

## WHEN IS A USE IN COMMERCE A NONCOMMERCIAL USE?

The current federal dilution statute, section 43(c) of the Lanham Act, creates liability based on the “use of a mark or trade name in commerce,” when that use is likely to blur or tarnish a famous mark. At the same time, the statute characterizes certain activities as non-actionable “exclusions,” including “any noncommercial use of a mark.” Debate exists on whether the statute requires “use *as* a mark,” or “trademark use,” but it is not necessary to resolve that issue before analyzing the noncommercial use exception. Because the “noncommercial use” exclusion logically should be seen as having some meaning even with a “trademark use” requirement, and because proponents of dilution urge the noncommercial use exclusion as the primary means by which the federal dilution provision escapes unconstitutionality under the First Amendment, examination of the appropriate role of the noncommercial use exception is ripe.

This article considers the broadening of trademark dilution since its conception over 75 years ago, and then examines the conflict between current trademark dilution law and the First Amendment, with attention to the distinction created by the Supreme Court between noncommercial speech and protected commercial speech. The article then turns to the statutory exclusion for “noncommercial use of a mark.” It examines the legislative history and past applications of the noncommercial use exclusion and provides recommendations for the future, using both trademark and First Amendment jurisprudence as a guide.

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