The Federal Trademark Dilution Act of 1995

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LEGISLATIVE UPDATES

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INTRODUCTION

The concept of trademark dilution has long played an enigmatic role in the development of trademark law. Defined as the gradual whittling away of a mark's distinctiveness, the dilution theory is seemingly at odds with the comfortable trademark standard of "likelihood of consumer confusion." Yet, the dilution theory has persisted throughout the twentieth century despite strong criticism and a dearth of consistent judicial interpretation.

The dilution theory was heretofore merely a creature of individual state legislation. However, on January 16, 1996, President Clinton signed into law the Federal Trademark Dilution Act of 1995.\(^1\) The law provides a federal cause of action for trademark dilution. The law also creates a non-exclusive seven factor test for determining whether a mark is "famous" or distinctive, and provides for injunctive and other relief upon a finding of likelihood of dilution. However, the law does not address uncertainties about the legal basis for dilution, the difficulty in proving dilution, and dilution law's fundamental conflict with traditional notions of trademark law.

Section I of this update will begin by offering an explanation of dilution. It will examine the history underlying the theory of dilution as it has evolved through state law and the new federal dilution legislation. Section II of this update will review the new legislation, and Section III will review the impact that the new legislation may have upon the legal and business communities.

I. BACKGROUND

A. What Is Trademark Dilution?

Since its conception in 1927, dilution theory has had a long and sordid past of misunderstanding, misinterpretation, and general ill use. The definition of dilution, while somewhat ephemeral, has been described in a relatively consistent manner as the gradual whittling away of a mark's effectiveness as a marketplace identifier.\(^2\) This concept in itself seems very simple to grasp. However, applying


the dilution doctrine in practical situations proves troublesome.

Much of the difficulty in applying the doctrine arises out of the natural conflict between traditional trademark law and the dilution concept. Trademark law provides protection to a trademark in order to protect the consumer. The trademark holder is entitled to protect the trademark only insofar as such protection is beneficial to consumers by enabling them to identify quality products or services. Dilution, on the other hand, seems to confer a property-like right upon the trademark holder. The holder is entitled to maintain the mark against uses that, although not confusing, may nevertheless over a period of time diffuse the power of a mark to identify itself in the marketplace. It is this property-like notion that creates much of the criticism and concern over the federal dilution statute. In practice, however, many courts either ignore the concept of dilution, or instead, implied a likelihood of confusion standard. This latter approach merely duplicated the protection, if any, afforded under the Lanham Act.

An example of a dilution scenario is illustrated in a well-known case involving the use of the name “LEXUS” for luxury cars. In that case, the owner of the registered mark “LEXIS,” an on-line computer database for professionals, sought to enjoin the use of the just emerging mark “LEXUS” for luxury cars. Since the products were dissimilar, that is, information versus automobiles, and since the market for each product was different, there was no likelihood of consumer confusion. The federal Lanham Act trademark claim was unsuccessful. However, the case was brought in New York which had a trademark anti-dilution statute at the time. To succeed under a dilution cause of action the plaintiff need not show a likelihood of confusion, only a likelihood of dilution. In the trial court, “LEXIS” prevailed under the dilution theory. The trial court found a likelihood that using a similar mark on dissimilar goods would gradually whittle away the marketing value of the “LEXIS” mark. This whittling away would cause the “LEXIS” mark to lose its unique place in the minds of the consumers. The trial court then enjoined the “LEXUS” mark from being used in the entire nation. This injunction illustrates one major problem with the state anti-dilution statutes. While only twenty-five states had anti-dilution laws, the New York trial court issued a nationwide injunction prohibiting actions that were illegal in only one-half of the states.

Problems with the patchwork of state anti-dilution laws, as well as the misap-
plication of dilution doctrine, led to efforts to provide for a cause of action on a national scale. These efforts began in the mid-1980s and culminated in the present legislation. The legislation, however, answers few of the problems encountered by similar state statutes. In order to understand the problems, both those addressed by the current legislation and those that are not, it is necessary to review some of the baggage carried by the term "dilution."

