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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CHRISTIAN LOUBOUTIN S.A.,
4 CHRISTIAN LOUBOUTIN, L.L.C.
and CHRISTIAN LOUBOUTIN,

5 Plaintiffs,

6 v.

11 CV 2381 (VM)

7 YVES SAINT LAURENT AMERICA,
8 INC., YVES SAINT LAURENT
AMERICA HOLDING, INC, et al.,

9 Defendants.

10 -----x

New York, N.Y.

11 July 22, 2011

12 3:30 p.m.

13 Before:

14 HON. VICTOR MARRERO,

District Judge

15 APPEARANCES

16 MCCARTER & ENGLISH

Attorneys for Plaintiffs

17 BY: HARLEY I. LEWIN

18 LEE CARL BROMBERG

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Attorneys for Defendants

20 BY: DAVID H. BERNSTEIN

21 JYOTIN HAMID

JILL van BERG

22 RAYNA S. FELDMAN

17mWchrC

1 (Case called)

2 THE COURT: Good afternoon. Thank you. Be seated.

3 This is a proceeding in the matter of Louboutin v.
4 Yves Saint Laurent, docket No. 11 CV 2381. The Court scheduled
5 this hearing on the application of the plaintiff for
6 preliminary injunctive relief. In this case, the Court has
7 received and reviewed the submissions from both sides,
8 voluminous as it is, and this hearing is scheduled as a formal
9 hearing on the record on the application.

10 Let's first address housekeeping matters of how long
11 the parties contemplate for their respective presentations.

12 MR. LEWIN: Your Honor, Harley Lewin, for the
13 plaintiffs, your Honor.

14 We were informed that there was an hour set aside. We
15 planned for about 20-some-odd minutes and if I could hold a
16 couple minutes back in reserve for reply.

17 THE COURT: All right.

18 MR. BERNSTEIN: We had heard the same, your Honor, and
19 so we'll be prepared to go for about half an hour, subject to
20 whatever questions your Honor may have.

21 THE COURT: All right. So in that event, let us
22 begin. Do any of the parties have witnesses, or is it just
23 going to be attorney argument?

24 MR. LEWIN: Again, your Honor, this is a motion
25 hearing, no testimony.

17mWchrC

1 THE COURT: Shall we begin?

2 MR. LEWIN: With pleasure, your Honor. May I
3 introduce myself. I'm Harley Lewin for the plaintiffs,
4 McCarter & English, with my colleague Lee Bromberg. With your
5 permission, sir, we have the general counsel of Christian
6 Louboutin, Mr. Xavier Ragot, and we've asked him to join us at
7 this table.

8 THE COURT: All right.

9 MR. LEWIN: Thank you.

10 Sir, your Honor, this is a case about, in very simple
11 terms, one of the iconic and strongest visual cues in our view
12 that's come in the 20th Century and the beginning of the 21st
13 Century, the red outsoled, bright red lacquered outsoled
14 Christian Louboutin. It is probably one of the true sparkling
15 marks certainly from 2000 to 2011. It is iconic by almost
16 everyone's testimony and has achieved a spectacular public
17 acceptance. It is, to use the words of YSL itself a strong
18 visual cue, and it has been in use that way for 20 years on
19 virtually all of the shoes Mr. Louboutin brought into the
20 United States. It is unique. The New Yorker in the profile
21 March 28, 2011, which they call Sole Mate, S-O-L-E, said that
22 it took an otherwise indistinguishable product, the high-heeled
23 shoe, and separated it from the masses.

24 This is a genuine Louboutin shoe, your Honor, with its
25 sparkling red sole. You hear the term "flash of red," it is an

17mWchrC

1 extraordinary source indicator to the public. It has been
2 graced by the fashion world, celebrities, television, media.
3 We sent you, as you say, voluminous evidence to that extent.
4 YSL knows this. They knew it. Their people have admitted it.
5 They searched for many years for a comparable visual cue and
6 never were able to develop one.

7 Ms. Vaissie, in her deposition testimony was
8 specifically asked whether they were able to develop a strong
9 visual cue, and she said no. Since then being clever, what
10 they did was to take what may have been an incidental
11 time-to-time use of a red outsole of a shoe and they took a
12 quantum leap at the end of 2010. In the beginning of 2011, at
13 least five shoes that we're aware of, four that we were aware
14 of when we filed the complaint, a fifth that has since been
15 discovered, landed in the United States.

16 What's happened now is after several months of
17 negotiations in January and February and then March, when
18 negotiations proved fruitless and there was no ability to
19 settle the case, on an amicable basis, Louboutin promptly filed
20 a lawsuit and, as your Honor is aware, sought at that time
21 preliminary injunction. We're here today by reason of
22 scheduling and calendar and foreign as well as domestic
23 discovery.

24 We would ask the Court to keep in mind several things
25 as you listen to this presentation today from both sides.

17mWchrC

1 First, the focus here is on postsale confusion; the confusion
2 that occurs after somebody buys something and it goes walking
3 down the street, or, in the case of Louboutin, as seen on JLo's
4 feet or as seen on the red carpet of the Oscars or the media,
5 but it's postsale confusion.

6 The second thing we ask you to keep in mind, your
7 Honor, is that we address the U.S. market. We don't address
8 runway shows in Paris, what may or may not have happened
9 somewhere else in the world.

10 The third thing that we're talking about, your Honor,
11 is that we're not talking about shoes. No one is talking about
12 what occurs on the upper part of the shoe, only the outsole,
13 just as is pictured in the trademark over on the easel before
14 you.

15 In terms of foreign law, we recently asked the Court
16 to at least consider a decision that was made the other day by
17 the second level of the Court of Appeals of the OAMI, which is
18 the high court ruling on trademarks. We do not, of course, it
19 would be rude of us to even imply that somehow or other that
20 court was offering guidance to your Honor. But we do note that
21 virtually every objection that has been raised by YSL in these
22 proceedings has been considered by the Court and we would hope
23 very much that after today's hearing, a ruling by your Honor
24 would be similar.

25 I would note finally without a preliminary injunction

17mWchrC

1 there's a very, very good chance that the YSL shoes that are
2 held in inventory will return, the weather is quite warm, that
3 the third parties that are watching this case so closely will
4 see or interpret it as a possibility for them to reenter the
5 market. And as I will explain a little bit later, irreparable
6 harm is bound to occur under the circumstances we're faced
7 with.

8 THE COURT: Mr. Lewin, you mentioned that your focus
9 is what happens in the United States.

10 MR. LEWIN: Correct.

11 THE COURT: But now you've introduced something of
12 what happened in Brussels with the decision by the European
13 Union court. But there's also the fact that six days after the
14 European Union court, there was a Court of Appeals of Paris
15 decision which essentially did not recognize the mark in that
16 particular case. You may want to address what is the
17 application of the second Court of Appeals decision which came
18 out after the European Union and also whether or not we're
19 looking only at what happens in the United States or does this
20 have any bearing on what this Court should be looking at.

21 MR. LEWIN: Let me take the second part first.

22 I don't think the decisions in either case have a
23 direct bearing on your Honor's decision today. I think the law
24 is very clear that trademarks are territorial in application of
25 the Lanham Act in this case, is applicable to the events in the

17mWchrC

1 United States. I do think, however, that there is an
2 interesting and we thought possibly helpful discussion in the
3 second case, OAMI case.

