completion of a gradual nationwide launch about nine months later. Given Diageo’s status as one of the world’s largest liquor companies, the court found that Diageo’s progressive rollout of its products “[did] not negate the reality that the products would ultimately be distributed nationwide.”⁸² The court contrasted a company of Diageo’s stature

76. *Id.* at *7.

77. See Raskopf & Edelman, *supra* note 1, 80 TMR at 85-56; Edelman, *supra* note 1, 92 TMR at 53-56; Edelman, *supra* note 1, 92 TMR at 658-59; Edelman, *supra* note 1, 99 TMR at 1087-88.

78. Outside of the context of a preliminary injunction, where laches is at issue, “the progressive encroachment doctrine requires proof that (1) during the period of the delay the plaintiff could reasonably conclude that it should not bring suit to challenge the allegedly infringing activity; (2) the defendant materially altered its infringing activities; and (3) suit was not unreasonably delayed after the alteration in infringing activity.” *Oriental Financial Group, Inc. v. Cooperativa de Ahorro y Crédito Oriental*, 698 F.3d 9, 21-22 (1st Cir. 2012).

79. *Museum Boutique Intercontinental Ltd. v. Picasso*, 880 F. Supp. 153, 165 (S.D.N.Y. 1995) (“MBI’s previous use of the Picasso trademarks and images is not qualitatively different than its exploitation of the Berg images over the past five months.”).

80. No. 12-601, 2013 WL 1314598 (W.D. Pa. Mar. 28, 2013).

81. *Id.* at *44.

82. *Id.* Interestingly, the Southern District of New York took the opposite, more lenient, position under analogous circumstances in *Guinness United Distillers & Vintners B.V. v. Anheuser-Busch, Inc.*, No. 02 CIV. 0861, 2002 WL 1543817 (S.D.N.Y. July 12, 2002). In that case, the plaintiff was not faulted for waiting nine months to file a preliminary injunction motion after Anheuser-Busch ran its initial test market of “Red Label from Budweiser” in twenty to thirty bars in New York City in September 2001. *Id.* at ** 1, 2, 6. After filing suit in February of 2002, plaintiff learned that Anheuser-Busch planned to expand its test marketing efforts to sixty accounts in Manhattan over the next six months, but it did not move for a preliminary injunction until it learned that Anheuser-Busch had changed its plans to expand its test marketing to Washington D.C., Los Angeles, and Las Vegas. *Id.* at *2. The court found that the plaintiff was not required to take action earlier

with a “fledgling corporation with a relatively low profile that would give rise to the application of the progressive encroachment doctrine.”⁸³ Making matters worse, the plaintiff’s delay in this case appeared to have been a tactical calculated effort to increase the settlement value.⁸⁴ All of these facts weighed heavily against the notion that the plaintiff’s delay in moving for a preliminary injunction was excusable.⁸⁵

Foreseeability also played a role in *Voices of the Arab World, Inc. v. MDTV Medical News Now, Inc.*,⁸⁶ in which the First Circuit reversed the district court’s grant of a preliminary injunction motion filed by the defendant based on its counterclaim for trademark infringement. Rejecting the doctrine of progressive encroachment, the court held that the alleged infringer’s most recent actions were “reasonably foreseeable.”⁸⁷ The court added, “[t]he harm allegedly flowing from the [most recent] changes [to the alleged infringer’s website] was not sufficiently qualitatively different from the harm purportedly flowing from the prior alleged infringement.”⁸⁸ Under the same rationale, the district court in *Jagex Limited v. Impulse Software*⁸⁹ noted that “[m]ore harm is not necessarily any more irreparable, so long as it is not qualitatively different.”⁹⁰

The court in *Athleta, Inc. v. Pitbull Clothing Co., Inc.*⁹¹ took a more lenient position by measuring delay from the time when “a plaintiff became aware of *significant* evidence of actual and likely confusion.”⁹² Plaintiff Athleta filed its motion for a preliminary injunction in December 2012, having first contacted the defendant in 2010.⁹³ The court did not measure Athleta’s delay from 2010, since “[a]t that time, defendants’ counsel credibly argued that plaintiff likely had no actionable claim for trademark infringement, because plaintiff only complained about the similarity of the parties[sic] websites.”⁹⁴ It was not until 2012 that

because of the “limited distribution and media penetration of ‘Red Label From Budweiser.’”
Id. at *6.

83. 2013 WL 1314598 at *44 (internal quotations omitted).

84. *Id.* at *45.

85. *Id.*

86. 645 F.3d 26 (1st Cir. 2011).

87. *Id.* at 36.

88. *Id.*

89. 750 F. Supp. 2d 228 (D. Mass. 2010).

90. *Id.* at 239 (internal quotations and citations omitted) (finding that the defendants’ new website was “insufficiently different from the defendants’ prior sites to excuse the delay” in filing for a preliminary injunction).

91. CV 12-10499, 2013 WL 142877 (C.D. Cal. Jan. 7, 2013).

92. *Id.* at *10 (emphasis added).

93. *Id.* at *11.

94. *Id.*

defendants began engaging in “the conduct that led to significant consumer confusion,” namely selling products bearing the confusingly similar trademark ATHLETICA.⁹⁵ The court held that the plaintiff was likely to suffer irreparable harm absent a preliminary injunction and found that Athleta did not unreasonably delay in seeking expedited relief.⁹⁶

VI. CONCLUSION

Inexcusable delay continues to play a significant role in determining whether a court will grant a motion for a preliminary injunction in a trademark case. Since 2009, when the last article in this series was published, many more courts have grappled with and applied the Supreme Court’s decision in *eBay Inc. v. MercExchange LLC*, holding that a presumption of irreparable injury upon proof of a likelihood of success on the merits no longer applies when moving for preliminary injunctive relief on a trademark claim. In these cases, where there has been unreasonable delay in seeking expedited relief, such delay may be considered as one of many factors weighed by the court in the analysis of irreparable injury. In other instances, inexcusable delay may play a more traditional, dispositive role in the finding that the plaintiff has failed to establish the requisite irreparable harm.

Consistent with past precedent, a plaintiff’s delay in seeking preliminary injunctive relief will be excused if the delay was occasioned by good faith settlement negotiations pursued promptly and diligently. Progressive encroachment on the plaintiff’s rights may also excuse a delay in filing a motion for a preliminary injunction so long as the change in the defendant’s conduct is material, with some courts emphasizing that the change must have also been unforeseeable. In either case, a plaintiff must move promptly to seek expedited relief once it knows, or if it should have known, about the change in the nature of the defendant’s actions.

