

## IP Survey

- Module 5
- Trademarks

## Trademark

	Generic	Descriptive	Suggestive	Arbitrary / Fanciful / Coined
aspirin				  
		"Brilliant" for diamonds	"Brilliant" for shoe polish	"Brilliant" for canned apple sauce

### Descriptive?

- character
- function
- feature
- quality
- ingredient
- nature
- purpose
- use
- characteristics
  - dimensions, color, odor.



### Generic -ness

**It's *just* not BOTOX®  
without the ®.**

The ® after BOTOX® Cosmetic means it's a  
registered trademark of Allergan, Inc.  
**Not a nickname. Or a generic term for other botulinum toxins.**  
It's the BOTOX® you and your patients trust.  
And the one we trust you'll always use with an ®.

**BOTOX®**  
—Cosmetic  
Botulinum Toxin Type A

ALLERGAN ©2003 Allergan, Inc., Irvine, CA 92612 BOTOX is a registered trademark of Allergan, Inc. www.botox.com 0304625

### Likelihood of Confusion factors

1. strength of the mark
  - Based on the continuum of distinctiveness
2. proximity of the goods
  - The closer the goods, the greater danger the public will mistakenly assume an association between the producers of the related goods, so the less tolerance for close marks
  - Sold to the same class of purchasers?
3. similarity of the marks
4. evidence of actual confusion
5. marketing channels used
6. type of goods and the degree of care likely to be exercised by the purchaser
7. defendant's intent in selecting the mark
8. likelihood of expansion of the product lines

### Likelihood of Confusion factors

1. strength of the mark
2. proximity of the goods
3. similarity of the marks
  - Sight, sound and meaning
  - Tested as encountered in the marketplace
  - Compare the marks as a whole, don't dissect unless trying to eliminate trademark coverage for generic, functional or disclaimed portions of a trademark or trade dress
  - Similarities weigh more heavily than differences
4. evidence of actual confusion
  - Persuasive proof, but difficult to prove, often brought by parties in unclear or insubstantial form
  - Actual or anecdotal evidence, or with a survey, strictly screened
5. marketing channels used
  - Similarities and differences of channels used
6. type of goods and the degree of care likely to be exercised by the purchaser
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## Likelihood of Confusion factors

1. strength of the mark
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6. type of goods and the degree of care likely to be exercised by the purchaser
  - Standard is typical buyer exercising ordinary caution – the “reasonable purchaser” of the products at issue is who must be likely confused
    - Wholly indifferent excluded, ignorant and credulous included
    - Buyers with expertise in the field, or expensive product, may allow for a higher standard
  - Effect of quality differences or equivalence
7. defendant's intent in selecting the mark
  - Bad faith or intent to “pass off” is presumptive evidence that defendant will accomplish its purpose – deceive customers
8. likelihood of expansion of the product lines
  - When goods are closely related, any expansion is likely to result in direct competition

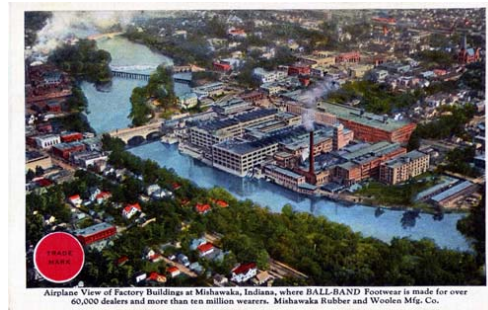
## Illustrations . . .

*Coca-Cola* *Long's Cola*



**Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co. 316 US 203 (1942)**

- What is operating as a mark?
- Commercial harm?
- The “red ball” as a brand



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**Beating Global Monopolists at Their Own Marketing Game**

- Brands as meaning systems
- Brand extensions
- Relationships to market power
- Connections to original purposes of trademark protection

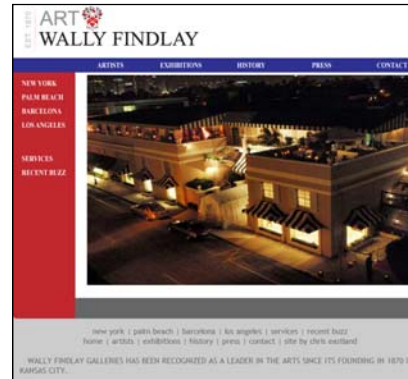
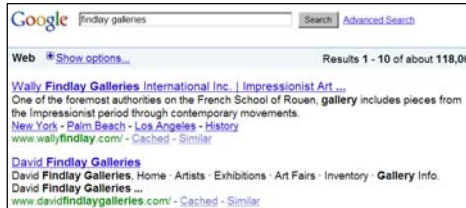
five qualities of a great “brand:” (1) “a compelling idea;” (2) “a resolute core purpose and supporting values;” (3) “a central organizational principle;” (4) an American origin; and (5) use on commodities.