4 As to the second part or first part of your Honor's
5 statement, the decision of the French court involved a
6 different trademark. It does not involve that trademark. And
7 that's what's so interesting. It involved a trademark that
8 essentially is a sort of a drawing of a red sole but simply
9 without any shoe on it, and if you read the decision very
10 carefully, they make a point of that. They acknowledge the
11 strength of the trademark. They acknowledge the association
12 with the public. They acknowledge it as a source indicator,
13 but they said that's not what's before them.

14 What's before them is this other trademark, and then
15 for very unique reasons in France, under French law, it did not
16 qualify as a trademark. What was so interesting is the second
17 mark is the same mark that is before your Honor, that mark that
18 is registered in the United States, and that mark received a
19 ruling from the OAMI that indicated that they were going
20 forward with registration of that mark in 27 countries.

21 THE COURT: All right. Let's address that for a
22 moment because there the Court essentially constrained the mark
23 in two very significant ways. One is it's not the color red.
24 It has Pantone with a specific number Pantone, and it also said
25 high heels. We're not talking about just any old footwear. If

17mWchrC

1 you look at the chart you have on the board there, which is the
2 U.S. registration, your client's registration in the U.S. says
3 the color red is claimed as a feature of the mark and also says
4 that it's for footwear. It doesn't say that it's for
5 high-heeled footwear or for low-heeled footwear or for flats or
6 for platforms.

7 Coming back to the question of red, your registration
8 says the color red is claimed as a feature of the mark. I show
9 you five drawings. Which of these is red? I represent to you
10 that these are different shades taken from a computer. But
11 under your registration, which of these would be red?

12 MR. LEWIN: Your Honor, you've asked the question in
13 two parts, both with the verbal description as well as the
14 sample, the drawing of the mark. United States trademark
15 office, under its TMEP guidelines, specifically states and
16 requests that people use a general verbal description of the
17 mark to be registered.

18 THE COURT: But you use the very general description
19 of red.

20 MR. LEWIN: Yes, your Honor. If I may.

21 THE COURT: All right.

22 MR. LEWIN: That's not what governs. That's not what
23 the law says. The law says what governs is the sample
24 submitted and the drawing of the sample is required to be the
25 same as the sample submitted. In the case of any conflict

17mWchrC

1 between the language that's used and the sample that's
2 permitted, you go with the sample, that color.

3 Our mark is that color. Whether it's Pantone 18-1663,
4 whether it's some other Pantone number, that's the color. In
5 terms of your question, which one of those would be infringing,
6 I would compare any of those to that color. If it came too
7 close, it would be infringing. If it's far enough away, it
8 would not be. But what the law says very specifically, your
9 Honor, and the reason that they do it, and Ms. Beresford points
10 this out, the commission of trademarks in her declaration, is
11 that when you search a mark electronically now, they want you
12 to be able to search using common words. They specifically
13 give examples in the USPTO. What they don't want is red,
14 brown, something-something, and they're presuming that you may
15 or may not know the Pantone number that you're searching for.
16 So what they say is you type in red and then you get this and
17 you pull that up, and as a second-comer, your duty is to
18 compare it to the mark that's registered.

19 What's very clear, your Honor, if you look at the file
20 that was submitted in this case, the trademark application
21 submitted a photograph of a shoe, not an actual Louboutin shoe,
22 but a photograph of a shoe. And in that regard, that
23 photograph is reproduced in that drawing and that red is the
24 same red that's in that sample. And what the law very
25 specifically says is that that's the red that governs. There's

17mWchrC

1 no requirement to use the Pantone number, and you are asked by
2 the PTO to use general color language. It's not the words.

3 THE COURT: Let's suppose for the moment that this is
4 that red.

5 MR. LEWIN: All right.

6 THE COURT: All right. And let's say for the moment
7 this is not.

8 MR. LEWIN: Yes, sir.

9 THE COURT: So you see JLo walking down the street
10 using shoes of this color and then comes Angelina with shoes of
11 this color.

12 MR. LEWIN: Yes, sir.

13 THE COURT: Is it your view then that if Angelina is
14 wearing Yves Saint Laurent shoes of this color would not
15 infringe upon the mark?

16 MR. LEWIN: No, sir. No, sir. If that were the color
17 that was reproduced on the shoes that Angelina was wearing at
18 YSL, she would be infringing. That would be an infringing use.
19 It would be too close, and the likelihood of confusion, as you
20 measure it under any other circumstances, would be too close.

21 THE COURT: You have to have some kind of light meter
22 going around.

23 MR. LEWIN: Maybe. But I think what comes clear is
24 that on the back of shoes and when shoes are in the street,
25 there's a particular image that gets cast, and that image is

17mWchrC

1 the image that matters.

2 Let me give you an example. This is a red. This is a
3 red that's cited by Ms. Vaissie in her declaration as one of
4 the red shoes that YSL has brought in over the years. This is
5 the Divine shoe and the color that she cites is Grenade, this
6 color.

7 May I approach the bench, your Honor.

8 THE COURT: Sure.

9 MR. LEWIN: Now, that arguably falls within the red
10 family.

11 THE COURT: Yes.

12 MR. LEWIN: In our view, that's not infringing. It's
13 a dark, wine color, and it wouldn't be infringing. It doesn't
14 resemble this color, which is another YSL shoe, which in our
15 view is infringing.

16 THE COURT: Let me then turn to another question. The
17 sample raises another question. Your registration specifically
18 says it is for lacquered red shoes. Of course, I don't know
19 what lacquered means, perhaps you can explain it, but this has
20 a kind of a red leather. So if you have a shoe that is that
21 color, your Pantone, whatever it is, but it's not shiny, it's
22 not like nail polish, but it's Benjamin Moore flat, would that
23 be infringing?

24 MR. LEWIN: I would have to give you the classic legal
25 answer, your Honor. It depends.

17mWchrC

1 Let me make a distinction. There's a distinction
2 between what we claim that we own is a trademark and what may
3 or may not be infringing as a trademark. That bright lacquered
4 outsole is precisely that. Lacquer is a clear material sprayed
5 on like paint.

6 THE COURT: Laminate.

7 MR. LEWIN: It's not a laminate as much as it is a
8 ladies' nail polish and then they buff it and make it bright
9 and shiny. And Louboutin's testimony is they do much the same.
10 Mr. Russo testified in his deposition that they hand rub shoes
11 to achieve the shiny effect. I don't think that Louboutin's
12 rights are limited to that which is identical to his mark. I
13 think like any other trademark question, it's a factually
14 intensive inquiry. And you measure the particular product or
15 name or logo or design against what's been registered and
16 what's been used. And I believe very strongly, your Honor,
17 that if you want to take lacquer, for example, that the effect
18 of lacquer could be achieved by some other means, I don't know,
19 polishing by hand or something, shoe polish or something or it
20 may be dulled or as you say glint in the street. But I think
21 there's a simple question here, how close can someone come to
22 what's been a properly registered, valid, strong trademark and
23 I don't think there's any right under any circumstances to come
24 so close that you confuse people.

25 THE COURT: Let me come back then to the other aspect

17mWchrC

1 of your registration. Your registration is for red on
2 footwear. This is a footwear and so is a thong, flats.

3 In the EU case, as you know, the EU, reading between
4 the lines, is essentially saying you overreach if what you want
5 is red on any kind of shoe. We might recognize it if it's a
6 particular Pantone ending in 63 red and high heels. So which
7 is it here? And where does it say that?

