# 15.26 Trademark Damages—Actual or Statutory Notice (15 U.S.C. § 1111)

In order for plaintiff to recover damages, the plaintiff has the burden of proving by a preponderance of the evidence that defendant had [either statutory or] actual notice that the plaintiff’s the trademark was registered.

[Defendant had statutory notice if:]

[1. plaintiff displayed the trademark with the words “Registered in U.S. Patent and Trademark Office”] [or]

[2. plaintiff displayed the trademark with the words “Reg. U.S. Pat. & Tm. Off.”] [or]

[3. plaintiff displayed the trademark with the letter R enclosed within a circle, thus ®.]

**Comment**

Although elements of a claim in trademark may overlap with a claim in copyright, the acts do not preempt each other. *See Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 721 & n.18 (9th Cir. 2004) (“Copyright and trademark are related but distinct property rights, evidenced by different federal statutes governing their protection” so that “[a]lthough there is a general bar to double recovery, we caution that damages arising from a copyright violation do not necessarily overlap wholly with damages from a trademark violation, even though there might be only one underlying action.”); *Nintendo of America, Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, 1011 (9th Cir. 1994) (upholding award for statutory damages under Copyright Act and actual damages under trademark statute).