B. A Brief History Of Dilution Law

1. Dilution's Humble Birth

The origin of the dilution theory is generally attributed to a Harvard Law Review article written in 1927 by Frank Schecter. The Schecter article never coined the term "dilution," but did express the definition that has come to embody the view of dilution taken by most commentators today. Schecter defined the problem as "the whittling away or dispersion of the identity and hold upon the public mind of the mark." This definition has survived well enough to be included in contemporary trademark vernacular.

From Schecter in 1927, the dilution theory received sparse notice. However, in 1933, the idea of dilution began to take shape in the nation's courts. In the celebrated case of Tiffany & Co. v. Tiffany Productions, a New York court granted relief to the famous jeweler against the defendant movie theater for attempting to use the Tiffany name. The court used dilution terminology, as opposed to confusion terminology, to justify its decision.

After the Tiffany case was decided in 1933, no significant advances were made in the dilution rationale. In 1946, the Lanham Act was passed; however, it did not provide any dilution protection. One year later, however, the first state anti-dilution measure was passed.

2. State Statutes And Judicial Creation

In 1947, the first state anti-dilution statute was passed by Massachusetts. After Massachusetts, many other states adopted similar laws. The International Trademark Association (ITA) even developed and urged states to adopt a model trademark dilution bill. The state laws largely follow the ITA model and provide injunctive relief on a finding of likelihood of dilution. Nonetheless, between the Tiffany case in 1933 and 1977, courts were extremely reluctant to apply dilution principles despite the clear authority to do so from the various state legislatures. The only case to apply dilution principles effectively during that

7. Id. at 825.
time span was a Seventh Circuit case applying Illinois law. In that case the court found that the use of the mark "POLAROID" in conjunction with a heating and refrigeration business diluted the stronger mark "POLAROID" as used for cameras. The court went on to say that if the dilution statute is not applicable to this situation, it is useless because it adds nothing to the established law of unfair competition.

Dilution was brought into the mainstream in 1977. In that year, Allied Maintenance Corp. v. Allied Mechanical Trades, Inc., was decided by a New York court. The court finally provided a judicial definition of dilution that was consistent with Schechter's understanding of the problem. The court stated that dilution was not confusion in the public mind, but rather a "cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark." Ironically, in defining dilution, the court found that no such dilution existed in the case before it. The court limited dilution protection to those marks that were sufficiently distinct. The court found that the plaintiff did not have such a mark.

The Allied Maintenance case seemed to signal a newfound willingness by courts to embrace the dilution doctrine. But commentators differ on the actual impact of the case on dilution and trademark law. In Allied Maintenance's wake, dilution was pleaded almost boilerplate in jurisdictions that recognized the dilution theory. Kenneth Port remarked that the courts have remained extremely hesitant to apply dilution rationale after Allied Maintenance. He found that the dilution issue was raised in federal courts of appeal 159 times since 1977. Of those 159 cases, only forty-three considered dilution as more than boilerplate. Of the original 159 cases, only ten cases resulted in an injunction based in any part on dilution. Only four cases based their sole rationale on dilution.

However, other commentators feel that the dilution rationale has been fully recognized by the courts. One such commentator has stated that the law has developed to a point where it can be said that there is an almost complete judicial acceptance of a correct dilution approach. This comment was based on seeming acceptance of the dilution rationale by the Second, Fifth, Seventh, and Eleventh Circuits in their own case law. Other commentators have remarked that dilution is "one of the most potent weapons in the arsenal available to the plaintiff in protecting distinctive trademarks." The Restatement on Unfair

13. Id. at 837.
14. Id.
16. Port, supra note 11, at 440.
17. Allied Maintenance, 369 N.E.2d at 1165.
18. Id.
19. Port, supra note 11, at 441.
21. Id.
Competition reiterates the view that while courts were reluctant to utilize the dilution rationale before the *Allied Maintenance* case, there has been a general acceptance of the theory in the years since. However, the Restatement cautions that courts continue to confine the cause of action for dilution to cases in which the protectable interest is clear and the threat of interference is substantial.\(^3\)

While courts were more willing to embrace dilution as a complement to traditional trademark causes of action, they were wary of creating a broad dilution remedy. Perhaps for this reason alone, a federal dilution statute was contemplated.