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## David B. Findlay, Inc. v. Findlay, 218 NE2d 531 (NY Ct App. 1966)

- David Findlay – NY, NY
- Wally Findlay – Chicago
  - later Florida
  - then . . .
- Findlay Galleries, Inc.
- Actual confusion
- Defense of using one's name?



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## Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003)

- What is the trademark?
- Forsythe's goals?
- Result under balancing test?

The *Rogers* balancing test requires courts to construe the Lanham Act "to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."

- Genericide?
- Iconicide?

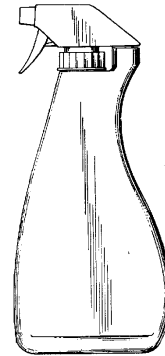


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**In re Morton Norwich Products, Inc., 671 F.2d 1332 (CCPA 1982)**

- What aspects of product design are protectable as a trademark?
- Functionality -> utility -> competitors need to use the design
  - Because it is superior?
  - Because there are no other plausible alternatives?
- Distinctiveness is a separate inquiry from functionality
- Effect of patent on mechanism inside spray head?



**Trade Dress and Product Configuration**

- Trade Dress
  - The packaging materials and other product presentation effects carry source indicating significance
- Product design and shape – Product Configuration
  - Can carry source indicating significance
- Both registrable, but both often protected under § 43(a) without registration





### Traffix Devices v. MDI (2001)



### Trademarks

- Signal a common source, or at least affiliation
- Words, phrases, logos . . .
- Federal / state regimes
- Use in commerce
  - Law of marks is based on use of the brand on goods
  - Exclusivity derives from that type of use in commerce
  - Must:
    - “Affix” the mark to goods
    - Move the marked goods in commerce
  - Registration not needed – but Federal registration is highly beneficial
- Service marks
  - Used “in connection with” services to signal common source
- Certification / Collective marks



## Trademarks

The term "trademark" includes any word, name, symbol, or device, or any combination thereof –

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. 15 U.S.C. § 1127 (Lanham Act § 45)

## Certification Marks

- The term "certification mark" means any word, name, symbol, or device, or any combination thereof –
  - (1) used by a person other than its owner, or
  - (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter,
  - to certify
    - regional or other origin,
    - material,
    - mode of manufacture,
    - quality,
    - accuracy,
    - or other characteristics of such person's goods or services
    - or that the work or labor on the goods or services was performed by members of a union or other organization. 15 U.S.C. § 1127
- Must be open to any producer that meets the standards.








## Collective Marks

- The term "collective mark" means a trademark or service mark –
  - (1) used by the members of a cooperative, an association, or other collective group or organization, or
  - (2) which such cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,
  - and includes marks indicating membership in a union, an association, or other organization. 15 U.S.C. § 1127
- Two possible functions of the collective mark with respect to the association, union, cooperative, fraternal organization or other organized collective group using the mark:
  - As a mark adopted for use only by its members, who in turn use the mark to identify goods or services – mostly treated as ordinary trademarks/service marks
  - Solely to identify the person displaying a mark as a member of the collective group – a membership mark
- The term "mark" includes any trademark, service mark, collective mark, or certification mark. 15 U.S.C. § 1127

## Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976)

- Safari mark
- Alleged infringing uses by Hunting World
  - Safari
  - Minisafari
  - Safariland
- Use as applied to products versus in language?
- Continuum of distinctiveness for a word mark
- Application
  - Generic for clothing
  - Suggestive or descriptive for boots / shoes
    - But, "incontestable"

## Trademark

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## Zatarain's

- Attributes of Zatarain's marks?
- Classification of marks?
- Secondary meaning?
- "Fair use" defense - 15 U.S.C. § 1115(b)(4)

