

Proposing Policy Limits on Government Marks, or Why I Love NY, But Hate “I ♥ NY®”

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Abstract: Should government rights in marks be different than the rights of private entities? Should government’s relationship to a word, name, symbol, device, or some combination thereof, limit the ability of private entities to use, or to obtain mark-rights, in such otherwise mark-worthy signals? Neither the Lanham Act nor case law provide a general answer. Because of this gap, Senator Conrad Burns of Wyoming attempted to prevent private ownership of “The Last Best Place” by inserting language in an appropriations bill. *See* Last Best Beef, LLC v. Dudas, 506 F.3d 333 (4th Cir. 2007) (enforcing registration ban), *reversing*, 455 F. Supp. 2d 496 (E.D. Va. 2006).

The government relationship was considered legally irrelevant in several recent cases. For example, *R & R Partners, Inc. v. Tovar*, 447 F. Supp.2d 1141, 82 U.S.P.Q.2d 1572 (D. Nev. 2006), granted summary judgment to a government tourism authority for infringement of its trademark “What Happens Here Stays Here,” by a local business’ use of “What Happens in Vegas Stays in Vegas” on tourist merchandise. The court’s analysis did not mention the governmental nature of the plaintiff in deciding either the merits or the appropriate remedy. At the other extreme, GM won a trade dress suit against a toy maker’s HUMMER look-alikes, even though the design’s value was tied to the prestige of the United States military. *See* *General Motors v. Lanard Toys, Inc.*, 468 F.3d 405 (6th Cir. 2006).

The work-in-progress will attempt to formulate a general theory of government-related marks by considering the inter-relationships between the reasons for granting rights in marks and the proper functioning of a liberal, constitutional government.