95. *Id.*

96. *Id.*

**UPDATED APPENDIX 2015
FIRST CIRCUIT**

CASE	DELAY LENGTH	HOLDING ON MOTION
Voices of the Arab World, Inc. v. MDTV Medical News Now, Inc., 645 F.3d 26 (1st Cir. 2011)	Approximately 10 years; 3 months after change in website that allegedly expanded scope of infringement	Vacated district court's grant of injunction and remanded
Women, Action and the Media Corp. v. Women in the Arts & Media Coalition, Inc., Civ. No. 13-10089, 2013 WL 3728414 (D. Mass. July 12, 2013)	11 months (suit filed after 9 months)	Granted
Interactive Media Corp. v. Imation Corp., Civ. No. 12-11364, 2012 WL 4058064 (D. Mass. Sept. 13, 2012)	2-2 1/2 years	Denied
Boathouse Group, Inc. v. TigerLogic Corp., 777 F. Supp. 2d 243 (D. Mass. 2011)	6 weeks (suit filed within one week of product launch)	Granted
Polar Corp. v. PepsiCo, Inc., 789 F. Supp. 2d 219 (D. Mass. 2011)	7 months after notice of intended future sales; 2 1/2 months after notice of actual distribution	Granted
Jagex Limited v. Impulse Software, 750 F. Supp. 2d 228 (D. Mass. 2010)	Approximately 2 1/2 years	Denied
Operation Able of Greater Boston, Inc., 2009 WL 2407753 (D. Mass. Aug. 3, 2009)	6 weeks from alleged expansion of infringement	granted in part

CASE	DELAY LENGTH	HOLDING ON MOTION
Oliva v. Ramirez, 2007 U.S. Dist. LEXIS 62011 (D.P.R. Aug. 21, 2007)	6 months	granted
Boston Duck Tours, LP v. Super Duck Tours, LLC, 514 F. Supp. 2d 119 (D. Mass. 2007)	6 years after knowledge of use in other geographic market 2 years after knowledge of intent to expand into plaintiff's market 5 weeks after alleged expansion of infringement	granted (as to trademark claims)
MJM Prods. v. Kelley Prods., Inc., 68 U.S.P.Q.2d 1131 (D.N.H. 2003)	6-7 months	denied
Montblanc-Simplo GMBH v. Staples, Inc., 172 F. Supp. 2d 231 (D. Mass. 2001)	2 months	granted
Media3 Tech., LLC v. Mail Abuse Prevention Sys., LLC, 2001 WL 92389 (D. Mass. 2001)	6 months	denied
Boustany v. Boston Dental Group, Inc., 42 F. Supp. 2d 100 (D. Mass. 1999)	8 months	granted
Fritz v. Arthur D. Little, Inc., 944 F. Supp. 95, 41 U.S.P.Q.2d 1352 (D. Mass. 1996)	At least 2 years constructive notice	denied
Supercuts, Inc. v. Super Clips, 18 U.S.P.Q.2d 1378 (D. Mass. 1990)	10 months: suit brought after 1 month; motion filed 9 months later	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Calamari Fisheries, Inc. v. The Village Catch, Inc., 698 F. Supp. 994, 8 U.S.P.Q.2d 1953 (D. Mass. 1988)	21 months after first use; 1 month after expansion caused increased level of confusion	granted
Salt Water Sportsman, Inc. v. B.A.S.S. Inc., 685 F. Supp. 12, 4 U.S.P.Q.2d 1407 (D. Mass. 1987), as amended, 5 U.S.P.Q.2d 1620 (D. Mass. 1987)	less than 6 months	granted
Jordan K. Rand, Ltd. v. Lazoff Bros., Inc., 537 F. Supp. 587, 217 U.S.P.Q. 795 (D.P.R. 1982)	3 months	granted
SECOND CIRCUIT		
Weight Watchers Int'l, Inc. v. Luigino's, Inc., 423 F.3d 137 (2d Cir. 2005)	4-6 months	denial vacated, with remand for entry of modified injunction
Virgin Enters. Ltd. v. Nawab, 335 F.3d 141 (2d Cir. 2003)	19 months after knowledge of ITU applications 2 days after knowledge of actual infringement	denial reversed
W.B. Marvin Mfg. Co. v. Howard Berger Co., 33 Fed. Appx. 588 (2d Cir. 2002)	6 months (motion filed 3 months after lawsuit commenced)	denial affirmed
Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 35 U.S.P.Q.2d 1617 (2d Cir. 1995)	13 months (complaint filed after 9 months)	vacating district court's grant

