

SCHECHTER'S IDEAS IN HISTORICAL CONTEXT AND DILUTION'S ROCKY ROAD

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Abstract

Dilution as a theory of trademark liability is something of a mystery. The theory persists despite an extremely poor fit with traditional trademark doctrine and standard trademark policies. This Article explores the mystery of dilution by tracing it back to its origins in Frank Schechter's famous 1927 Harvard Law Review article, The Rational Basis of Trademark Protection. Schechter's argument for dilution must be understood against the broader economic, jurisprudential, and doctrinal background of his time. Schechter was a legal realist and his arguments for dilution were quintessentially realist in character. He believed that protecting marks from dilution was the true rationale for trademark protection because it best fit the way marks actually functioned in the marketplace. He urged courts to adopt the dilution theory because he believed that frank recognition of the true basis for trademark protection would lead to better decisions. Yet dilution never made serious headway until the late 1940s. The reason is not because Schechter's contemporaries rejected the idea in principle, but rather because they saw a strategic advantage to using broad confusion theories to expand trademark protection. When states began to adopt anti-dilution statutes in the late 1940s, two developments played an important role. First, dilution found a strong and aggressive advocate in the person of Rudolf Callmann, and second, political factors favored action on the state level. This history of dilution's origins and early reception provides useful background for understanding current debates and also helps explain why dilution is so much more controversial today than it was in Schechter's time.

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