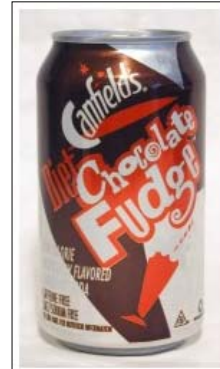


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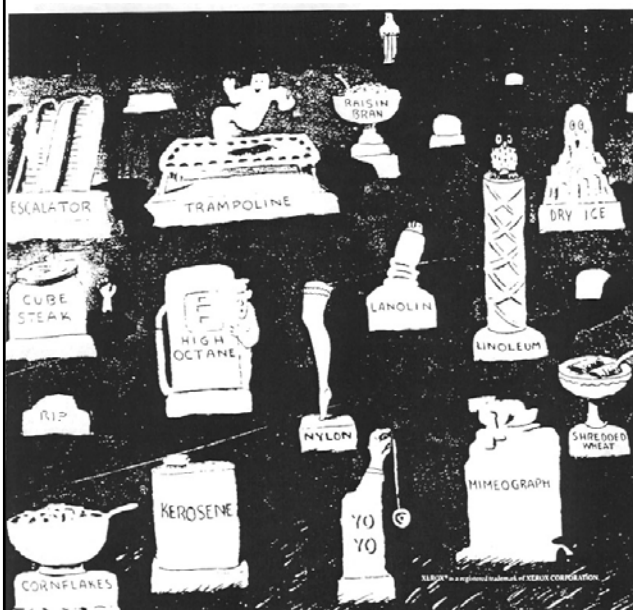
**A.J. Canfield Company v. Honickman, 808 F.2d 291 (3rd Cir. 1986)**

- Mark as applied to diet soda found to occupy 3 different locations on the continuum of distinctiveness
  - Court below said “descriptive”
- Alleged infringing use: “diet chocolate fudge soda” by Concord under its Vintage mark
- Primary significance test for genericness of a word mark
  - Product or Producer
  - What is the product genus?
    - Chocolate soda
    - Chocolate fudge soda
- Classification
  - Not suggestive
  - Not descriptive
  - Did the brand become its own genus?



If a producer introduces a product that differs from an established product class in a particular characteristic, and uses a common descriptive term of that characteristic as the name of the product, then the product should be considered its own genus. Whether the term that identifies the product is generic then depends on the competitors' need to use it. At the least, if no commonly used alternative effectively communicates the same functional information, the term that denotes the product is generic.

**Genericness**



**Once a trademark,  
not always a trademark.**

They were once proud trademarks, now they're just names. They failed to take precautions that would have helped them have a long and prosperous life.

We need your help to stay out of there. Whenever you use our name, please use it as a proper adjective in conjunction with our products and services: e.g., Xerox copiers or Xerox financial services. And never as a

verb: "to Xerox" in place of "to copy," or as a noun: "Xeroxes" in place of "copies."

With your help and a precaution or two on our part, it's "Once the Xerox trademark, always the Xerox trademark."

**Team Xerox. We document the world.**

**In re Budge Manufacturing Co., Inc., 857 F.2d 773 ( Fed. Cir. 1988)**

- (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?
- (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?
- (3) If so, is the misdescription likely to affect the decision to purchase?
- What evidence makes the prima facie case?



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**In re Old Glory Condom Corp., 26 USPQ2d 1216 (TTAB 1993)**

- Filed in 1989
- Registered in 1993
- Cancelled in 2004



unassigned

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### Harjo v. Pro-Football, Inc., 50 USPQ2d 1705 (TTAB 1999) [case not assigned]

- Grounds for refusal
  - **immoral, deceptive, or scandalous matter**, or matter which may **disparage** or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or **bring them into contempt, or disrepute** . . .
  - flag or coat of arms or other insignia [of a jurisdiction]
  - name, portrait, or signature identifying a particular living individual except by his written consent . . .
  - a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be **likely**, when used on or in connection with the goods of the applicant, **to cause confusion, or to cause mistake, or to deceive** [but – Concurrent Registration is a possibility] . . .
  - primarily geographically deceptively misdescriptive of [the goods]
  - [the mark] comprises any matter that, as a whole, is **functional**
  - Unless there is secondary meaning:
    - **merely descriptive** or deceptively misdescriptive of [the goods]
    - **primarily geographically descriptive** of [the goods], except as indications of regional origin may be registrable under section 1054 [Collective and Certification marks]
    - merely a **surname**

### Surnames as marks

- Example - GARAN
  - Registration by Garan, Inc.
    - Fancifully chosen, but also turned out to be a rare surname
  - For use of GARAN on hosiery, used on a variety of clothing . . .



**Maryland Stadium Authority v. Becker, 806 F.Supp. 1236 (D. Md. 1992)**

- Becker's allegedly infringing use of CAMDEN YARDS

- MSA's use?

- unregistered
- before July, 1991?