CASE	DELAY LENGTH	HOLDING ON MOTION
Tom Doherty Assoc., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 35 U.S.P.Q.2d 1537 (2d Cir. 1995)	4 months	affirming district court's grant
King v. Innovation Books, 976 F.2d 824, 24 U.S.P.Q.2d 1435 (2d Cir. 1992)	11 months from knowledge of intended use, including 3 months from knowledge of actual use	granted
Majorica, S.A. v. R.H. Macy & Co., 762 F.2d 7, 226 U.S.P.Q. 624 (2d Cir. 1985)	several years	denied
Citibank, N.A. v. Citytrust, 756 F.2d 273, 225 U.S.P.Q. 708 (2d Cir. 1985)	10 weeks after direct notice of actual use; 9 months after notice of intended use in press; years after notice of use in another state	denied
Harlequin Enters. Ltd. v. Gulf & Western Corp., 644 F.2d 946, 210 U.S.P.Q. 1 (2d Cir. 1981)	6 months after notice of intended use; 3 months after notice of actual use	granted
My-T-Fine Corp. v. Samuels, 69 F.2d 76, 21 U.S.P.Q. 94 (2d Cir. 1934)	2 years	granted
FC Online Mktg., Inc. v. Burke's Martial Arts, LLC, 2:14-cv-03685, 2015 WL 4162757 (E.D.N.Y. July 8, 2015)	10 months (suit filed after 9 days)	Denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Saint Laurie Ltd. v. Yves Saint Laurent America, Inc., 13 Civ. 6857, 2014 U.S. Dist. LEXIS 143441 (S.D.N.Y. Sept. 30, 2014), later opinion, 2015 U.S. Dist. LEXIS 42621 (S.D.N.Y. Mar. 26, 2015)	4 months	Denied (on grounds other than delay; motion based on breach of trademark settlement claims)
Berkley Networks Corp. v. InMarket Media, LLC, 14-cv-5145, 2014 WL 8332290 (S.D.N.Y. Dec. 30, 2014)	More than 2 years; 11 months after alleged expansion of activities	Denied
Alpha Media Group, Inc. v. Corad Healthcare, Inc., 13 Civ. 5438, 2013 WL 5912227 (S.D.N.Y. Nov. 4, 2013)	12 years; 7 years after change in trade dress	Denied
Juicy Couture, Inc. v. Bella Int'l Ltd., 930 F. Supp. 2d 489 (S.D.N.Y. 2013)	At least one month and possibly up to four months	Granted as to U.S.- based conduct (extra-territorial injunction denied)
Bulman v. 2BKCO, Inc., 882 F. Supp. 2d 551 (S.D.N.Y. 2012)	Several months; protest letters sent within two days	Granted
CJ Products LLC v. Snuggly Plushez LLC, 809 F. Supp. 2d 127 (E.D.N.Y. 2011)	6 months; immediately after increase in scope of infringement (suit filed after three months)	Granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Grout Shield Distributors, LLC v. Elio E. Salvo, Inc., 824 F. Supp. 2d 389 (E.D.N.Y. 2011)	Over 18 months	Denied
Life Technologies Corp. v. AB Sciex Pte. Ltd., 99 U.S.P.Q.2d 1785 (S.D.N.Y. 2011)	Over 9 months	Denied
The Marks Organization, Inc. v. Joles, 784 F. Supp. 2d 322 (S.D.N.Y. 2011)	Approximately 16 months	Granted
Two Kids From Queens, Inc. v. J & S Kidswear, Inc., Civ. No. 09-3690, 2009 WL 5214497 (S.D.N.Y. Dec. 30, 2009)	5 months (suit filed after 2 months)	Denied
Kuklachev v. Gelfman, 2008 WL 5411641 (E.D.N.Y. Dec. 22, 2008)	15-20 months from first acts of infringing performance name that later ceased within 1 month of resumed infringement	granted
Dudley, D.C. v. Healthsource Chiropractic, Inc., 585 F. Supp. 2d 433 (W.D.N.Y. 2008)	almost 1 year from knowledge of anticipated infringement 6 months from knowledge of actual infringing use	denied (but note that delay was found reasonable)
Lapham v. Porach, 2007 WL 1224924 (S.D.N.Y. Apr. 25, 2007)	Approximately 2 years since first use (actual knowledge unclear)	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Richard A. Leslie Co., Inc. v. Birdie, LLC, 2007 WL 4245847 (S.D.N.Y. Nov. 26, 2007)	More than a year after first use 5 months after knowledge of infringement (motion filed 3 months after lawsuit commenced)	denied
Air Cargo News, Inc. v. Tabmag Publ'g, Ltd., 2007 WL 1101183 (E.D.N.Y. Apr. 11, 2007)	Approximately 24 years after initial use of infringing mark Several months after knowledge of alleged expansion of infringement	denied
Total Control Apparel, Inc. v. DMD Int'l Imports, LLC, 409 F. Supp. 2d 403 (S.D.N.Y. 2006)	More than 19 months	denied
Metlife, Inc. v. Metro. Nat'l Bank, 388 F. Supp. 2d 223 (S.D.N.Y. 2005)	3.5 years after first knowledge of defendant's mark 3.5 months after knowledge of alleged expansion of infringement	granted
The Deal, LLC v. Korangy Publ'g, Inc., 309 F. Supp. 2d 512 (S.D.N.Y. 2004)	4 months after first knowledge of infringement (7 months after first use)	denied
Christian v. Alloy, Inc., 72 U.S.P.Q.2d 1697 (S.D.N.Y. 2004)	Almost 2 years	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Louis Vuitton Malletier v. Dooney & Bourke, Inc., 340 F. Supp. 2d 415 (S.D.N.Y. 2004), <i>aff'd in part and vacated in part on other grounds</i> , 454 F.3d 408 (2d Cir. 2006)	9-10 months after knowledge of intended use A few weeks after sending protest letter	denied
Christopher Norman Chocolates, Ltd. v. Schokinag Chocolates N. Am., Inc., 270 F. Supp. 2d 432 (S.D.N.Y. 2003)	8-9 months	denied
Kadant, Inc. v. Seeley Mach., Inc., 244 F. Supp. 2d 19 (N.D.N.Y. 2003)	4 months	granted in part
M&G Elecs. Sales Corp. v. Sony Kabushiki Kaisha, 250 F. Supp. 2d 91 (E.D.N.Y. 2003)	6-7 months (motion filed 6 months after lawsuit commenced)	denied
Guinness United Distillers & Vintners B.V. v. Anheuser-Busch, Inc., 64 U.S.P.Q.2d 1039 (S.D.N.Y. 2002)	9 months after first use in limited market 2 months after alleged expansion of infringement (motion filed 4 months after lawsuit commenced)	granted
Brockmeyer v. Hearst Corp., 2002 U.S. Dist. LEXIS 11725 (S.D.N.Y. 2002)	More than 16 months after first knowledge of infringement (motion filed 2 months after lawsuit commenced)	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Yurman Design Inc. v. Diamonds and Time, 169 F. Supp. 2d 181 (S.D.N.Y. 2001)	4 months	granted
Tactica Int'l, Inc. v. Atlantic Horizon Int'l, Inc., 154 F. Supp. 2d 586 (S.D.N.Y. 2001)	1 month	granted
Magnet Commc'ns, LLC v. Magnet Commc'ns, Inc., 2001 WL 1097965 (S.D.N.Y. 2001)	3 months	denied
Media Group, Inc. v. Ontel Prods. Corp., 2001 WL 169776 (D. Conn. 2001)	7-8 months (complaint filed after 4-5 months)	denied
Origins Nat'l Res., Inc. v. Kotler, 2001 WL 492429 (S.D.N.Y. 2001)	4-6 months	denied
Greenpoint Fin. Corp. v. Sperry & Hutchinson Co., 116 F. Supp. 2d 405 (S.D.N.Y. 2000)	4 months	denied
Ryan v. Vulpine Stamp Co., 107 F. Supp. 2d 369 (S.D.N.Y. 2000)	2 months	granted
ImOn, Inc. v. ImaginOn, Inc., 90 F. Supp. 2d 345 (S.D.N.Y. 2000)	4 months	denied
First Jewellery Co. of Canada, Inc. v. Internet Shopping Network LLC, 53 U.S.P.Q.2d 1838 (S.D.N.Y. 2000)	2 months	granted
Gidatex, S.r.L. v. Campaniello Imports, Ltd., 13 F. Supp. 2d 417, 47 U.S.P.Q.2d 1701 (S.D.N.Y. 1998)	more than 2 years (5-8 months after termination of related litigation between parties)	denied
Lexington Mgmt. Corp. v. Lexington Capital Partners, 10 F. Supp. 2d 271 (S.D.N.Y. 1998)	5-6 months	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Marcy Playground, Inc. v. Capitol Records, Inc., 6 F. Supp. 2d 277 (S.D.N.Y. 1998)	9 months	denied
Marshak v. Thomas, 1998 WL 476192 (E.D.N.Y. 1998)	2 months	granted
Ushodaya Enters., Ltd. v. V.R.S. Int'l, Inc., 47 U.S.P.Q.2d 1223 (S.D.N.Y. 1998)	almost 3 years at minimum	denied