8 MR. LEWIN: Your Honor, not footwear. It says women's
9 high fashion designer footwear.

10 THE COURT: Does high fashion mean dollars or does
11 high fashion mean the height of the heel?

12 MR. LEWIN: I don't think it means dollars, your
13 Honor. I'm inclined to think based on the drawing and the
14 sample submitted it means the height of the heel. I'm not
15 claiming --

16 THE COURT: That's a definitional problem here. Is a
17 dress high fashion?

18 MR. LEWIN: Depends on the dress.

19 THE COURT: Is a Size eight high fashion but size two
20 is not?

21 MR. LEWIN: No, your Honor. It would very much depend
22 on the cut and style of the dress, the pricing of the dress.

23 THE COURT: We are sort of mincing words here, because
24 you're saying that high fashion there defines heels and I'm
25 wondering whether under ordinary language that would be a fair

17mWchrC

1 interpretation of what high fashion means. It says high
2 fashion designer footwear.

3 MR. LEWIN: Women's. Women's also.

4 THE COURT: Yes. Women's. We're in agreement on
5 that.

6 MR. LEWIN: I can't answer specifically that, you also
7 add the word designer, and I think that that has clear meaning.
8 I don't think it means an average piece of footwear. If you
9 add each of those components together, women's, designer, high
10 fashion shoes, I think that the examiner was comfortable with
11 that description and I think it carves out a market, a niche
12 market to which this trademark applies. It would not apply to
13 the Air Jordan sneakers that came out in the '80s in red, for
14 example, whether men's or women's.

15 THE COURT: In the EU, they also limited it also by
16 saying it doesn't apply to orthopedic shoes.

17 MR. LEWIN: That's correct, your Honor. To my
18 knowledge, and I could be corrected, I don't know of too many
19 designer's high-end luxury orthopedic products that are out
20 there today.

21 THE COURT: That's probably true. But the important
22 point is that the EU court basically said if you're talking
23 about footwear that's red without anything more, that may be
24 overreaching.

25 MR. LEWIN: I agree.

17mWchrC

1 THE COURT: And they said we are going to limit it in
2 several respects: One, high heel; two, particular Pantone;
3 three, high fashion designer type stuff, not orthopedics.

4 MR. LEWIN: I agree. I agree.

5 THE COURT: But my question to you is: Where in this
6 case do you have those kinds of limitations?

7 MR. LEWIN: You have exactly that limitation, your
8 Honor.

9 THE COURT: Where?

10 MR. LEWIN: This color is the only color registered
11 for Louboutin, whatever you want to call it.

12 THE COURT: I grant you that what you've said is the
13 color.

14 MR. LEWIN: That's right.

15 THE COURT: But you're not addressing the question of
16 lacquered red. You're not addressing the issue of footwear.

17 MR. LEWIN: I am addressing the issue of footwear in
18 its description because I said it's women's high fashion
19 designer, and I think that those have very specific meanings.

20 THE COURT: So if I took this shoe and made it a
21 platform two inches lower with a huge heel, would that be --

22 MR. LEWIN: If it was designed by YSL and it had a red
23 outsole, it may well be because it sells for \$800 and it's a
24 designer product. But if you took that same shoe and you
25 lowered it even further to a relative flat shoe and it came in

17mWchrC

1 under someone's no name, it might or might not be because I
2 think the issue is not identical, it's infringement.

3 THE COURT: How far does YSL have to lower the shoe in
4 order not to infringe? If it made a flat sole, guppies or --

5 MR. LEWIN: It would be unlikely that we would speak
6 to infringement under those circumstances. In fact, your
7 Honor, there are certain shoes before you that would be a very
8 close call under the circumstances, those Chinese shoes that
9 were supposedly put in.

10 THE COURT: Right. But, Mr. Lewin, the law is
11 supposed to give notice to someone who is trying to comply with
12 the law, especially in the setting of business, what is
13 permitted and what is not permitted. And the difficulty I'm
14 having is that you're suggesting here that it's kind of either
15 a moving target or that every time Yves Saint Laurent or some
16 other manufacturer wishes to see whether it is infringing, it
17 would have to come to a court and ask the judge to compare that
18 red versus some other red, shoe by shoe, and determine whether
19 or not it infringes.

20 MR. LEWIN: Your Honor, may I.

21 THE COURT: Yes.

22 MR. LEWIN: I'm sorry. I don't mean to interrupt.

23 THE COURT: No. Please do.

24 MR. LEWIN: If you just give me a moment, I want to
25 look for one particular reference.

17mWchrC

1 THE COURT: Yes.

2 MR. LEWIN: I guess if I boil this down, what I'm
3 saying is the following: The criteria you've outlined I think
4 are really no different than if somebody wants to adopt a word
5 that's similar to a made-up word. Take Exxon and they want to
6 adopt the word Esson, or something. Is that or is that not too
7 close? Well, they could see Exxon and they know Exxon is for
8 oil services or whatever it may be. But they're going to make
9 a judgment. They're either going to go to their lawyer,
10 they're going to look at the marketplace, and they're going to
11 make a judgment. That happens every single day in the
12 trademark field, what is or is not too close.

13 I agree with your Honor, a trademark registration in
14 the United States is supposed to guide the second-comer as to
15 what he can do and what he cannot do. I think that the issue
16 of distinctive red is specifically provided as a matter of law
17 because the sample governs, not the words. The sample. Can
18 somebody determine whether a red is arguably too close? Sure.
19 He searches the word red, he finds this trademark application,
20 the trademark registration, he compares the shoe, color that he
21 intends to use, with the color there.

22 Parenthetically, your Honor, it's extremely difficult
23 when you hold up samples of reds because everything prints
24 differently. This shoe, which is the shoe we tested in the
25 survey, your Honor, is one of the shoes that YSL says is

17mWchrC

1 monochrome. The red outsole is different than the red upper.
2 The sides, of course, are completely different. But if you
3 look at most of the shoes that are claimed to be red, the red
4 varies because of the way it prints on leather versus some
5 other material, so you can't really tell when you look at a
6 color printed on a piece of paper.

7 Does a person in business understand what a women's
8 luxury high-heeled designer shoe is? I think they do. I think
9 the USPTO did. Really in no one's mind was that too broad to
10 be able to determine what is or what is not an appropriate use
11 of the second-comer's color and what shoe he can put it on or
12 cannot put it on.

13 The Europeans make a lot of noise in many countries
14 about telling where the mark belongs and on what the product
15 belongs. As a matter of law, what governs is the drawing and
16 the sample. That drawing is of a high-heeled shoe. It is of a
17 women's shoe, and it is a luxury designer item.

18 Now, I understand, your Honor, that it may be some
19 issue, but if I'm a businessman, my job is to stay far enough
20 away that I can't get confused. That's my job. My job is not
21 to do the same thing that the registration's for. And that's
22 what's going on here. Exactly the same thing, a women's luxury
23 high-heeled designer shoe with a red outsole that infringes.

24 THE COURT: Anything else before we proceed?

25 MR. LEWIN: No, not responsive to what you were

17mWchrC

1 saying, your Honor.

2 THE COURT: You're beginning to push on the time.

3 MR. LEWIN: Yes, I understand, your Honor.

4 Your Honor, I'm not going to take a lot more time. I
5 had a long, arduously prepared opening statement, but that's
6 fine. It wouldn't be the first time it's happened.