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

43(a): Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person ...shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.



**Thrifty Rent-A-Car v. Thrift Cars, Inc., 831 F.2d 1177 (1st Cir. 1987)**

- Thrift Cars – Mass, October 1962



- Thrifty – Mass, 1967

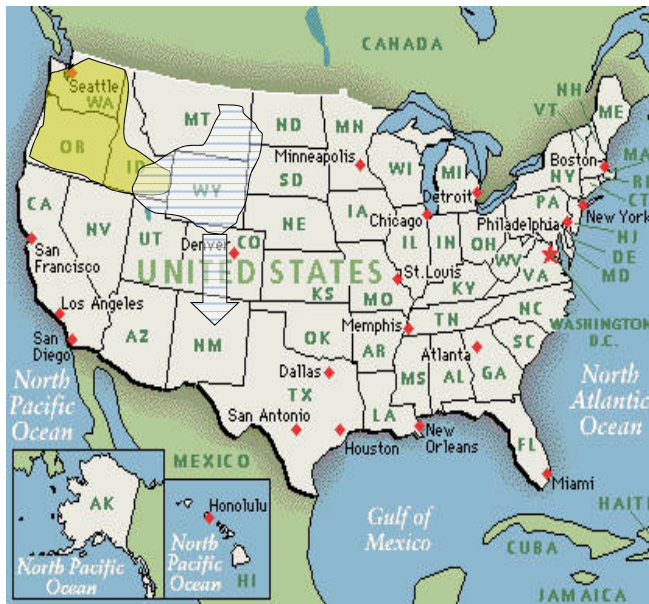
- Federal registration filing: 7/30/1962
- Issued: July, 1964

- Use / priority / where ?

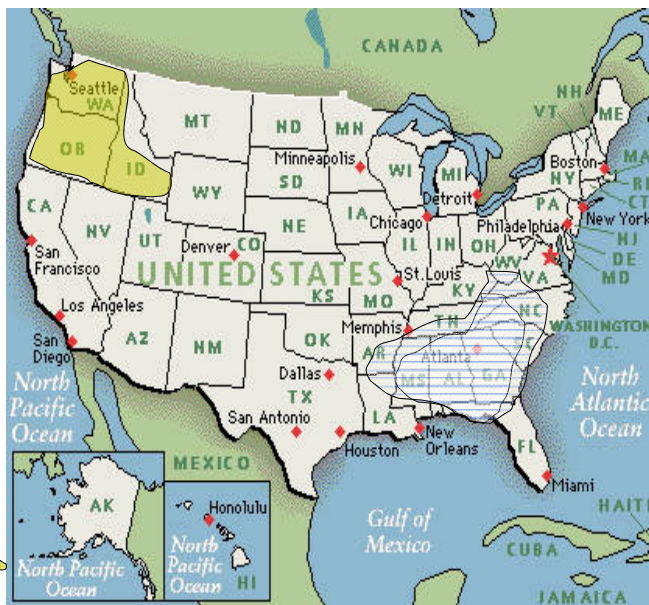
15 U.S.C. § 1115(b)(5) confers upon a junior user, such as Thrift Cars, the right to continued use of an otherwise infringing mark in a remote geographical area if that use was established prior to the other party's federal registration.



- Two c/I users of the same TM
- c/I rule – only protected where products sold or advertised
- Exceptions:
  - Where reputation established
  - Normal expansion of business
  - Anywhere someone intentionally trades on the TM owner's goodwill
- Earlier user has superior rights in area of overlap

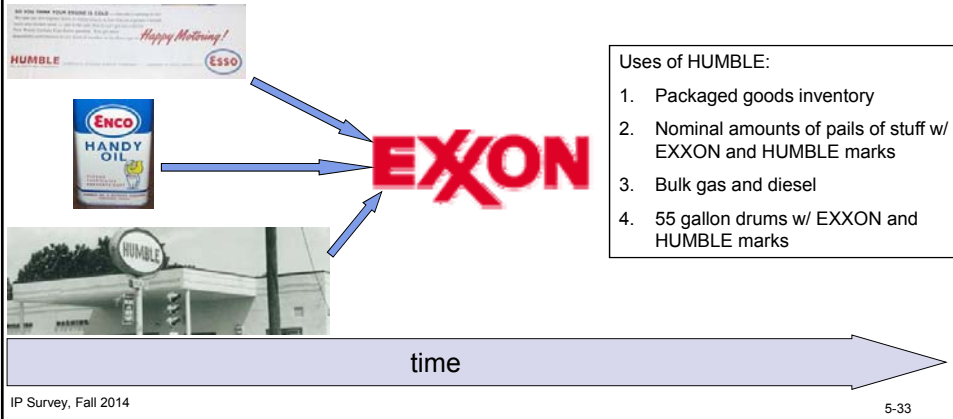


- Earlier c/l user federally registers
- Non-registering user – “limited area” defense
  - Frozen to areas of operation before federal registration
  - Some zone of natural expansion possibly allowed
- In the remainder of the country, the registered user has senior rights