### 3. The Call For Federal Legislation

At the time federal legislation was first considered, approximately half of the states had anti-dilution laws. At the end of the 1980s the idea of a federal dilution statute was being considered by lawmakers. The major problem with the various state dilution statutes was made clear by the aforementioned "LEXUS" case.\(^2\) In that case, the trial court held that the two marks "LEXUS" and "LEXIS," for a luxury car and an on-line database respectively, were not likely to be confused, yet use of "LEXUS" would dilute the previously registered mark "LEXIS." The Second Circuit Court of Appeals reversed, stating that the "LEXIS" mark was distinctive only to those in the legal profession (approximately one percent of the population). In order to qualify for dilution, the court reasoned, the mark must be distinctive to the general public.\(^2\)

The trial court opinion and the court of appeals opinion touch on two of the major problems of state anti-dilution statutes: (1) inadequacy of an injunction without the force of federal law and (2) difficulty in determining when a mark is distinctive. As a result of the "LEXUS" case, lawmakers sought to introduce a federal cause of action as early as 1988.\(^2\) While there was little opposition debate on the bill, it was deleted from the comprehensive trademark reform package passed by the Senate later that year.\(^2\) However, the issue was revived in the 1990s largely as a result of the United States Trademark Association’s perseverance.

### C. The Problem With State Dilution Laws

State dilution laws were subject to a variety of problems. Most notable among these problems was the difficulty in obtaining a remedy. The only remedy available under most of the state laws was an injunction preventing the use of the

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\(^{25}\) Id.

diluting mark. However, since only half of the states had dilution laws, the scope of the injunction became a major issue. If an injunction was issued only for the jurisdiction granting the injunction, Illinois for example, the dilution mark could be used in any other state. The effect of such use would eventually spill over into Illinois and cause the very dilution prohibited by the injunction. On the other hand, if a nationwide injunction was granted, as happened originally in the "LEXUS" case, the legal basis for applying the injunction in states without anti-dilution laws was extremely suspect. 28 Because dilution law at the time was not part of a federal scheme, uniform relief was either unavailable or impracticable. This "patchwork" system of anti-dilution law was inadequate to protect distinctive marks which are by definition nationally recognized and require a nationwide injunction. 29

A second problem for state anti-dilution law is improper judicial application. In most cases, dilution as a state claim was pleaded alongside the more important Lanham Act trademark infringement claims. 30 Therefore, most of the rulings on dilution were by federal courts applying a state's law based on pendant jurisdiction. 31 These results led to questionable precedential value of any dilution interpretation which, in turn, led to a judicial reluctance to apply the dilution rationale at all. In fact, some courts actually implied a confusion standard similar to traditional trademark law in order to find dilution. This had the effect of making the dilution cause of action superfluous. 32

A third problem with state anti-dilution law is its feeble attempts to define the varying degrees of distinctiveness. Courts have found considerable difficulty in drawing the line between a mark that is distinctive enough to be diluted and a mark that is not so distinctive. 33 While some marks, such as "TIFFANY" for jewelry, 34 are considered well known enough by consumers to be diluted, the mark "LEXIS" 35 was considered only distinctive to a small percentage of the nation's population. The problem with dilution in this respect is that the dilution concept is a prediction of what will happen over time. Therefore, the analysis of whether a mark is distinct is subjective. Evidence of the future value of a mark to consumers is almost impossible to quantify.

The dilution theory also raises First Amendment concerns. 36 The typical sce-
Amendment concerns of free speech usually trump any claim of trademark dilution.  The problem for dilution is much the same as that for traditional trademark protection. If the allegedly infringing use is for criticism purposes, it is usually upheld as an example of free speech. However, if there is a profit motive for infringing the mark, the speech may be characterized as commercial and thereby deserving of less protection.

One final problem encountered by the state anti-dilution statutes is the possible preemption of dilution law by the Lanham Act. While the majority of courts have held that state dilution protection can exist alongside federal trademark protection, at least one court has decided otherwise. In United States Jaycees v. Commodities Magazine, Inc., a federal district court applying Iowa law held that Iowa's anti-dilution statute was preempted by the Lanham Act. The court's reasoning was that the Lanham Act was designed to give uniform, nationwide trademark protection. The state statutes that provided additional protection created an uneven set of standards contradicting the Lanham Act's intention of uniformity. However, most of the courts who have discussed the preemption issue have declined to preempt state law.