7 I would say to you, your Honor, that if somebody came
8 to us today and said if you'll amend your application to
9 high-heeled shoes only, non-orthopedics, as they did, in fact,
10 in those proceedings, but not by the high court, the middle
11 level, we probably would do it, but we complied with the law,
12 and when you have a mark that is as well known as this
13 trademark, even as a matter of common law, your Honor, whether
14 we had a registration or not, we would still ask for that
15 preliminary injunction just as they did with the LSU case with
16 the university colors. We would still argue that it's iconic
17 in status. We would still argue that the public uses that red
18 on a women's luxury high-heeled shoe as a source indicator.
19 When they see that on the street and you see the red sole, 47.1
20 percent of the people who looked at the YSL shoe used that red
21 outsole as a source indicator.

22 THE COURT: Mr. Lewin, you also said that it is the
23 drawing that governs. Looking at the drawing and looking at
24 the actual registration, it says the dotted lines are not part
25 of the mark but are intended only to show placement of the

17mWchrC

1 mark.

2 MR. LEWIN: That's correct.

3 THE COURT: So?

4 MR. LEWIN: That's correct, your Honor. We're not
5 claiming the trademark, that that particular shoe is our
6 trademark. We're claiming that that's the place on that kind
7 of a shoe. That's why you use a dotted line. We would claim
8 this shoe, your Honor, which is a Louboutin shoe. The outsole
9 is a trademark, not the upper. Not this particular
10 configuration of it.

11 THE COURT: I understand that. But the reason I bring
12 that up is apropos of our discussion as to how low a shoe has
13 to be and what part of the shoe has to be visible in order for
14 infringement to occur. If the outer part of the shoe here is
15 not part of the mark, then presumably almost any way in which
16 you shape the outer part of that shoe theoretically could be
17 covered by the word "footwear."

18 MR. LEWIN: Your Honor, it's not footwear. It's
19 women's luxury designer footwear.

20 THE COURT: Footwear.

21 MR. LEWIN: It's not merely footwear.

22 THE COURT: If Yves Saint Laurent sold a \$1,000 sandal
23 that's one inch off the ground, and it had red --

24 MR. LEWIN: We wouldn't have a problem with it, your
25 Honor.

17mWchrC

1 THE COURT: How does Yves Saint Laurent know that?

2 MR. LEWIN: Because I think Yves Saint Laurent takes
3 its guidance right from that drawing.

4 I don't think anybody knows it, your Honor, just like
5 I said Exxon and Esson. How does Esson know that he's far
6 enough away? How does Esson know? How does any potential
7 infringer know? Unless he's absolutely duplicating the mark
8 100 percent, but if he's coming too close, how does he know?
9 He doesn't know.

10 THE COURT: If the drawing counts, if the drawing is
11 what you go by --

12 MR. LEWIN: Yes, it is.

13 THE COURT: -- this drawing doesn't tell me what's
14 behind the heel. See where the heel goes?

15 MR. LEWIN: Yes.

16 THE COURT: Does it tell me that the red goes also
17 down along?

18 MR. LEWIN: No.

19 THE COURT: It doesn't tell you that?

20 MR. LEWIN: No.

21 THE COURT: How would Yves Saint Laurent know that?

22 MR. LEWIN: Yves Saint Laurent would be justifiably,
23 in assuming that if they only did the inside of the heel and
24 did not do the red sole of that shoe, they would be safe. It's
25 an outsole, your Honor. It has a very specific meaning in the

17mWchrC

1 footwear industry. It doesn't mean heel. Period. That's not
2 what it means. The footwear industry takes an outsole to be
3 this part on down. That's what an outsole is, nothing more,
4 nothing less.

5 THE COURT: All right. Do you want to sum up then?

6 MR. LEWIN: Yes, sir.

7 MR. BERNSTEIN: Your Honor, may we put our
8 demonstrative up.

9 THE COURT: Yes.

10 MR. LEWIN: If I may, your Honor.

11 THE COURT: Yes.

12 MR. LEWIN: A couple of good things. Somehow or
13 other, your Honor, YSL recognized it as a trademark, and, as I
14 said a moment ago, your Honor, even in common law, as far as
15 we're concerned, if we had no registration whatsoever, we would
16 be entitled to injunctive relief under these circumstances. We
17 would be entitled because, as Mr. Russo, who was for eight
18 years the designer for YSL, says, the red sole, he says, YSL
19 says, right, are you familiar with the red sole, oh, any person
20 who works in the fashion industry is, the businessman, a moment
21 ago you said any person, what did you mean. I mean that the
22 red sole in the fashion industry has become a distinctive mark
23 for Christian Louboutin. He knows.

24 Now, PPR, who is the parent company of YSL, the head
25 of PPR, says very specifically, in a letter to our client, he

17mWchrC

1 says, in the fashion or luxury world, your Honor, it's
2 absolutely clear we recognize the notoriety of the distinctive
3 signature constituted by the red sole of Louboutin's models in
4 contrast with the general presentation of the model,
5 particularly its upper, and he recognizes that for all shades
6 of red. That's further than we went. We are only claiming the
7 one shade. This is Mr. Pinault.

8 The photograph, your Honor, is the photograph on the
9 street of the YSL shoe. It's this shoe, claiming to be
10 monochrome. That's the shoe.

11 As I say, your Honor, you may have a quarrel with the
12 registration. Indeed, we don't think so. We think even YSL
13 recognizes what an outsole is on a shoe, what a woman's luxury
14 high-heeled shoe is, what a woman's luxury shoe is, pardon me,
15 and what a designer shoe is. We think the PTO has done that.
16 We think the world has done that at large, and whether you
17 apply the registration or whether you apply the common law, we
18 still think, your Honor, that with the confusion that reigns
19 when that shoe goes down the street, the core mark of this
20 company will be lost. The reason it sells the kind of product
21 it does is because of that singular identity.

22 Thank you.

23 THE COURT: Thank you.

24 MR. BERNSTEIN: Good afternoon, your Honor. I'm David
25 Bernstein with Debevoise & Plimpton, here with my partner Joe

17mWchrC

1 Hamid, my colleagues Jill van Berg and Rayna Feldman. Nicole
2 Mara, the general counsel of Gucci, which is the parent
3 company, is here as well.

4 Your questions to Mr. Lewin are quite prescient, your
5 Honor, with respect to why this is not a trademark that should
6 be deemed valid and why it's not a trademark that should be
7 enforced against my client. And the deposition of
8 Mr. Louboutin himself is incredibly relevant to the questions
9 you were asking because we don't know what that trademark
10 registration, which we think was improperly granted, means. We
11 don't know what we are and are not allowed to do, and indeed,
12 Mr. Louboutin himself doesn't know. So just a couple of quick
13 points.

14 No. 1, this is a Louboutin shoe. I'm sorry it's used.
15 It's a bit scuffed. But it's a flat with a red sole. I
16 believe this is covered by the trademark registration.
17 Certainly my reading of the registration is the same as your
18 Honor's: the dotted part doesn't count. So I do believe it
19 covers flats. I believe it covers high heels, it covers thick
20 heels, it covers thin heels. And as your Honor mentioned, it
21 says red, lacquered red, unlike the new European application.
22 It doesn't say Pantone 18-1663TP. They could have said that,
23 if that's what they were claiming, although even then I must
24 say I believe that would be a functional mark as well.

25 The decision of the OHIM board, let's be very clear

17mWchrC

1 about what that was. That is not a court of law that was
2 deciding whether someone's mark was infringed. That was not
3 even a decision as to whether that mark is now a registration.
4 That was only a decision from OHIM, which manages the European
5 community trademark, as to whether the application can proceed
6 to the next step, which would be publication and then other
7 people can come and object.