Gen. Cigar Co., Inc. v. G.D.M. Inc., 988 F. Supp. 647, 45 U.S.P.Q.2d 1481 (S.D.N.Y. 1997)	3 months	granted
Les Ballets Trockadero de Monte Carlo, Inc. v. Trevino, 945 F. Supp. 563, 41 U.S.P.Q.2d 1109 (S.D.N.Y. 1996)	2 months	granted
Krueger Int'l, Inc. v. Nightingale Inc., 915 F. Supp. 595 (S.D.N.Y. 1996)	6-9 months	denied
Bear U.S.A., Inc. v. A.J. Sheepskin & Leather Outerwear, Inc., 909 F. Supp. 896, 38 U.S.P.Q.2d 1640 (S.D.N.Y. 1995)	1-2 months for some infringing products; 3-4 months for other infringing products	granted as to 1-2 month delay; denied as to 3-4 month delay
Trustco Bank, Nat. Ass'n v. Glens Falls Nat'l Bank & Trust Co., N.A., 903 F. Supp. 335 (N.D.N.Y. 1995)	3 months	denied (but delay found excusable)
Firma Melodiya v. ZYX Music GmbH, 882 F. Supp. 1306 (S.D.N.Y. 1995)	3-4 months	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Museum Boutique Intercontinental, Ltd. v. Picasso, 880 F. Supp. 153 (S.D.N.Y. 1995)	14 years (15 months from alleged change in scope of infringement while standstill agreement in effect)	denied
Cheng v. Dispeker, 35 U.S.P.Q.2d 1493 (S.D.N.Y. 1995)	5 months	denied
Del-Rain Corp. v. Pelonis USA Ltd., 1995 WL 116043 (W.D.N.Y. 1995)	23 months	denied
Swanson v. Georgetown Collection, Inc., 1995 WL 72717 (N.D.N.Y. 1995)	8 months (complaint filed after 5 months)	denied
Mastercard Int'l, Inc. v. Sprint Commc'ns Co., 30 U.S.P.Q.2d 1963 (S.D.N.Y. 1994)	6-9 months from knowledge of intended use	granted (dicta)
Tommy Hilfiger U.S.A., Inc. v. Siegfried & Parzifal, Inc., 31 U.S.P.Q.2d 1222 (S.D.N.Y. 1994)	2-3 years from notice of initial elements of infringement	denied
Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc., 841 F. Supp. 1339 (E.D.N.Y. 1994)	3-4 years	granted
Jordache Enters., Inc. v. Levi Strauss & Co., 841 F. Supp. 506 (S.D.N.Y. 1993)	4 years	denied
Kraft General Foods, Inc. v. Allied Old English, Inc., 831 F. Supp. 123, 31 U.S.P.Q.2d 1094 (S.D.N.Y. 1993)	7 months from publication of defendant's mark	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Chase Manhattan Corp. v. Nw. Mutual Life, 1993 WL 60602 (S.D.N.Y. 1993)	11 months: suit brought after 5 months; motion filed 6 months later	denied
Bausch & Lomb, Inc. v. Nevitt Sales Corp., 810 F. Supp. 466, 26 U.S.P.Q.2d 1275 (W.D.N.Y. 1993)	1 month after increased scope of infringement	granted
H.G.I. Mktg. Serv., Inc. v. Pepsico, Inc., 1992 WL 349675 (N.D.N.Y. 1992)	2-4 years	denied
Am. Direct Mktg. v. Azad Int'l, Inc., 783 F. Supp. 84, 22 U.S.P.Q.2d 1108 (E.D.N.Y. 1992)	3-6 months	denied (but delay found excusable)
MGM Pathe Commc'ns Co. v. Pink Panther Patrol, 774 F. Supp. 869, 21 U.S.P.Q.2d 1208 (S.D.N.Y. 1991)	6 months	granted
Nat'l Football League Players Ass'n v. Nat'l Football League Props., Inc., 1991 WL 79325 (S.D.N.Y. 1991) (licensing dispute)	9 months	denied
Century Time Ltd. v. Interchron, 729 F. Supp. 366, 14 U.S.P.Q.2d 1765 (S.D.N.Y. 1990)	6 months: suit brought after 2 months; motion filed 4 months later	denied
Lanvin, Inc. v. Colonia, 739 F. Supp. 182 (S.D.N.Y. 1990) (licensing dispute)	7 months	denied
Mathematica Policy Research, Inc. v. Addison-Wesley Publ'g Co. Inc., 11 U.S.P.Q.2d 1391 (S.D.N.Y. 1989)	10 months	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Comic Strip, Inc. v. Fox Television Stations, Inc., 710 F. Supp. 976, 10 U.S.P.Q.2d 1608 (S.D.N.Y. 1989)	7 months	denied
Kusan, Inc. v. Alpha Distribs., Inc., 693 F. Supp. 1372, 7 U.S.P.Q.2d 1211 (D. Conn. 1988)	17-18 months	denied
Artemide Spa v. Grandlite Design & Mfg. Co., Inc., 672 F. Supp. 698, 4 U.S.P.Q.2d 1915 (S.D.N.Y. 1987)	7 months	granted in part
Great Lakes Mink Ass'n v. Ferrari, Inc., No. 86-6038 (S.D.N.Y. 12/21/87), 1987 U.S. Dist. LEXIS 11800	20 months	denied
Ventura Travelware, Inc. v. A to Z Luggage Co., 1 U.S.P.Q.2d 1552 (E.D.N.Y. 1986)	approximately 18 months	granted
Allen Organ Co. v. CBS, Inc., 230 U.S.P.Q. 479 (S.D.N.Y. 1986)	7-8 months	denied
Gear, Inc. v. L.A. Gear Cal., Inc., 637 F. Supp. 1323, 227 U.S.P.Q. 980 (S.D.N.Y. 1986)	17-18 months	denied
Nina Ricci S.A.R.L. v. Gemcraft Ltd., 612 F. Supp. 1520, 226 U.S.P.Q. 575 (S.D.N.Y. 1985)	4 months from notice, including 6 weeks from breakdown of settlement talks	denied
Calvin Klein Co. v. Farah Mfg. Co., Inc., 229 U.S.P.Q. 795 (S.D.N.Y. 1985)	7 years of use; plaintiff's claim of less than 6 months' notice rejected	denied
I. Peiser Floors, Inc. v. I.J. Peiser's Sons, Inc., No. 81-3359 (S.D.N.Y. 10/4/82), 1982 U.S. Dist. LEXIS 15465	2 years	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Exxon Corp. v. Xoil Energy Res., Inc., 552 F. Supp. 1008, 216 U.S.P.Q. 634 (S.D.N.Y. 1981)	approximately 12 months	denied
Nike, Inc. v. Rubber Mfrs. Ass'n, 509 F. Supp. 919, 212 U.S.P.Q. 225 (S.D.N.Y. 1981)	several months	granted
C.B. Sports, Inc. v. Gaechter-Haber & Assoc., Inc., 210 U.S.P.Q. 597 (D. Vt. 1981)	6 months	granted
Le Sportsac, Inc. v. Dockside Research, Inc., 478 F. Supp. 602, 205 U.S.P.Q. 1055 (S.D.N.Y. 1979)	10 months	denied
Mego Corp. v. Mattel, Inc., 203 U.S.P.Q. 377 (S.D.N.Y. 1978)	7 months after notice of intended use	denied
Programmed Tax Sys., Inc. Raytheon Co., 419 F. Supp. 1251, 193 U.S.P.Q. 435 (S.D.N.Y. 1976)	4-5 months after actual notice; 3 years after first use	denied
Le Cordon Bleu S.a.r.l. v. BPC Publ'g Ltd., 327 F. Supp. 267, 170 U.S.P.Q. 477 (S.D.N.Y. 1971)	13 weeks	denied
Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc., 173 U.S.P.Q. 188 (S.D.N.Y. 1971) (copyright and trademark claims)	7 1/2 months	denied
Helena Rubenstein, Inc. v. Frances Denney, Inc., 286 F. Supp. 132, 159 U.S.P.Q. 346 (S.D.N.Y. 1968)	20 months	denied
Stix Prods., Inc. v. United Merchants & Mfrs., Inc., 273 F. Supp. 250, 154 U.S.P.Q. 477 (S.D.N.Y. 1967)	preliminary injunction motion filed 5 years after suit	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Goodyear Tire & Rubber Co. v. Topps of Hartford, Inc. 247 F. Supp. 899, 147 U.S.P.Q. 240 (D. Conn. 1965)	8-9 years	denied
Colgate-Palmolive Co. v. N. Am. Chem. Corp. 238 F. Supp. 81, 144 U.S.P.Q. 266 (S.D.N.Y. 1964)	20 months	granted
Gillette Co. v. Ed Pinaud, Inc., 178 F. Supp. 618, 123 U.S.P.Q. 531 (S.D.N.Y. 1959)	4-5 years	denied
THIRD CIRCUIT		
Kos Pharms., Inc. v. Andrx Corp., 369 F. 3d 700 (3d Cir. 2004)	Approximately 18 months since first knowledge of intended use of infringing mark At least 13 months since knowledge of sale of infringing products	reversal of denial and remand for entry
Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C., 212 F.3d 157, 54 U.S.P.Q.2d 1577 (3d Cir. 2000), <i>cert. denied</i> , 531 U.S. 1071, 121 S. Ct. 760 (2001)	14-15 months	grant affirmed
Pappan Enters., Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800, 46 U.S.P.Q.2d 1769 (3d Cir. 1998)	5 weeks	reversed district court's denial
S&R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 23 U.S.P.Q.2d 1201 (3d Cir. 1993)	3 1/2 months	granted
Vita-Pure, Inc. v. Bhatia, Civ. No. 2:14-7831, 2015 WL 1496396 (D.N.J. Apr. 1, 2015)	4 months	Denied