**Exxon Corp. v. Humble Exploration Company, Inc., 695 F2d 96 (5th Cir. 1983)**

- Time period of non-use under Lanham act results in presumption of abandonment
- Use that might serve to block a registration versus use that constitutes “use” so as to not trigger the presumption



**Types of confusion**

- Confusion as to the products
  - Confusion leading to purchase of infringer's product (Sleekcraft) when trademark (“TM”) owner sells the same product
- Confusion as to source
  - Infringer uses TM owner's mark on products the TM owner does not sell at all
  - Two possible types of harm: (i) potentially inferior quality of infringer's products; (ii) if TM owner expands into product area where infringer sells, very high chance of likelihood of confusion
- Confusion as to sponsorship
  - For example, United States Olympic Committee label on soup
- Initial interest confusion
  - Confusion that is dispelled before purchase occurs
- Post-sale confusion
  - Confusion after the sale of a product
- Reverse Confusion
  - A large company adopts the mark of a smaller TM owner
  - Risk is not junior user trading on goodwill of senior, but that the public comes to associate the mark not with its true owner, but with the infringing junior user who may have spent a lot of money to advertise it



### McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126 (2d Cir. 1979)

- McGregor
  - DRIZZLER golf jackets
  - Federally registered in 1965
- Drizzle, Inc.
  - Women's coats
  - Unregistered mark, DRIZZLE, since 1969
- Among the factors
  - Bridging the gap
  - Actual confusion

1. strength of the mark
2. proximity of the goods
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6. type of goods and the degree of care likely to be exercised by the purchaser
7. defendant's intent in selecting the mark
8. likelihood of expansion of the product lines

### Harlem Wizards v. NBA Properties, Inc., 952 F. Supp. 1084 (DNJ 1997)

- Junior user?
  - Washington Bullets
  - Washington Wizards
- Senior user?
  - Harlem Wizards
- Analysis of court's ten factors
- Sponsorship or approval?

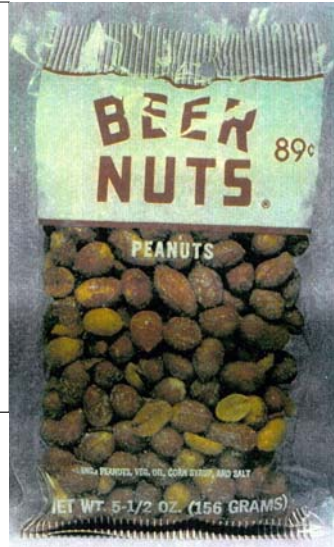
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## Likelihood of Confusion HYPO



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Suave



## Likelihood of Confusion – Prob. 5-7



1. strength of the mark
2. proximity of the goods
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### **Dilution – § 43(c) – remedies for dilution of famous marks (Act of 2006)**

(1) INJUNCTIVE RELIEF.—Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) DEFINITIONS.--(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.
- (iv) Whether the mark was registered . . . on the principal register.

### **Dilution (Trademark Dilution Revision Act of 2006)**

(B) For purposes of paragraph (1), 'dilution by blurring' is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

- (i) The degree of similarity between the mark or trade name and the famous mark.
- (ii) The degree of inherent or acquired distinctiveness of the famous mark.
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
- (iv) The degree of recognition of the famous mark.
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark.
- (vi) Any actual association between the mark or trade name and the famous mark.

(C) For purposes of paragraph (1), 'dilution by tarnishment' is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.




(3) EXCLUSIONS.--The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with--

- (i) advertising or promotion that permits consumers to compare goods or services; or
- (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

(B) All forms of news reporting and news commentary.

(C) Any noncommercial use of a mark.