These abovementioned problems have plagued the development of dilution law in the United States. The new federal legislation was designed to combat these flaws in the dilution theory, and is successful in addressing the flaws of dilution in varying degrees.

III. THE LEGISLATION

The new legislation, titled the Federal Trademark Dilution Act of 1995, creates a federal cause of action for trademark dilution by adding section 43(c) to the Lanham Act. The Act is limited to protection of "famous" marks. While the act is similar to the model bill after which most state statutes were patterned, it does have some striking differences. The Act defines dilution as:

the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception.

1013 (1987) (Defendants spoofed plaintiff's catalog by placing a similar ad in its adult magazine. The court held that trademark rights do not entitle the owner to quash an unauthorized user who is expressing a point of view). But see Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397 (8th Cir. 1987), cert. denied, 488 U.S. 933 (1988) (rejecting a First Amendment defense on the grounds of commercialism to defendant's use of T-shirts with a logo mocking the plaintiff company which displayed the message "Mutant of Omaha").

38. See L.L. Bean, 811 F.2d 26
39. Id.
40. See Mutual of Omaha, 836 F.2d 397.
41. 661 F. Supp. 1360 (N.D. Iowa 1987).
42. Id. at 1368.
43. Id.
44. See Welkowitz, supra note 4, at 12.
the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception.\(^4\)\(^5\)

This definition makes it clear that likelihood of confusion is not to be considered as a factor in the dilution analysis.

### A. The Seven "Famous" Factors

The Act steps beyond the limits of most state statutes and offers a list of factors to be considered as to whether a mark is "famous." The list is similar to the factors to be used in judging the likelihood of confusion but is geared towards discovering a likelihood of dilution. The Act lists the factors to be considered as the following:

- (A) the degree of inherent or acquired distinctiveness of the mark;
- (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
- (C) the duration and extent of advertising and publicity of the mark;
- (D) the geographical extent of the trading area in which the mark is used;
- (E) the channels of trade for the goods or services with which the mark is used;
- (F) the degree of recognition of the mark in the trading areas and channels of trade of the mark's owner and the person against whom the injunction is sought;
- (G) the nature and extent of use of the same or similar marks by third parties; and
- (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.\(^6\)

These measures will provide much needed guidance on how to decide whether a mark is "famous."

### B. Remedies

The new federal legislation provides an injunction as the main remedy for a successful dilution suit.\(^7\) The obvious asset of such an injunction is that it is now based upon federal law, and therefore is enforceable nationwide without any doubt as to the propriety of doing so. The new legislation also allows for damages in certain situations.\(^8\) The successful trademark owner is entitled only to injunctive relief, unless the diluter is found to have willfully intended to trade on the owner's reputation, or to have caused dilution of the famous mark.\(^9\) In such an instance, the owner of the famous mark is entitled to profits, damages, and costs up to treble amounts as well as destruction of the offending articles.\(^10\)

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46. Id. at 985-86.
47. Id. at 986.
48. Id.
49. Id.
50. Id. (applying the damage provisions of §§ 35(a) and 36 of the Lanham Act, 15 U.S.C. § 1117 (1996)).
C. Fair Use And News Reporting

The new legislation was also sensitive to First Amendment concerns. The Act contains a provision that exempts fair use of a famous mark in a comparative commercial advertisement to identify the competing goods of the owner of the famous mark.\textsuperscript{51} The exemption is also extended to noncommercial use of a mark.\textsuperscript{52} Finally, pursuant to concerns raised in legislative session, the law was passed with a provision exempting all forms of news reporting and news commentary.\textsuperscript{53} Lack of consideration for these free speech concerns is what caused the 1988 dilution provision to be deleted from the trademark reforms passed at that time.\textsuperscript{54}

The law, while seemingly straightforward, solves only some of the problems encountered by the state anti-dilution laws. In the next section, the strengths and weaknesses of the law will be examined.