CASE	DELAY LENGTH	HOLDING ON MOTION
American Beverage Corp. v. Diageo North America, Inc., 936 F. Supp. 2d 555 (W.D. Pa. 2013)	7-9 months	Denied
ProFoot, Inc. v. MSD Consumer Care, Inc., Civ. No. 11-7079, 2012 WL 2262904 (D.N.J. June 14, 2012) (not for publication)	3 months	Denied
Barrolle v. Liberian Sports Ass'n of Pennsylvania, Civ. No. 11-4518, 2011 WL 3047811 (E.D. Pa. July 25, 2011)	Several years	Denied
Ultimate Trading Corp. v. Daus, 2007 WL 3025681 (D.N.J. Oct. 15, 2007)	5 months	denied
Medavante, Inc. v. Proxymed, Inc., 2006 U.S. Dist. LEXIS 74614 (D.N.J. Oct. 12, 2006)	4 months	granted
Lazzaroni USA Corp. v. Steiner Foods, 2006 U.S. Dist. LEXIS 20962 (D.N.J. Apr. 10, 2006)	2 months	granted
EMSL Analytical, Inc. v. Testamerica Analytical Testing Corp., 2006 WL 892718 (D.N.J. Apr. 4, 2006)	4-6 years after first knowledge of infringing uses 6 months after knowledge of alleged expansion of infringement	
Pharmacia Corp. v. Alcon Labs., Inc., 201 F. Supp. 2d 335 (D.N.J. 2002)	Approximately 2 years since constructive knowledge Approximately 1 year since actual knowledge	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
J & J Snack Foods Corp. v. Nestlé USA, Inc., 149 F. Supp. 2d 136 (D.N.J. 2001)	10 months (complaint filed after 2 months)	denied
New Dana Perfumes Corp. v. The Disney Store, Inc., 131 F. Supp. 2d 616 (M.D. Pa. 2001)	50 years (as to one claim); 9-10 months (as to another claim)	denied
Sunquest Info. Sys., Inc. v. Park City Solutions, Inc., 130 F. Supp. 2d 680 (W.D. Pa. 2000)	15 months	granted
Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 129 F. Supp. 2d 351, 57 U.S.P.Q.2d 1522 (D.N.J. 2000)	9 months (as to claim against product name); 4 months (as to advertising claim)	granted
Mobilificio San Giacomo S.p.A. v. Stoffi, 1997 WL 699299 (D. Del. 1997)	6 months after filing suit (but 1 month after use of mark became unauthorized)	granted
Rockland Mortgage Corp. v. Shareholder's Funding Inc., 835 F. Supp. 182, 30 U.S.P.Q.2d 1270 (D. Del. 1993)	6 months: suit brought after 2 months; motion filed 4 months later	granted
Accu Personnel, Inc. v. AccuStaff Inc., 823 F. Supp. 1161, 27 U.S.P.Q.2d 1801 (D. Del. 1993)	9 months after knowledge of intended use, including 2 months after knowledge of expanded activity	granted
W.L. Gore & Assoc., Inc. v. Totes, Inc., 23 U.S.P.Q.2d 1091 (D. Del. 1992)	4 months after increased scope of activity	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Warner Lambert Co. v. McCrory's Corp., 718 F. Supp. 389, 12 U.S.P.Q.2d 1884 (D.N.J. 1989)	12 months after first use; 5 months after claimed actual notice	denied
Am. Int'l Group, Inc. v. Am. Int'l Airways, Inc., 726 F. Supp. 1470, 14 U.S.P.Q.2d 1933 (E.D. Pa. 1989)	3 years	denied
Transfer Print Foils, Inc. v. Transfer Print Am., 720 F. Supp. 425, 12 U.S.P.Q.2d 1753 (D.N.J. 1989)	16 months: suit brought after 5 months; motion filed 11 months later	granted
Country Floors, Inc. v. Gepner, 11 U.S.P.Q.2d 1401 (E.D. Pa. 1989)	at least 2 years' actual notice; up to 6 years' constructive notice	denied
Mars, Inc. v. H.P. Mayer Corp., 1988 U.S. Dist. LEXIS 9069 (D.N.J. 1988) (not for publication)	approximately 19 months	denied
Reedco, Inc. v. Hoffmann-La Roche, Inc., 667 F. Supp. 1072, 2 U.S.P.Q.2d 1994 (D.N.J. 1987)	17 months after actual notice; years after notice in the press	denied
Horizon Fin., F.A. v. Horizon Bancorp., 2 U.S.P.Q.2d 1696 (E.D. Pa. 1987)	13 years use; 8 months after geographic expansion of defendant's use	granted
Louis Rich, Inc. v. Horace W. Longacre, Inc., 423 F. Supp. 1327, 195 U.S.P.Q. 308 (E.D. Pa. 1976)	2 months	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
FOURTH CIRCUIT		
Wilson-Cook Med., Inc. v. Wiltex, Inc., 18 U.S.P.Q.2d 1642 (4th Cir. 1991)	1 year	denied
Nabisco Brands, Inc. v. Conusa Corp., 722 F. Supp. 1287, 11 U.S.P.Q.2d 1788 (M.D.N.C.), <i>aff'd mem.</i> , 892 F.2d 74, 14 U.S.P.Q.2d 1324 (4th Cir. 1989)	5-8 months from increase in scope of infringement	granted
Potomac Conference Corp. of Seventh-Day Adventists v. Takoma Academy Alumni Ass'n, Inc., Civ. No. 13-1128, 2014 WL 857947 (D. Md. Mar. 4, 2014)	1 year (suit filed after 10 months)	Granted
Rebel Debutante LLC v. Forsythe Cosmetic Group, Ltd., 799 F. Supp. 2d 558 (M.D.N.C. 2011)	6 months	Granted in part (product recall denied)
Garden & Gun, LLC v. Twodalgals, LLC, 2008 WL 3925276 (W.D.N.C. Aug. 21, 2008)	5-6 weeks	granted in part
Fairbanks Capital Corp. v. Kenney, 303 F. Supp. 2d 583 (D. Md. 2003)	More than 10 months; potentially up to 2 years	granted in part
Great Eastern Resort Corp. v. Virtual Resort Solutions, LLC, 189 F. Supp. 2d 469 (W.D. Va. 2002)	Several years since knowledge of initial use 7 months after knowledge of alleged expansion of infringement	granted
Rubbermaid Comm'l Prods., Inc. v. Contico Int'l, Inc., 836 F. Supp. 1247, 29 U.S.P.Q.2d 1574 (W.D. Va. 1993) (design patent and trade dress case)	almost 2 years, including 8 months after issuance of design patent	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
John Lemmon Films, Inc. v. Atlantic Releasing Corp., 617 F. Supp. 992, 227 U.S.P.Q. 386 (W.D.N.C. 1985)	8 months	denied
FIFTH CIRCUIT		
Am. Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n, 532 F. Supp. 1376, 214 U.S.P.Q. 936 (S.D. Tex. 1982), <i>aff'd</i> , 701 F.2d 408, 218 U.S.P.Q. 489 (5th Cir. 1983)	3 weeks after increased level of infringement; 4 years after less objectionable use	granted
BuzzBallz, LLC v. JEM Bev. Co., LLC, Civ. No. 3:15-CV-588-L, 2015 WL 3948757 (N.D. Tex. June 26, 2015)	At least 4 months (suit filed after 6 weeks)	Denied
PIU Management, LLC v. Inflatable Zone Inc., Civ. No. H-08-2719, 2010 WL 681914 (S.D. Tex. Feb. 25, 2010)	21 months	Granted
H.D. Vest, Inc. v. H.D. Vest Mgmt. & Servs., LLC, 2009 WL 1766095 (N.D. Tex. June 23, 2009)	at least 5 and up to 11 months	denied
Innovation Ventures, LLC v. Ultimate Lifestyles, LLC, 2009 WL 1490588 (E.D. Tex. May 27, 2009)	9 months	denied
Ellipse Commc'ns, Inc. v. Caven, 2009 WL 497268 (N.D. Tex. Feb. 26, 2009)	more than 7 months	denied
Adventure Plus Enters., Inc. v. Gold Suit, Inc., 2008 U.S. Dist. LEXIS 27220 (N.D. Tex. Apr. 2, 2008)	17 months (motion filed almost 3 months after lawsuit commenced)	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
GoNannies, Inc. v. GoAuPair.com, Inc., 464 F. Supp. 2d 603 (N.D. Tex. 2006)	7 years after initial use 6 months after alleged expansion of infringement	denied
Amicus Commc'ns, L.P. v. Hewlett-Packard Co., 1999 WL 495921 (W.D. Tex. 1999)	2-3 years	denied
TJM Corp. v. Xerox Corp., 25 U.S.P.Q.2d 1067 (E.D. La. 1992)	17 months: suit brought after 14 months; motion filed 3 months later	denied
SIXTH CIRCUIT		
CLT Logistics v. River West Brands, 777 F. Supp. 2d 1052 (E.D. Mich. 2011)	Less than 2 months	Denied (on grounds other than delay)
King Pharmaceuticals, Inc. v. Zymogenetics, Inc., No. 2:09-cv-244, 2009 WL 4931238 (E.D. Tenn. Dec. 10, 2009)	More than 22 months	Denied
AmMed Direct, LLC v. Liberty Medical Supply, Inc., No. 3:09-00288, 2009 WL 3680539 (M.D. Tenn. Sept. 23, 2009)	Approximately 7 months	Denied (on grounds other than delay)
Guar. Residential Lending, Inc. v. Homestead Mortg. Co., 2005 U.S. Dist. LEXIS 43640 (E.D. Mich. Dec. 13, 2005), <i>later proceeding</i> , 291 Fed. Appx. 734 (6th Cir. 2008)	6 years after initial use (motion by counterclaim plaintiff filed 9 months after lawsuit commenced)	denied
Wells Fargo v. WhenU.com, Inc., 293 F. Supp. 2d 734 (E.D. Mich. 2003)	9 months	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
R.L. Polk & Co. v. Infousa, Inc., 230 F. Supp. 2d 780 (E.D. Mich. 2002)	3 months	dranted
McDonald's Corp. v. Burger King Corp., 87 F. Supp. 2d 722, 54 U.S.P.Q.2d 1507 (E.D. Mich. 1999)	8-9 months	denied
P.T.C. Brands, Inc. v. Conwood Co. L.P., 28 U.S.P.Q.2d 1895 (W.D. Ky. 1993)	8 months: suit brought after 2 months; motion filed 6 months later	granted
Central Benefits Mutual Insurance Co. v. Blue Cross & Blue Shield Ass'n, 711 F. Supp. 1423, 11 U.S.P.Q.2d 1103 (S.D. Ohio. 1989)	18 months	granted
Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville Inc., 514 F. Supp. 704, 213 U.S.P.Q. 559 (S.D. Ohio 1981), <i>aff'd</i> , 670 F.2d 642, 214 U.S.P.Q. 15 (6th Cir. 1982), <i>cert. denied</i> , 459 U.S. 916 (1982)	at least 2 years	granted
SEVENTH CIRCUIT		
AM Gen. Corp. v. DaimlerChrysler Corp., 311 F.3d 796 (7th Cir. 2002)	Years after knowledge of initial use At least 6 months after knowledge of alleged expansion of infringement	denial affirmed
Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 57 U.S.P.Q.2d 1617 (7th Cir. 2001)	at least 8 months (motion filed 8 months after complaint was filed)	grant affirmed

