Expansion and Contraction with the TDRA:
A VERY Preliminary Look

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Clarifications in the TDRA

- Tarnishment covered explicitly (+)
- Applies to marks with both inherent and acquired distinctiveness (+)
- Attempt to clarify scope of exclusions, including parody and critique (-)
Key Changes

- Likelihood of dilution rather than actual dilution

- Niche or limited geographic fame is not sufficient

  - Fame under the TDRA:
    - Mark is “widely recognized by the general consuming public of the United States as a designation of source”
(Lanham Act Cases With & Without Dilution)
Why Do We See Little Change?

- Many incidental mentions
- Most tacked on to a laundry list of other claims
- Cases generally turn on traditional infringement
Dealing with the Question of Fame
In the past 6 months:

famous: Nike (2)
“for dummies”
Levi-Strauss
Audi
but also Global Van Lines
Chem-Dry
(possibly: Tempur-Pedic)
And what doesn’t

- Tyler Green
- Air Cargo News
- Cosi’s

- Not quite clear how to apply the indicators of what constitutes fame:
  (e.g., court in Cosi’s merged fame factors and “likely to cause blurring” factors)
Expansion of Dilution Through Change from Actual to Likelihood of Dilution

- Few cases thus far turning on evidence of “likelihood of dilution”

- One survey case published on the issue in the past 11 months
The Puzzle: Why so little evidence of activity?

- Too soon?
  - Affected cases are settling, so need to look at filed cases

And/Or

- Some circuits already limited fame
- Few fact patterns actually need/fit a dilution action (e.g., counterfeiting -> likelihood of confusion)
Long-Term Effects of TDRA?