IV. IMPACT

A. Strengths

The Federal Trademark Dilution Act bears the virtues of good legislation in that it accomplishes its intended goals. To illustrate, the legislation provides a remedy to the patchwork system of state dilution laws. The problems of inconsistent dilution standards and specious nationwide injunctions were perhaps the most criticized features of the state anti-dilution laws. The federal law solves these problems nearly completely. A successful litigator under the federal statute will, by definition, be able to enforce nationally an injunction against the diluting use of the mark. No longer will a famous mark holder have to settle for a questionable dilution verdict from a state court in an attempt to enjoin what is a nationwide problem. This uniformity is the primary reason the federal law was passed.\textsuperscript{55}

The other major strength of the federal legislation is that it provides for a measure of consistency in the application of dilution principles. Instead of federal courts applying state law, the Act will allow federal courts to apply federal law. This will, by its very nature, provide consistency to the definition and interpretation of dilution. Through a case by case analysis of the dilution problems arising before them, the federal courts will be able to lay down sound legal analysis of the dilution rationale, and to provide case law with precedential value.

\textsuperscript{51} Id.

\textsuperscript{52} Id. An example of a noncommercial use of a mark would be as follows: A company's trademark was used in a political cartoon criticizing that company's policies. In such a case, the critical nature of the cartoon is protected as free speech. As the use of the trademark is not intended to gain a profit at the expense of the company, such use is noncommercial.

\textsuperscript{53} Id.

\textsuperscript{54} Dominic Bencivenga, Trademark Dilution, New Law Extends Protection Of Famous Marks, N.Y.L.J., Jan. 25, 1996, at 5.

\textsuperscript{55} See, e.g., id. at 5; News & Comment, Legislation, Trademarks, 50 PAT., TRADEMARK & COPYRIGHT L. (BNA) 711 (1995).
While not quite as effective as the previous strengths, the Act’s nonexclusive factors for determining whether a mark is “famous” provide a clearer legislative mandate on an intangible idea. The trouble with the state dilution statutes is that no solid definition was ever enunciated of which marks were distinctive enough to be diluted. The inclusion of the seven factors in the text of the legislation will provide a starting point for federal courts to decide what exactly constitutes a famous mark. While the ultimate decision on this issue will be some time in the making, the list also provides litigators and the business world some idea of the protection they can expect to receive from trademark law on a national scale.

The new legislation also makes clear that noncommercial, critical, and comparative advertising uses of a famous mark are not dilutions. These provisions allow the Act to pass Constitutional muster. Much of the internal debate of cases dealing with free speech and fair use issues deals with exactly the matter exempted by the statute itself. In essence, the legislation has learned from the mistakes of courts attempting to apply dilution principles to parody, comparative advertising, and educational use of trademarks. The strengths of the legislation rationalize its existence. However, as mentioned above, the federal legislation is not without its problems.

B. Weaknesses

The Act fails miserably at what it does not attempt to accomplish. This statement, while not profound, suggests that the legislation could have taken cognizance of other problems within the dilution rationale. For one, the definition of dilution provided in the statute gives no additional insight into the problems of the state statutes in defining when dilution was occurring. The definition in the federal legislation is stated in such broad terms that any lessening of value could be considered dilution. The broad terminology used comes dangerously close to providing the owner of a famous mark a monopoly on not only the mark, but anything resembling the mark. This concept brings us to a near recognition of the trademark as a property right, subject to trespass and invasion.

Furthermore, this property-like right is in direct conflict with trademark law. One of the reasons trademarks were developed is to aid the consumer. The mark holder was entitled to its benefit only as an incentive to aid the consumer in easy identification of product quality. Dilution, as an abstract rationale, is designed to

56. The typical state anti-dilution statute provides no definition of dilution but states that “likelihood of injury to business reputation or of dilution of the distinctive quality of a mark...shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.” ME. REV. STAT. ANN. tit. 10, §1530 (West 1980).

57. The federal legislation defines dilution only as follows: “the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception.” 109 Stat. at 986.