CASE	DELAY LENGTH	HOLDING ON MOTION
Vaughan Mfg. Co. v. Brikam Int'l, Inc., 814 F.2d 346, 1 U.S.P.Q.2d 2067 (7th Cir. 1987)	10 months	granted
Floralife, Inc. v. Floraline Int'l, Inc., 633 F. Supp. 108 (N.D. Ill. 1985), <i>later proceeding</i> , 807 F.2d 518, 1 U.S.P.Q.2d 1132 (7th Cir. 1986)	at least 3 years notice of limited use; less than 3 weeks after knowledge of expansion of use	granted
Ideal Indus., Inc. v. Gardner Bender, Inc., 612 F.2d 1018, 204 U.S.P.Q. 177 (7th Cir. 1979), <i>cert. denied</i> , 447 U.S. 924, 206 U.S.P.Q. 864 (1980)	suit filed 7 months after notice; preliminary injunction motion filed 8 months later	granted
Helene Curtis Indus., Inc. v. Church & Dwight Co., Inc., 560 F.2d 1325, 195 U.S.P.Q. 218 (7th Cir. 1977), <i>cert. denied</i> , 434 U.S. 1070, 197 U.S.P.Q. 592 (1978)	suit filed within weeks of notice; preliminary injunction filed 13 months later	granted
Nat'l Fin. Partners Corp. v. Paycom Software, Inc., No. 1:14-CV-07424, 2015 WL 3633987 (E.D. Ill. June 10, 2015)	4 months (suit filed after 3 months)	Granted
Real-Time Reporters, P.C. v. Sonntag Reporting Servcs., No. 13C 5348, 2013 WL 5818460 (N.D. Ill. Oct. 29, 2013)	4 months (suit filed after 3 months)	Denied
Country Inns & Suites by Carlson, Inc. v. Nayan, LLC, 2008 WL 4735267 (S.D. Ind. Oct. 28, 2008)	less than 1 month	granted
Miyano Mach. USA, Inc. v. MiyanoHITEC Mach., Inc., 576 F. Supp. 2d 868 (N.D. Ill. 2008)	approximately 1 year	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Nat'l Council of Young Men's Christian Assocs. of U.S. v. Human Kinetics Publishers, Inc., 2006 WL 752950 (N.D. Ill. Mar. 15, 2006)	One year	granted
MB Fin. Bank, N.A. v. MB Real Estate Servs., L.L.C., 2003 WL 22765022 (N.D. Ill. Nov. 21, 2003)	9 months	denied
Keystone Consol. Indus. Inc. v. Mid-States Distrib. Co., 235 F. Supp. 2d 901 (C.D. Ill. 2002)	7 months	granted
Ty, Inc. v. Softbelly's, Inc., 2001 WL 125321 (N.D. Ill. Feb. 9, 2001)	10 months	granted
Ty, Inc. v. Publications Int'l, Ltd., 81 F. Supp. 2d 899 (N.D. Ill. 2000)	14 months	granted
Avent Am., Inc. v. Playtex Prods., Inc., 68 F. Supp. 2d 920 (N.D. Ill. 1999)	2-3 months	granted
Philip Morris, Inc. v. Allen Distribs., Inc., 48 F. Supp. 2d 844, 51 U.S.P.Q.2d 1013 (S.D. Ind. 1999)	5 months	granted
Reins of Life, Inc. v. Vanity Fair Corp., 5 F. Supp. 2d 629, 45 U.S.P.Q.2d 1854 (N.D. Ind. 1997)	8-9 months	denied
Porsche Cars N. Am., Inc. v. Manny's Porshop, Inc., 972 F. Supp. 1128, 43 U.S.P.Q.2d 1475 (N.D. Ill. 1997)	4 years (10 years from first infringement dispute)	granted
RWT Corp. v. Wonderware Corp., 931 F. Supp. 583 (N.D. Ill. 1996)	9 months	denied
Eldon Indus., Inc. v. Rubbermaid, Inc., 735 F. Supp. 786, 17 U.S.P.Q.2d 1280 (N.D. Ill. 1990)	4 1/2 years: suit brought after 4 years; motion filed 6 1/2 months later	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Stokely-Van Camp, Inc. v. Coca-Cola Co., 2 U.S.P.Q.2d 1225 (N.D. Ill. 1987)	3 months	denied
Am. Airlines, Inc. v. A 1-800-A-M-E-R-I-C-A-N Corp., 622 F. Supp. 673, 228 U.S.P.Q. 225 (N.D. Ill. 1985)	a few months notice by high level employee; earlier notice by sales personnel	granted
Universal City Studios, Inc. v. Mueller Chem. Co., 223 U.S.P.Q. 798 (N.D. Ill. 1983)	3 months	granted
EIGHTH CIRCUIT		
Novus Franchising, Inc. v. Dawson, 725 F.3d 885 (8th Cir. 2013)	17 months	Affirmed grant of preliminary injunction as to unauthorized use of trademarks, denied as to breach of non-compete agreement on the ground of delay.
Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc., 182 F.3d 598, 51 U.S.P.Q.2d 1373 (8th Cir. 1999)	4 years	denied
Mutual of Omaha Ins. Co. v. Novak, 775 F.2d 247, 227 U.S.P.Q. 801 (8th Cir. 1985)	12 months	granted
Cmt. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church, 613 F. Supp. 2d 1140 (W.D. Mo. 2009)	approximately 1 year	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Clam Corp. v. Innovative Outdoor Solutions, Inc., 89 U.S.P.Q. 2d 1314 (D. Minn. 2008)	1 year after initial use 3 months after alleged expansion of infringement	denied
Gander Mountain Co. v. Cabela's, Inc., 2006 WL 2788184 (D. Minn. Sept. 26, 2006)	3 months after objectionable conduct by defendant More than 2 years after litigation between parties began	denied
NINTH CIRCUIT		
Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc. 736 F.3d 1239 (9th Cir. 2013)	11 months	Grant of injunction reversed (on grounds other than delay)
GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 53 U.S.P.Q.2d 1652 (9th Cir. 2000)	at least 5 months (additional delay prior to filing of complaint)	grant affirmed
Fogerty v. Poor Boy Prods., Inc., 124 F.3d 211 (9th Cir. 1997) (unpublished)	more than 1 year	reversing district court grant
Ocean Garden, Inc. v. Marktrade Co., 953 F.2d 500, 21 U.S.P.Q.2d 1493 (9th Cir. 1991)	11 months from notice of intended sale, including 2-3 months from notice of actual sale	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Cutting Edge Solutions, LLC v. Sustainable Low Maint. Grass, LLC, No. 14-cv-02770, 2014 WL 5361548 (N.D. Cal. Oct. 20, 2014)	18 months	Denied
Wahoo Int'l, Inc. v. Phix Doctor, Inc., No. 13cv1395, 2014 WL 2106482 (S.D. Cal. May 20, 2014)	17 months	Motion for ex parte TRO denied
Hanginout, Inc. v. Google, Inc., 54 F. Supp. 3d 1109 (S.D. Cal. 2014)	8 months (31 months after first public use)	Denied
AK Metals, LLC v. Norman Indus. Materials, Inc., 12cv2595, 2013 WL 417323 (S.D. Cal. Jan. 31, 2013)	2 months after filing complaint	Denied
Athleta, Inc. v. Pitbull Clothing Co., Inc., 12-10499, 2013 WL 142877 (C.D. Cal. Jan. 7, 2013)	1 month from expanded use	Granted
Boldface Licensing + Branding v. By Lee Tillett, Inc., 940 F. Supp. 2d 1178 (C.D. Cal. 2013)	8 months	Granted
Russell Road Food & Beverage, LLC v. Spencer, 2:12-CV-01514, 2013 WL 321666 (D. Nev. Jan. 28, 2013)	5 months	Denied
SpiralEdge, Inc. v. SeaWorld Entertainment, Inc., 13cv296, 2013 WL 3467435 (S.D. Cal. July 9, 2013)	At least 13 months	Denied
ConocoPhillips Co. v. Gonzalez, 5:12-cv-00576, 2012 WL 538266 (N.D. Cal. Feb. 17, 2012)	8 months	Denied
