Trademark Dilution and Corporate Personhood

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Sandra L. Rierson, *The Myth and Reality of Dilution*, 2012 **Duke L. & Tech. Rev**. __ (forthcoming), available at SSRN.

It's become almost passé to decry our federal trademark dilution laws. The laws – first passed in 1995 and amended in 2006 – protect "famous trademarks" against uses that are likely to dilute their distinctiveness, without regard to any confusion among consumers or competition between the parties. Early critics warned that passage of the anti-dilution statute marked a turning point in trademark law: by giving famous trademark holders rights against even non-confusing uses of their marks, the law created "property"-like rights in trademarks. The initial commentary on the statute focused mainly on the costs associated with this increasingly absolutist approach to trademark rights.

After several years of witnessing the dilution laws in action, however, the nature of the commentary has shifted. Scholars have gone from a state of wary watchfulness to one of bemused head-scratching, as they have unpacked the theoretical underpinnings of the doctrine and observed its treatment in the courts. Dilution laws, it turns out, are a solution in search of a problem, and have had little practical effect. We have learned that consumers can handle linguistic clutter, so the supposed harm from dilution – the gradual whittling away of a mark's distinctiveness – lacks empirical support. We've heard that the fear of famous trademark holders – that third parties have an incentive to adopt their mark in entirely unrelated markets – defies reality, in which businesses have little interest in replicating someone else's utterly irrelevant mark. And we've been told that the dilution claim has made virtually no difference in the outcome of trademark litigation. No doubt because good old-fashioned trademark law gives owners rights to prevent uses in widely disparate markets, the owners of famous trademarks didn't need this new statute to protect them against use of their marks even on unrelated products.

Given all of this, it seems curious that mark owners cling so fiercely to their newly minted legal right. Why, in the absence of any real economic threat from dilution, do trademark holders view dilution laws as so essential to their IP arsenal? In this article, Sandra Rierson proposes one possible answer: that dilution laws have little to do with economics and more to do with corporate "moral rights." In Rierson's view, the dilution laws are part of a broader legal and societal trend that embraces corporate personhood and anthropomorphizes brands. If corporations are people, and brands project aspects of their personhood, then why not protect them against third-party uses that distort and degrade? Rierson's article explores the moral-rights justification for dilution laws, and finds it dangerous and normatively flawed.

While the moral-rights argument may have motivated this project, the value of Rierson's article lies as much in describing and situating the dilution laws as it does in elaborating her moral rights claim. The article identifies three distinct objectives: to establish the illusory nature of the harm that dilution laws purport to address; to identify the costs imposed by dilution protection; and to unmask and appraise the moral rights motivation. In the course of fulfilling these goals, Rierson offers a comprehensive and readable intellectual and doctrinal history of dilution law in this country. While she covers a lot of familiar terrain, her narrative does yeoman's work of compiling and consolidating the work of other scholars and harnessing it to support her normative points. But her project is not merely descriptive and derivative; she builds on the existing critiques in insightful ways. In discussing the harms from

dilution protection, in particular, she offers a thoughtful account of the value that "word play" can serve in a competitive market. CHARBUCKS coffee, she argues, reflects the use of word play and humor to call attention to a newcomer to the coffee market – a pro-informational use of language that the trademark laws should welcome rather than condemning. In this and other ways, Rierson asks us to think outside the box about whether the harms from dilution protection outweigh the theoretical harms from dilution itself. I'm not sure I fully agree with her moral rights explanation for dilution laws – I think dilution laws resemble corporate rights of publicity as much as they do moral rights claims – but she offers a cogent argument that dilution protection resembles a moral right of integrity for corporate creators.

Even in the crowded field of dilution articles, this one is worth a read. It offers an engaging account of the history and evolution of dilution laws, a thorough discussion of some of their warts, and a creative new look at why corporations care so deeply about this curious form of legal protection.

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