8 Louboutin tells you that that court considered and
9 rejected all of YSL's concerns. YSL has not even had the
10 opportunity yet to file its objection, and I can tell the Court
11 and it will be no surprise, of course, to Louboutin, that we
12 fully expect in Europe to oppose that trademark registration;
13 it's now only an application, and we will be submitting to the
14 registration board all sorts of arguments as to why that
15 trademark, even limited to 18-1663TP Pantone, even limited to
16 shoes that are not orthopedics and all of the others that your
17 Honor mentioned, should not be registered.

18 There's another decision from Paris, and I actually
19 agree with Mr. Lewin, I think all of the decisions from Europe
20 don't really bind or are terribly relevant to the Court. But
21 another decision in Paris dealt with the shoes made by Cesare
22 Paciotti. This is Mr. Paciotti's shoe. Louboutin sued
23 Paciotti in France saying this infringed his rights and the
24 French court, and your Honor has the decision, rejected that
25 suit and said that Louboutin is not entitled to broad

17mWchrC

1 protection for red. Indeed, Paciotti sells red-soled shoes in
2 the United States and has never been challenged in the United
3 States.

4 So what is this case about? What did Mr. Louboutin
5 say?

6 THE COURT: Let me come back to a statement you made
7 concerning what happened in the French proceedings. You
8 acknowledge that they did limit it there to high heels
9 specifically and also specifically to a particular Pantone, the
10 one ending in 63. What if Louboutin either amends or
11 acknowledges that its mark is similarly limited to something
12 like what happened in the European Union application?

13 MR. BERNSTEIN: Then this case is over, your Honor,
14 because for the first time on Tuesday, for the first time,
15 Louboutin took the position that this is their Pantone color,
16 and that's all they're seeking to protect. If your Honor goes
17 back and looks at their initial preliminary injunction papers,
18 they talk about red. We asked in discovery, we had a discovery
19 request, tell us what Pantone number you used. Never responded
20 to, it was never offered to us. We asked Mr. Louboutin in his
21 deposition, Do you know what Pantone color you use. He said
22 no. Then we said, Would you object --

23 Your Honor, would you like me to hand up the full
24 transcript?

25 THE COURT: No. That's all right.

17mWchrC

1 MR. BERNSTEIN: We asked Mr. Louboutin:

2 "Q. Would you object if another designer made a shoe that had
3 an outsole that was any of these colors?" And we were showing
4 him the Pantone book with the number of reds, he said:

5 "A. I would have an objection if they use a red sole."

6 Then my partner, Mr. Hamid asks, just on the next
7 page:

8 "Q. Are all shades of red objectionable to you?"

9 He answered:

10 "A. I must see a red sole.

11 "Mr. Hamid: That's not my question. My question is,
12 would you object to any shade of red on a sole?"

13 Mr. Lewin then instructs his client not to answer that
14 question.

15 Your Honor, we tried very hard to know what is it that
16 we're allowed to do. We actually showed Mr. Louboutin in his
17 deposition a number of Yves Saint Laurent shoes and asked him,
18 Do you object to this. Here's one, your Honor. It's from this
19 year's campaign. Excuse me, the campaign that ended. It's the
20 Cruise 2011. This is called the Gypsy shoe. We showed this to
21 him and said: "Do you object to this?"

22 He said, "I'll think about it."

23 We said, "Please do."

24 He said, "I'll think about it back in my office."

25 "Q. If Yves Saint Laurent wants to know if it can sell the

17mWchrC

1 shoe or not, you can't tell us whether you object?

2 "A. Right now?

3 "Q. Yes, right now.

4 "A. No, I can't say."

5 Your Honor, if Mr. Louboutin, in his deposition, can't
6 tell us what we're allowed to do and what we're not allowed to
7 do, how are we supposed to figure it out when we're designing
8 shoes? This goes, of course, to the more fundamental issue.
9 It goes to the question of whether this should be a trademark
10 at all or whether it is aesthetically functional to take a
11 primary color like red, apply it to a shoe, and say we are the
12 only ones who have the right to make these shoes.

13 In *Qualitex*, the Supreme Court told us that although
14 color can be protected in appropriate circumstances, if the
15 color is something that is unique, it can be protectable, but
16 if it's being used in an anticompetitive way to give one party
17 monopoly rights over a useful feature, a feature that doesn't
18 exclusively serve a source-identifying trademark-like function,
19 then that's not something that's appropriate. It would be
20 aesthetically functional, and the Supreme Court even noted some
21 other cases.

22 It noted the *Brunswick* case, your Honor, where there
23 was a claim that the use of the color black on boat engines,
24 which was trade dress, the Supreme Court noted with approval,
25 no, that's aesthetically functional. You need to be able to

17mWchrC

1 use black for boat motors because it matches lots of different
2 types of boats, lots of different color boats; you want to be
3 able to coordinate, and also because black makes things look
4 smaller and so you might want your boat engine to look smaller.

5 The Supreme Court noted the John Deere case where
6 there was a claim that green-colored farm equipment serves as a
7 trade dress and protectable trademark, and the court said no,
8 that's aesthetically functional. Farmers might want their
9 equipment to match and then I suppose the green blends in with
10 the green scenery. Whatever it is, the Supreme Court
11 recognized in those circumstances the color is not serving as a
12 trademark, but rather it's serving some other purpose, a
13 purpose that should not be monopolized, and that is the case
14 with Yves Saint Laurent shoes, your Honor.

15 It's interesting. One of the things I did in
16 preparing was I went back and I read the initial preliminary
17 injunction brief that was filed on April 7. On page 10 of
18 Louboutin's April 7 brief, they wrote, "YSL shoes never bore
19 red-colored outsoles."

20 Now, we've learned that's not true.

21 May I move this up so you can see it, your Honor.

22 THE COURT: Yes.

23 MR. LEWIN: We're going to object to this. This
24 document has never been shown before to us. It wasn't provided
25 to us in discovery. We have no idea of anything about this,

17mWchrC

1 your Honor. We don't know whether those pictures are accurate.
2 We don't know whether the document accurately reflects
3 anything. It's a chart and we don't know what the chart's been
4 taken from, sir.

5 THE COURT: All right. Mr. Bernstein will explain it
6 to you now.

7 MR. BERNSTEIN: Your Honor, this is a demonstrative.
8 It's not an evidentiary hearing, of course. It's a
9 demonstrative, just all drawn from documents that we've
10 produced in the case. Let me give a little history of Yves
11 Saint Laurent, to put it in context.

12 The House of Yves Saint Laurent was founded almost 50
13 years ago. In the early '60s, Mr. Yves Saint Laurent made red
14 one of his signature colors. Now, he didn't say I'm the only
15 one who can make red dresses, but he did famously make red
16 dresses, and it's hard to remember in today's colorful world,
17 but back in the '60s that was quite a statement. Red was one
18 of his colors from the start. And starting in the '70s,
19 Mr. Yves Saint Laurent or the House of Yves Saint Laurent
20 designed red-soled shoes, and your Honor has seen pictures of
21 those in the record. Unfortunately, in the time we've had,
22 we've not been able to find those old shoes; we're certainly
23 still looking for them, but you do have images of them.