JL Beverage Co., LLC v. Beam, Inc., 899 F. Supp. 2d 991 (D. Nev. 2012)	12 months	Denied
SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd., 846 F. Supp. 2d 1063 (N.D. Cal. 2012)	11 months (suit filed after 10 months)	Granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Kerr Corp. v. N. Am. Dental Wholesalers, Inc., 11-0313, 2011 WL 2269991 (C.D. Cal. June 9, 2011)	8 months	Denied
Wetzel's Pretzels, LLC v. Johnson, 797 F. Supp. 2d 1020 (C.D. Cal. 2011)	1 year	Granted
Edge Games, Inc. v. Electronic Arts, Inc., 745 F. Supp. 2d 1101 (N.D. Cal. 2010)	3 years	Denied
Masters Software, Inc. v. Discovery Communications, Inc., 725 F. Supp. 2d 1294 (W.D. Wash. 2010)	1 year	Granted
Credit One Corp. v. Credit One Financial, Inc., 661 F. Supp. 2d 1134 (C.D. Cal. 2009)	Approximately 18 months (suit filed after approximately 15 months)	Denied
Protech Diamond Tools, Inc. v. Liao, 2009 WL 1626587 (N.D. Cal. June 8, 2009)	almost 3 years	denied
Volkswagen AG v. Verdier Microbus and Camper, Inc., 2009 WL 928130 (N.D. Cal. Apr. 3, 2009)	Approximately 2 months	granted
Cascade Fin. Corp. v. Issaquah Cmty. Bank, 2007 WL 2871981 (W.D. Wash. Sept. 27, 2007)	6-7 months	denied
Topline Corp. v. 4273371 Can., Inc., 2007 WL 2332471 (W.D. Wash. Aug. 13, 2007)	10 months	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
PDL, Inc. v. All Star Driving School, 2007 WL 1515139 (E.D. Cal. May 22, 2007)	More than 3 years after initial use 4-6 months after knowledge of alleged expansion of infringement	granted
Studio Red Inc. v. Rockwell Architecture Planning and Design, P.C., 2007 WL 1462458 (N.D. Cal. May 18, 2007)	8 months	denied
Jonathan Neil & Assoc., Inc. v. JNA Seattle, Inc., 2007 WL 788354 (W.D. Wash. Mar. 14, 2007)	At least 9 months	granted
Nova Wines, Inc. v. Adler Fels Winery LLC, 467 F. Supp. 2d 965 (N.D. Cal. 2006)	1-3 months	granted
Conversive, Inc. v. Conversagent, Inc., 433 F. Supp. 2d 1079 (C.D. Cal. 2006)	More than 1 year	granted
eAcceleration Corp. v. Trend Micro, Inc., 408 F. Supp. 2d 1110 (W.D. Wash. 2006)	More than 1 year	denied
First Franklin Fin. Corp. v. Franklin First Fin., Ltd., 356 F. Supp. 2d 1048 (N.D. Cal. 2005)	11 years after first use At least 2 and up to 7 months after claimed first knowledge	denied
SMC Promotions, Inc. v. SMC Promotions, 355 F. Supp. 2d 1127 (C.D. Cal. 2005)	4 months after suit commenced First notice by plaintiff unclear	granted
Rain Bird Corp. v. Hit Prods. Corp., 72 U.S.P.Q.2d 1105 (C.D. Cal. 2004)	At least 17 months	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Nautilus Group, Inc. v. Icon Health and Fitness, Inc., 308 F. Supp. 2d 1208 (W.D. Wash. 2003)	Several months	granted
Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002)	9 months after suit commenced First notice by plaintiff unclear	granted
H.O. Sports, Inc. v. Earth & Ocean Sports, Inc., 57 U.S.P.Q.2d 1927 (W.D. Wash. 2001)	1-2 months	granted
eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (trespass and trademark case)	2 years	granted
Playboy Enters., Inc. v. Netscape Commc'ns Corp., 55 F. Supp. 2d 1070, 52 U.S.P.Q.2d 1162 (C.D. Cal. 1999)	11 months	denied
Sun Microsystems, Inc. v. Microsoft Corp., 999 F. Supp. 1301, 46 U.S.P.Q.2d 1531 (N.D. Cal. 1998)	6 weeks	granted
Guess?, Inc. v. Tres Hermanos, Inc., 993 F. Supp. 1277, 45 U.S.P.Q.2d 1179 (C.D. Cal. 1997)	9 months	granted
Anheuser-Busch, Inc. v. Customer Co., 947 F. Supp. 422 (N.D. Cal. 1996)	2-3 months	granted
Creative Tech. Ltd. v. SRT, Inc., 29 U.S.P.Q.2d 1474 (N.D. Cal. 1993)	6 months after notice and sending of protest letter	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
Sega Enters. Ltd. v. Accolade, Inc., 785 F. Supp. 1392, 23 U.S.P.Q.2d 1440 (N.D. Cal. 1992)	5 months: suit brought after 1 1/2 months; motion filed 3 1/2 months later	granted
Lisa Frank, Inc. v. Impact Int'l, Inc., 799 F. Supp. 980 (D. Ariz. 1992)	7 months after filing Complaint; 3 months after knowledge of expanded line of infringing products	granted
Nat'l Yellow Pages Serv. Ass'n v. O'Connor Agency, Inc., 9 U.S.P.Q.2d 1516 (C.D. Cal. 1988)	3 years	granted
Earth Tech. Corp. v. Envtl. Research & Technology, Inc., 222 U.S.P.Q. 585 (C.D. Cal. 1983)	2 years	granted
Steinway & Sons v. Robert Demars & Friends, 210 U.S.P.Q. 954 (C.D. Cal. 1981)	2 years	granted
TENTH CIRCUIT		
GTE Corp. v. Williams, 731 F.2d 676, 222 U.S.P.Q. 803 (10th Cir. 1984)	3 years	denied
Close to My Heart, Inc. v. Enthusiast Media LLC, 508 F. Supp. 2d 963 (D. Utah 2007)	Up to 2 years after initial use Several months after alleged expansion of infringement	denied
Hodgdon Powder Co., Inc. v. Alliant Techsystems, Inc., 2006 WL 2092391 (D. Kan. July 26, 2006)	7 months	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Nature's Life, Inc. v. Renew Life Formulas, Inc., 2006 WL 62829 (D. Utah Jan. 11, 2006)	7 months	denied
Pimentel & Sons Guitar Makers, Inc. v. Pimentel, 2005 WL 3664269 (D.N.M. Oct. 12, 2005)	More than 2 and up to 10 months	granted
J.D. Williams & Co., Inc. v. Am. Home Mortgage Invest. Corp., 2005 WL 1429271 (W.D. Okla. June 13, 2005)	Approximately 6 months	denied
Simmons, Inc. v. Bombardier Inc., 2002 WL 31956160 (D. Utah Sept. 16, 2002), <i>later proceeding</i> , 73 Fed. Appx. 421 (Fed. Cir. 2003)	More than 4 years	denied
Big O Tires, Inc. v. Bigfoot 4x4, Inc., 167 F. Supp. 2d 1216 (D. Colo. 2001)	more than 2 years	granted
Packerware Corp. v. Corning Consumer Prods. Co., 895 F. Supp. 1438 (D. Kan. 1995)	3-4 months	denied
Studio 1712, Inc. v. Etna Prods. Co., 777 F. Supp. 844, 22 U.S.P.Q.2d 1280 (D. Colo. 1991)	10 months: suit brought after 4 months; motion filed 6 months later	granted
Universal Motor Oils Co. v. Amoco Oil Co., 15 U.S.P.Q.2d 1613 (D. Kan. 1990)	3 months	granted
Paramount Pictures Corp. v. Video Broad. Sys., 724 F. Supp. 808, 12 U.S.P.Q.2d 1862 (D. Kan. 1989)	15 months	denied
Cyclonaire Corp. v. U.S. Sys., Inc., 209 U.S.P.Q. 310 (D. Kan. 1980)	6 months	granted
Volkswagenwerk, G.m.b.H. v. Frank, 198 F. Supp. 916, 131 U.S.P.Q. 236 (D. Colo. 1961)	17 months after lawsuit	granted