58. For an expanded view on the problem of recognizing the trademark as a property right, see generally Port, supra note 11.
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protect the consumer in the long run from losing the ability to identify the mark in the marketplace. However, the application of the dilution doctrine suggests more of an attempt to reward the mark holder for years of advertising, quality production, and maintenance of the mark. If this is true, the Lanham Act is offended. The new legislation not only does nothing to reconcile the two differing policies, but seems to completely ignore the dichotomy. Also, there is no guarantee that, even with the seven "famous" factors, courts will do a better job of ferreting out "true" dilution from supposed dilution. Indeed, since 1933 courts have found this to be a daunting task. The fact that dilution is at odds with traditional trademark reasoning, the broad definition of dilution, and the large amount of discretion seemingly given to the courts to define a famous mark, all work against the true strength of the statute, which is its uniformity of law.

Also working against the law's strength is the fact that the federal act is not intended to preempt state laws. In what seems to be illogic, the federal statute is designed to augment state laws and not preempt them. This, however, does not fit within the Lanham Act's desire for uniformity. Prior to the passage of the new legislation, the Lanham Act preempted the field of unfair competition in all areas that it addressed. The peaceful coexistence of both a federal dilution statute and the state statutes can only be rationalized if state statutes are limited to those activities that are solely intrastate in accordance with the Commerce Clause. However, it seems unlikely that a famous mark could ever exist as solely intrastate given wide interpretation of the Commerce Clause.

However, these weaknesses are not threats to the continued vitality of the law. The weaknesses of the new legislation were present in the state statutes. This dilution concept has been embraced to some extent by the judiciary, the legislatures, and, certainly, the big business of America.

V. CONCLUSION

The United States has come a long way in grappling with the notion of trademark dilution. From the fledgling ideas of a 1927 commentator who saw a gap in traditional trademark protection to the new federal legislation, dilution has suffered long periods of neglect and misuse with brief moments of enlightenment. The federal legislation is a valiant step towards increasing the frequency of these moments. It counters the long-standing problem of national injunctions merely by virtue of it being a federal act. It provides a list of factors to be considered by any federal judge in deciding whether a mark is worthy of dilution protection. It sets out the framework by which the courts of this nation can systematically, gradually, and consistently develop the dilution rationale and apply it to the realities of the business community.

As of the time of this article, successful preliminary injunctions have already been issued under the Act. A preliminary injunction was granted for the plaintiff

in *Hasbro, Inc. v. Internet Entertainment Group, Ltd.* 60 In this case, the defendant operated an on-line, adult-oriented internet site named “candyland.com.” 61 The plaintiff is the registered owner of the trademark “CANDYLAND” for a children’s board game. 62 The injunction was issued based upon a likelihood that Hasbro would prevail on the merits of its dilution claim under both the federal act and the Washington state anti-dilution statute. 63 The injunction ordered the defendant to immediately dismantle the offending internet site and refrain from using the “candyland.com,” or similar, name. 64 While the order is not a decision on the merits under the new legislation, the Act is already being used as a formidable tool by owners of famous marks to combat dilution.

Another example is the successful reclamation of the internet moniker “avon.com” from a private individual by the Avon corporation. In this case, the individual had successfully registered the internet name before the Avon corporation even became interested in using the internet as a marketing tool. Nevertheless, the Avon corporation was successful under the federal dilution act. 65

The new statute places the United States in harmony with other nations as well. The provisions of the dilution statute pertain to both registered and unregistered marks as advocated by the United States’ adherence to the General Agreement on Tarriffs and Trade (GATT). In an era where trademarks are frequently appearing internationally, providing reciprocal protection is of much value to foreign and domestic business.

The dilution rationale does leave some troublesome doubts. Unwise overapplication of dilution doctrine will increase the property-like right of the trademark holder beyond the expectations envisioned by traditional trademark theory. The federal act is broad enough in its definition of dilution to allow such a result if the courts are not careful in their rulings. Dilution should not be allowed to swallow whole the protection, or lack thereof, provided by trademark law.

The call for a national standard of dilution was strong and successful. The strength of providing a uniform system of dilution law seriously outweighs the weaknesses associated with the dilution theory. It remains to be seen what the courts will do with the new legislation.

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61. Id.

62. Id.

63. Id.

64. Id.