24 Use of red-soled shoes by Yves Saint Laurent goes back
25 long before Mr. Louboutin himself first started using red on

17mWchrC

1 his shoes, which was, I believe, 1992. We go back to the '70s.
2 Going back to 2003, looking at the last eight years or so, Yves
3 Saint Laurent has produced no less than 15 different models of
4 shoes that have had on them, and they've not had red outsoles
5 because we want people to think our shoes are from Christian
6 Louboutin.

7 To the contrary. Yves Saint Laurent has its story
8 design history, Yves Saint Laurent wants its shoes to stand
9 apart. We want people to know that when they buy an Yves Saint
10 Laurent shoe they know what they're getting. You couldn't
11 doubt it because it comes in a box that couldn't say Yves Saint
12 Laurent bigger. They're sold only in Yves Saint Laurent
13 boutiques or in Yves Saint Laurent sections of department
14 stores like Bergdorf Goodman and Saks Fifth Avenue, so you know
15 exactly what you're getting, which is why Mr. Lewin said at the
16 start this case is only about postsale confusion. No one could
17 possibly be confused when they buy an 800 or \$1,000 pair of
18 shoes as to whether they're getting Yves Saint Laurent or
19 Louboutin.

20 Your Honor, when we have used red, it has been not as
21 a trademark, not to say I want you to know who I'm from because
22 I have a red sole. It's as a design element. It's a critical
23 design element. So on this chart, and we have all of the shoes
24 here, your Honor, so you can see the actual colors. I actually
25 will agree with Mr. Lewin that when you print color, it doesn't

17mWchrC

1 always print the same way on paper as it does on leather and
2 the lighting conditions.

3 These are two shoes that are reflected in the first
4 column. Actually, if your Honor would like, I can hand up to
5 you and also give Mr. Lewin a smaller version of this so you
6 can see it. So the first column, your Honor, is from 2004, and
7 in 2004, Yves Saint Laurent designed a collection that was
8 inspired by Chinese elements, and because it was inspired by
9 Chinese elements, he used red lacquered soles on his shoes.
10 And I've got two of the actual samples here, your Honor.

11 Why did he use red lacquered soles on his shoes? The
12 Chinese restaurants that I used to go to when I was a kid
13 always had red lacquered elements. Red lacquer is a key design
14 element that you see very often in Chinese-themed issues. So
15 to each part of this whole collection, the shoes had this red
16 lacquered sole. It's also important to understand that I'm
17 talking about a collection. Unlike Louboutin, which designs
18 shoes and that's all they do, Yves Saint Laurent is an entire
19 fashion house.

20 THE COURT: You were never sued by the Chinese
21 restaurants, I assume.

22 MR. BERNSTEIN: Fortunately not, your Honor, although
23 I know the Court has had a number of Chinese restaurant suits
24 lately.

25 So when Yves Saint Laurent designs a collection, it's

17mWchrC

1 a head-to-toe collection, and the shoes are part of that. In
2 that Chinese collection, we had these Chinese shoes, and what
3 is most interesting is that Mr. Louboutin himself was at the
4 runway show where these shoes were shown. That's also why
5 Mr. Lewin said to you at the start this case isn't about runway
6 shows in Paris. He doesn't want this case to be about anything
7 about Mr. Louboutin having seen these shows at the runway show
8 in 2004.

9 But at the runway show in 2004, every single model
10 wore shoes with red soles. Mr. Louboutin claims his trademark
11 goes back to 1992. Here we are 12 years later, he never
12 complained to Yves Saint Laurent when he saw these shoes, and
13 these shoes for us were huge sellers.

14 We don't sell shoes the way Louboutin does. As your
15 Honor will see from the chart, we sold only 3,800 pairs of
16 these shoes in the United States. For Yves Saint Laurent, that
17 was an incredibly successful shoe collection. But it wasn't
18 just 2004, your Honor. In 2005, we had a shoe called the St.
19 Germain. This was a very well-known shoe featured in an ad
20 campaign, once again with a red sole. I apologize. Because
21 it's a used shoe it's a little bit scuffed, which is why the
22 image on the picture is a bit scuffed. But, once again, a
23 red-soled shoe in 2005, not a huge seller in the United States,
24 just a little over a hundred pairs, but still a prominent shoe
25 designed not because we want to take advantage of the rights

17mWchrC

1 that Mr. Louboutin may or may not have but because this was
2 part of the monochromatic theme of our collections. And the
3 creation of monochromatic color blocking is also a venerated
4 tradition of Yves Saint Laurent.

5 It is just not true that when Christian Louboutin
6 designed his shoes in 1992 he separated his high-heeled shoes
7 from the masses. People have been using color on shoe bottoms
8 for many, many years, and I know there were some chuckles about
9 it but King Louis XIV famously had red-soled shoes and Dorothy
10 in the Wizard of Oz, when I was a kid, had her red-soled shoes
11 that carried her home at the end of the day.

12 THE COURT: She still does.

13 MR. BERNSTEIN: Sorry. Thank you, your Honor. Wizard
14 of Oz.

15 It's not only red. We have used many colors on shoes,
16 so if we design a blue shoe, your Honor, it has a blue sole.
17 If we design a green shoe, it has a green sole. The idea is
18 not for the sole to pop out, which is what the Louboutin shoe
19 does. The sole is designed to pop out from the shoe.
20 Mr. Lewin has brought a red version, but the classic Louboutin
21 look is this one where the red sole pops out from the rest of
22 the shoe. It's the contrasting upper as opposed to the concept
23 of a monochrome style where, as part of an entire collection,
24 the whole shoe provides a block of color.

25 THE COURT: Let me stop you for a moment to see if you

17mWchrC

1 can address Mr. Lewin's point about what Louboutin registered
2 and that particular color and to what extent you need to go
3 near the color between that Pantone and all the extremes of
4 red. There may be 20 different others that they would probably
5 acknowledge would not cause them any problem. The issue is to
6 what extent does Yves Saint Laurent have to go into their
7 territory, if they're claiming a territory?

8 MR. BERNSTEIN: First of all, I think I started on
9 this and I forgot to finish my point, we have a declaration
10 that says we do not use their Pantone color, and we didn't know
11 about it so we couldn't have put it in earlier because when we
12 asked in discovery what Pantone color do you use, they refused
13 to produce the document, and when we asked Mr. Louboutin he
14 didn't give it to us.

15 THE COURT: We know what it is now and if I'm reading
16 between the lines, Mr. Lewin says as long as it's not that
17 Pantone or something within a couple of degrees of it, you're
18 okay.

19 MR. BERNSTEIN: It's the couple of degrees of it that
20 makes me nervous, your Honor, because we showed Mr. Louboutin
21 the Pantone book and we said tell us which of these reds we can
22 use, which ones we can't. He said I can't tell you, I need to
23 see it on the actual sole. So I guess what he's telling us is
24 we have to go ahead and produce the shoes and then go to Paris
25 and show them to him.

17mWchrC

1 THE COURT: Or go to court.

2 MR. BERNSTEIN: Or go to court, which would be a very
3 expensive way of designing shoes, your Honor.

4 The key point is this. We do not use their Pantone.
5 We don't use this color, and if your Honor would like, I can
6 hand up a declaration, but I'm representing it to the Court. I
7 actually don't think, though, that Mr. Lewin would be satisfied
8 because he wants the degrees. The question is how far do those
9 degrees go, and from a preliminary injunction perspective,
10 candidly, this case, this motion should be denied for a number
11 of reasons, one of which is, as you can see from this chart,
12 your Honor, we've been doing this for years. We have been
13 using relatively similar shades of red for years, and when we
14 design the shoes, we don't sit down and say let's pick the
15 Pantone of Louboutin and design our entire collection around
16 it. Quite the contrary.