<u>Dilution – possible types or theories of harm</u>		
Type	“Tiffany” example (famous mark for a jewelry store) [example described in a recent 7 <sup>th</sup> circuit case]	Other Example(s)
Blurring	“Tiffany” for an upscale restaurant	Goldfish  Dupont shoes, Buick aspirin tablets, Schlitz varnish, Kodak pianos, Bulova gowns
Tarnishment	“Tiffany” for a “restaurant” that is actually a “striptease joint”	John Deere   Snuggles   Victoria’s Secret
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<u>Dilution - Tarnishment</u>
<ul style="list-style-type: none"> <li>Definitions/characterizations <ul style="list-style-type: none"> <li>defendant's unauthorized use dilutes by tarnishing or degrading positive associations of the mark and thereby dilutes the distinctive quality of the mark</li> <li>tarnishment is a finding that plaintiff's mark will suffer negative associations through defendant's use</li> <li>the essence of tarnishment <i>is the displacement of positive with negative associations of the mark that</i>, like a claim for blurring, <i>reduces the value of the mark</i> to the trademark owner</li> </ul> </li> <li>Other examples <ul style="list-style-type: none"> <li>CANDYLAND for a children's board game was held diluted by tarnishment by "candyland.com" for an internet web site showing sexually explicit pictures</li> <li>BUDWEISER was held diluted by the use of BUTTWEISER on T-shirts</li> <li>TOYS 'R US was held tarnished by use of ADULTS R US as a domain name for an internet site for the sale of adult sexual products: "adultsrus.com"</li> </ul> </li> </ul>
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**Visa Int'l Service Assn. v. JSL Corp., 590 F.Supp.2d 1306 (D. Nev. 2008)**

- Famous mark
  - VISA
- Allegedly diluting mark
  - eVisa ("EVISA")
- Commercial use element of the legal test, by defendant in commerce, with embedded element of nearly identical diluting mark?
- Six factors of dilution by blurring

**VISA**

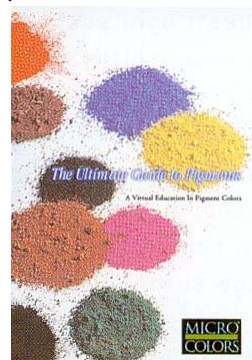


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**KP Permanent Make-Up v. Lasting Impression (U.S. 2004)**

- KP alleged microcolor use since 1990/91
- Lasting 1992 application for Micro Colors, issued in 1993, "incontestable" in 1999
- In 1999, KP's use of microcolor in ad brochure
- Dist. Ct. – on S/J, descriptive fair use, no confusion inquiry
- 9<sup>th</sup> – KP must also prove absence of confusion?
- Supreme Court?



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## Lanham Act § § 32 & 33 portions

- (1) Any person who shall, without the consent of the registrant -
  - (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
  - (b) . . .
  - shall be liable in a civil action by the registrant for the remedies hereinafter provided. 15 U.S.C. § 1114.

15 U.S.C. 1115(b) Incontestability; defenses. To the extent that the right to use the registered mark has become incontestable under section 15 [15 USC 1065], the registration shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce. . . . Such conclusive evidence of the right to use the registered mark shall be subject to proof of infringement as defined in section 32 [15 USC 1114], and shall be subject to the following defenses or defects:

- (1) That the registration or the incontestable right to use the mark was obtained fraudulently; or
- (2) That the mark has been abandoned by the registrant; or
- (3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services on or in connection with which the mark is used; or
- (4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is **descriptive of and used fairly and in good faith only to describe the goods or services of such party**, or their geographic origin; or . . .
- (7) That the mark has been or is being used to violate the antitrust laws of the United States; or
- (8) That the mark is functional; or
- (9) That equitable principles, including laches, estoppel, and acquiescence, are applicable.

## New Kids on the Block v. News America Pub., Inc., 971 F2d 302 (9th Cir. 1992)

- Issue with respect to use of band's name?
- Traditional fair use is for describing
- Nominative fair use is for naming when there is no good alternative
  - "non-trademark use of a mark - a use to which the infringement laws simply do not apply"
- 3-factor test instead of LofC analysis
  - No descriptive substitute
  - Use no more of mark than necessary
  - No suggestion of sponsorship, even if commercial use

Volkswagen could not prevent an automobile repair shop from using its mark. We recognized that in "advertising [the repair of Volkswagens, it] would be difficult, if not impossible, for [Church] to avoid altogether the use of the word 'Volkswagen' or its abbreviation 'VW,' which are the normal terms which, to the public at large, signify appellant's cars." *Id.* at 352. Church did not suggest to customers that he was part of the Volkswagen organization or that his repair shop was sponsored or authorized by VW; he merely used the words "Volkswagen" and "VW" to convey information about the types of cars he repaired.

