# 15.30 Trademark Dilution (15 U.S.C. § 1125(c))

**Comment**

In 1995, Congress passed the Federal Trademark Dilution Act (“FTDA”), which remained in effect until 2006, when Congress passed the Trademark Dilution Revision Act of 2006 (“TDRA”). The TDRA significantly modified the FTDA, including overturning *Moseley v. V. Secret Catalogue, Inc.*, 537 U.S. 418 (2003), which held that a plaintiff must prove actual dilution under the FTDA. Among other things, the TDRA established a “likelihood of dilution” standard (providing relief for “likely” dilution), eliminated the definition of “dilution,” added definitions of “dilution by tarnishment” and “dilution by blurring,” and modified the “fair use” exclusion.  *See generally Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1165-71 (9th Cir. 2011). Thus, case law that pre-dates the TDRA generally should not be relied on in a dilution case.

In *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 869-71 (9th Cir. 2020), the Ninth Circuit provided an extensive discussion of the concept of trade dress dilution.

In *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 143 S. Ct. 1578 (2023), the Supreme Court held that the “noncommercial use” exclusion to trademark dilution does not include “every parody or humorous commentary.” 143 S. Ct. at 1592. That is, the fair-use exclusion, 15 U.S.C. § 1125(c)(3)(A), “has its own exclusion: It does not apply when the use is ‘as a designation of source for the person’s own goods or services.’” *Id*. Put differently, if the alleged diluting mark is used as a trademark, the defendant cannot avail itself of the fair-use exclusion for trademark dilution.

*Revised August 2023*