17 The creative designer for the Yves Saint Laurent
18 house, for each season, thinks about what will be the theme of
19 this season. And for the Cruise 2011 season, which is the one
20 at issue here, the creative director said for this season I'm
21 going to hearken back to the color card used by Mr. Yves Saint
22 Laurent himself in 1967. And it was the colors he developed in
23 the Marrakesh collection.

24 THE COURT: You're saying, Mr. Bernstein, for every
25 season there's a color so this issue is going to be moot next

17mWchrC

1 year?

2 MR. BERNSTEIN: Absolutely not, your Honor, because we
3 need to know that our designers are not constrained in having
4 to worry every time they want to design an entire collection as
5 to whether the red they want to use is going to be too close to
6 Mr. Louboutin's. This is a trademark registration that should
7 never have been issued, but even if it was, we have a fair use
8 right to use the color red in all of its shades in designing
9 our shoes.

10 Now, I guess it would be an advisory opinion with
11 respect to this one Pantone color because none of our shoes use
12 this Pantone color. So, if the Court were to say, Look, you
13 should have said in your trademark registration, just as their
14 new registration in Europe says, this registration covers the
15 color red and specifically, Pantone 18-1663TP, which they could
16 absolutely have said in the description, and if that was
17 exactly what the registration was, they may have gotten that,
18 although I still believe it's aesthetically functional to take
19 a primary color and say you're the only one who has the right
20 to use it on the sole of a shoe, when so many other designers
21 have used it, and not just us, of course but Chanel.

22 Louboutin puts in a declaration saying they spoke to
23 an unnamed store clerk in Boston who said Chanel doesn't make
24 red shoes so this might be fake. I personally spoke with
25 Chanel and they have personally confirmed to me that this is an

17mWchrC

1 absolutely authentic shoe that was sold in the 2008 collection.
2 And in their declaration, they say this Christian Dior shoe
3 which our investigators found, someone told them we don't make
4 red-soled shoes, so it might be fake. We called Christian
5 Dior.

6 MR. LEWIN: Objection, your Honor. With all due
7 respect, counsel's testifying now.

8 MR. BERNSTEIN: I'm making representations. There's
9 an affidavit, a declaration put in that said Debevoise &
10 Plimpton is trying to mislead the Court, and I must say I took
11 offense at that, your Honor. And so when we saw that
12 declaration on Tuesday, we wanted to make sure that we were not
13 bringing shoes to Court that were counterfeit shoes. This is
14 an authentic Christian Dior shoe that was sold in their 2005
15 season. We are not the only designer who feels the need to be
16 able to use a primary color red as a design choice in designing
17 our shoes. And I won't bore your Honor with all the other
18 shoes.

19 THE COURT: All right.

20 MR. BERNSTEIN: I think you get the point that this is
21 a color choice that many designers have the right to use.

22 THE COURT: Begin to wrap up, Mr. Bernstein,
23 summarize.

24 MR. BERNSTEIN: I'd say, your Honor, that the
25 preliminary injunction should be denied then for a wide variety

17mWchrC

1 of reasons. No. 1, there's no irreparable injury because this
2 is something that Yves Saint Laurent has done for many years.
3 Indeed, one of the things Mr. Lewin said to you is that there
4 was a quantum leap with our 2010 collection. If you look at
5 the sales, your Honor, you'll see in fact for better or worse,
6 our sales in 2010, 2011, were not as high as they were in some
7 past years. There was no quantum leap. This is a continuation
8 of what we've done.

9 On top of that, Mr. Lewin said to you that there were
10 negotiations in January and February and March. With all due
11 respect, if you look at the declaration of the CEO of
12 Louboutin, Mr. Mourot, he concedes in his declaration that on
13 January 17 they receives a letter from Yves Saint Laurent
14 telling them we will not accede to your demands. They waited
15 almost 12 weeks to bring this motion. Under the Cititrust
16 case, the Second Circuit says that is way too long. That is an
17 indication that you have no irreparable injury.

18 Not only is there no irreparable injury, there is no
19 likelihood of success. There's no likelihood of success
20 because aesthetic functionality bars their trademark, because
21 our survey on secondary meaning shows that their mark doesn't
22 have secondary meaning.

23 We don't dispute, your Honor, that many people
24 associate red soles with Louboutin, but they don't exclusively
25 associate. When we asked people in our survey, does only one

17mWchrC

1 company or more than one company make red soles, only 24
2 percent say one company. We could go on about the survey
3 questions, but I won't go into them now, your Honor.

4 Then, of course, we have our survey. The postsale
5 confusion survey that Louboutin has offered, which showed 49
6 percent confusion, showed an incredibly unfair stimulus of the
7 shoe with someone's heel hanging in the air. Now, the whole
8 concept of postsale confusion doesn't apply in this context
9 when we're talking about equally expensive and high quality
10 shoes. But even if you were going to do a survey, you need to
11 show people a fair stimulus of how they would see it in the
12 marketplace, not a giant image with someone's shoe up in the
13 air like this, focused directly on the sole, which is a leading
14 way of saying, I'm asking you about the red sole. Instead, our
15 survey expert did a video where people if you saw someone
16 walking around, you could see all aspects of the shoe, the top,
17 the bottom, the sole, and found negligible confusion.

18 Finally, your Honor, even in the unlikely event that
19 there was confusion, our fair use defense would bar this claim
20 because we are not using the color red on the bottom of our
21 shoes in any way as an indicator of source of trademark. We
22 are using it in good faith, in a descriptive fashion, whether
23 it's to describe a Spanish theme or a Chinese theme or for this
24 monochrome key style.

25 We would respectfully ask that the preliminary

17mWchrC

1 injunction be denied.

2 THE COURT: Thank you.

3 MR. BERNSTEIN: Thank you, your Honor.

4 THE COURT: Mr. Lewin, did you want to respond?

5 MR. LEWIN: Just a few minutes, your Honor.

6 If I may, your Honor, before I go further, if I can
7 just approach for a second.

8 On the back of the Louboutin business card is the
9 Louboutin trademark that was the subject of the Paciotti
10 dispute and subject of the recent ruling of the high court in
11 France overturning it. The Paciotti case did not hold it was
12 unenforceable. The Paciotti case held in their instance
13 because the name Christian Louboutin was on the bottom of one
14 shoe and the name of Paciotti was on the bottom of the other
15 that they made the distinction with that other trademark. Its
16 ultimate demise, properly so, was because it did not picture
17 itself on a shoe. It could be anything that particular
18 picture.

19 With respect to the statements that were made by
20 Mr. Bernstein, if I can, first of all, the sales numbers, those
21 sales numbers are taken from Ms. Vaissie's affidavit, her
22 declaration. If you notice, your Honor, in her declaration,
23 there is not a single document showing sales, not one. There's
24 no receipts. There's no consumer documents. There's no sales
25 documents. There's no shipment documents. It's Ms. Vaissie

17mWchrC

1 testifying that she thinks her records show or that the records
2 appear to show something about sales. That's the first thing.

3 The second thing, your Honor, is as your Honor has
4 right in front of it, that's one of the colors that's over
5 there. Three shoes on that list are that color, to which we
6 would have no objection, your Honor. They talk about guidance
7 and they talk about what they can do and what they can't do,
8 that shoe fits fine.