CASE	DELAY LENGTH	HOLDING ON MOTION
ELEVENTH CIRCUIT		
AT & T Mobility LLC v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 487 F. Supp. 2d 1370 (N.D. Ga. 2007), <i>vacated and dismissed on other grounds</i> , 494 F.3d 1356 (11th Cir. 2007)	2-3 months	granted
CORD:USE Cord Blood Bank, Inc. v. CBR Systems, Inc., No. 6:11-cv-893, 2012 WL 8745157 (M.D. Fla. Nov. 5, 2012)	Approximately 14 months from filing suit	Denied
Anesthesia Healthcare Partners Inc. v. Anesthesia Healthcare Solutions of N. Florida LLC, 3:11cv149, 2011 WL 2446377 (N.D. Fla. May 20, 2011)	Approximately 5 months	Denied
Hi-Tech Pharms., Inc. v. Herbal Health Prods., Inc., 311 F. Supp. 2d 1353 (N.D. Ga. 2004)	7 months	denied
Seiko Kabushiki Kaisha v. Swiss Watch Int'l, Inc., 188 F. Supp. 2d 1350 (S.D. Fla. 2002)	10 months	denied
Bulova Corp. v. Bulova Do Brasil Com. Rep. Imp. & Exp. Ltda., 144 F. Supp. 2d 1329, 59 U.S.P.Q.2d 1077 (S.D. Fla. 2001)	4 1/2 years	granted
Golden Bear Int'l, Inc. v. Bear U.S.A., Inc., 969 F. Supp. 742, 42 U.S.P.Q.2d 1283 (N.D. Ga. 1996)	8 months (first use was more than a year prior to plaintiff's first actual notice of use)	denied

CASE	DELAY LENGTH	HOLDING ON MOTION
Glen Raven Mills, Inc. v. Ramada Int'l, Inc., 1994 WL 230365 (M.D. Fla. 1994)	16 months from notice of intended use, including 11 months after notice of actual use	denied, but court found that plaintiff had acted promptly
Bellsouth Adver. & Publ'g Corp. v. Real Color Pages, Inc., 792 F. Supp. 775 (M.D. Fla. 1991)	7-8 months	granted
Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 231 U.S.P.Q. 850 (N.D. Ga. 1986)	5-10 months	granted
D.C. CIRCUIT		
Nat'l Rural Elec. Coop. Assoc. v. Nat'l Agric. Chem. Assoc., 26 U.S.P.Q.2d 1294 (D.D.C. 1992)	several weeks after knowledge of increased scope of infringement	granted
Delmatoff, Gerow, Morris, Langhans, Inc. v. Children's Hosp. Nat'l Med. Ctr., 12 U.S.P.Q.2d 1136 (D.D.C. 1989)	12 months	denied