9 In terms of fashion, your Honor, and the so-called
10 need to use this particular color, there are several hundred
11 reds in the 9,000 colors of Pantone, and a fashion expert,
12 Gabriele Goldaper, indicated very clearly that to make a shoe
13 go with a collection, you do not need the bottom. We're not
14 talking about the shoe. This shoe, this YSL shoe, with a red
15 edge would be perfectly suitable to match in anything they had
16 in that color. We're not talking about owning the color red or
17 anything of its kind.

18 THE COURT: Mr. Lewin, we were narrowed before to a
19 question of degrees. Have you identified on the Pantone scale
20 starting from 63 how many up and how many down from that scale
21 you would find infringing?

22 MR. LEWIN: Offhand, your Honor, no. But you can take
23 guidance from Judge Sweet's decision in Oil of Olay back in
24 1978 when he was unable at a preliminary injunction stage to do
25 it. He ordered the defendants to stay 40 percent away. That

17mWchrC

1 was his solution at least temporarily. Are we troubled by dark
2 red? No. Are we troubled by pink? No. Are we troubled by
3 red-orange? No. Have I sat down personally and done a
4 mathematical calculation with a Pantone scale in front of me?
5 No. Mr. Louboutin can't because he doesn't know what a Pantone
6 scale is all about. He's a designer. He sits with markers and
7 designs shoes. This claim that because he can't pick a Pantone
8 scale off a page that somehow or other he can tell what's
9 infringing or noninfringing, he's not a lawyer. He's a
10 designer. He said when they showed him two shoes, sir, like
11 this, and they said to him, which one, what do you see, he said
12 I see my red shoe, I see my red outsole, when he talks about
13 what it has to look like, your Honor.

14 What we are saying at the end of the day is the
15 following --

16 THE COURT: All right. But, Mr. Lewin, I'm sure that
17 you're not suggesting that Yves Saint Laurent has to go to
18 Mr. Louboutin and ask for permission.

19 MR. LEWIN: No, not at all, your Honor.

20 THE COURT: Are you saying that this Court then should
21 take 63 and say up ten percent, down ten percent is okay, and
22 that gives them the guidance they need?

23 MR. LEWIN: I'm not sure this Court is supposed to
24 give them that kind of guidance, your Honor, but I am saying
25 this. I think a preliminary injunction should lie against the

17mWchrC

1 shoes that are at issue in this case, and I think that further
2 if they wanted to get guidance going forward as to what they
3 could do and what would be permitted to be done, if the Court
4 felt it was in its competency to do that, and Judge Sweet
5 certainly did, was to say stay X percent away, yes, sure. But
6 that's not the question.

7 The question is whether these four shoes infringe on
8 the Louboutin red outsole, and they're saying that they have to
9 have it, that there's some sort of aesthetic need to use a red
10 outsole to match clothes. There isn't. That's what the
11 fashion declarations say to you. The attorney is testifying,
12 your Honor. There's no evidence here, none, about sales in the
13 United States of any of these red shoes of any quantity, and
14 they throw in this panoply of red shoes which are clearly
15 infringing and shoes which are not. The one there in front of
16 you, your Honor, is not. This one, it is. It looks just like
17 the red that Louboutin has.

18 Now, I'm not a mathematician and I'm not a designer,
19 but if I was, as Mr. Russo is, their own guy, I would know how
20 far away to stay.

21 THE COURT: All right. Thank you.

22 MR. BERNSTEIN: One minute, your Honor?

23 THE COURT: One minute.

24 MR. BERNSTEIN: No. 1, if there's any question about
25 the providence of that chart, your Honor, I'm handing Mr. Lewin

17mWchrC

1 and the Court a version that has the cites from the record for
2 every fact that's there.

3 No. 2, my last point, your Honor, these are two shoes
4 that are on the chart from 2009. We showed both of them to
5 Mr. Louboutin at his deposition, and he said I object to both
6 of those. That's two years ago, your Honor. That alone is the
7 kind of proof that there's no irreparable harm, that we were
8 selling these shoes two years ago. Those are different reds,
9 your Honor can compare them. Indeed, I believe, although I'm
10 not looking at it in front of you, that the Grenade shoe was
11 shown to Mr. Louboutin and my recollection is that he said I
12 don't know. It may have been Mr. Mourot. I may be confusing
13 the two, but he said I don't know about this one, it's very
14 close.

15 The point is they don't know, we don't know. This is
16 a mark that should not be a trademark at all. It certainly
17 shouldn't be enforced against these shoes.

18 Your Honor, thank you very much.

19 THE COURT: Thank you very much. That was very
20 helpful, and we will reserve judgment and attempt to issue a
21 ruling as soon as possible.

22 MR. LEWIN: Thank you, your Honor.

23 THE COURT: I should have taken care of one other
24 point. Assuming for the moment that this case were to go to
25 trial, how soon would the parties be prepared to go to trial?

17mWchrC

1 Assume as short a leash as possible.

2 MR. LEWIN: Mr. Louboutin's biography is coming out, I
3 know this may sound a little far afield, at the end of October,
4 and they have planned almost a yearlong 20th anniversary
5 celebration, worldwide celebration. We had talked to
6 Mr. Louboutin anticipating something like this, and we are
7 advised that in between, this has been a year in the planning,
8 that somewhere around the end of November, possibly the
9 beginning of December, would be the very earliest. Otherwise,
10 it just won't work.

11 THE COURT: Thank you.

12 Mr. Bernstein.

13 MR. BERNSTEIN: First of all, your Honor, I think the
14 next step after what we hope is denial of the preliminary
15 injunction will be a motion for summary judgment on aesthetic
16 functionality and fair use. We think as a matter of law that
17 will dispose of the case. But if there is to be a trial, your
18 Honor, we are prepared to move very expeditiously. Normally
19 defendants don't stand up and say let's try it fast. We would
20 like this resolved.

21 THE COURT: If you wanted to resolve it this year,
22 don't look to summary judgment. You'll get a decision two
23 years from now if there's no appeal.

24 MR. BERNSTEIN: We're prepared to have no discovery
25 and to go right to trial on this case because I think the

17mWchrC

1 issues are that straightforward. So we would be looking to
2 move quickly, and the reason I say that is we design four
3 seasons a year. This case is now hanging like a sword of
4 Damocles over the designers, what are they allowed. And it's
5 not just Yves Saint Laurent. All of the fashion world is
6 watching this case. We have a lot of reporters from the
7 fashion world here. Women's Wear Daily has been reporting on
8 this case every day. Other fashion companies are concerned
9 about this overreaching claim. So we would like, your Honor,
10 as quick a trial date as possible, and we're prepared to do it
11 with no more discovery. We think the parties have had enough
12 already, and we'd like to move forward.

13 THE COURT: Thank you.

14 MR. LEWIN: Your Honor, may I just point out.

15 THE COURT: Yes.

16 MR. LEWIN: This chart that was just handed to you by
17 counsel would indicate that we want discovery. This is bogus.
18 These references to the record are all to Ms. Vaissie's
19 declaration. Ms. Vaissie's declaration has no proof on it.
20 We're going to question her on this. So for sure, we want
21 discovery, your Honor.

22 THE COURT: All right. Thank you. Have a good day
23 and a good evening.

24 MR. BERNSTEIN: Thank you, your Honor.

25 MR. LEWIN: Thank you, your Honor.