



## Article

# Rethinking Trademark Dilution in Jordan: Addressing Ambiguities and Aligning with Global Standards

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**Abstract:** This paper critically analyses the application of the trademark dilution doctrine under Jordanian trademark law, exposing fundamental deficiencies arising from statutory ambiguity and inconsistent judicial interpretation. The indeterminate definition of a “well-known” trademark in the second section has led to an indiscriminate classification of foreign marks as inherently well-known, resulting in courts extending automatic dilution protection without a rigorous evidentiary assessment. This practice fosters an implicit presumption favouring foreign trademark holders, potentially disadvantaging domestic marks that may not receive commensurate protection, thereby undermining the principle of equitable trademark enforcement. This paper argues for a systematic recalibration of Jordan’s dilution framework. A comparative analysis of the well-established dilution doctrines in the United States and European Union identifies jurisprudential best practices that could enhance the doctrinal coherence and judicial application of dilution protection in Jordan. Furthermore, drawing on the WIPO Joint Recommendation as a normative foundation, the paper proposes legal reforms to rectify inconsistencies, ensuring a more balanced and principled approach to trademark dilution. We argue that aligning Jordan’s legal framework with international standards strengthens the discourse on harmonising intellectual property law and ensuring equitable trademark protection in emerging markets.

**Keywords:** well-known trademarks; dilution; comparative law; Jordan; United States; EU law



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## 1. Introduction

The Free Trade Agreement between the United States and Jordan (US-JO FTA) (Malkawi 2008, p. 28) gives legal effect to Articles 1 to 6 of the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999), which was adopted by the General Assembly of the World Intellectual Property Organization (WIPO) and the Members of the Assembly of the Paris Union for Industrial Property. Although this Joint Recommendation (hereinafter WIPO JR) is a form of ‘soft law’ and therefore not legally binding on its own, the US-JO FTA (2000) renders its provisions enforceable between the two countries. Notably, the WIPO JR includes obligations to protect well-known marks from ‘dilution’—a form of harm that occurs when a famous mark’s distinctiveness or reputation is weakened, even in the absence of consumer confusion (Dinwoodie and Dreyfuss 2009, p. 28; Ramsey 2010, p. 432; Kur 2013, p. 796). As a result, this form is regarded as TRIPS-Plus (Correa 2007, p. 185). The dilemma lies in the vagueness of the dilution doctrine in the Jordanian Trade Mark Law (TML), which reflects the lack of in-depth knowledge of the Jordanian legislator on the true meaning of the concept of dilution. Consequently, Jordanian legal practitioners are incompetent in dealing with the doctrine of dilution.

This paper addresses the current imbalance in trademark rights under the Jordanian Trade Mark Law, where local trademarks often lack sufficient protection against dilution compared to foreign ones. Among Jordanian legal practitioners, there is a common assumption that foreign trademarks are inherently “well-known” and automatically deserve dilution protection, while local trademarks are frequently overlooked (Al-Hneeti 2015, p. 43). This perception, shared by courts and practitioners, has led to dilution protections favouring foreign trademarks almost exclusively—a concern raised by several Jordanian scholars. As a result, Jordanian businesses investing considerable resources into building well-known trademarks within the country may struggle to secure adequate protection against foreign competition due to these misconceptions around the dilution doctrine.

This paper proposes a legal framework within Jordanian trademark law to ensure fair and equal protection for domestic and foreign trademarks against dilution. The current system suffers from inconsistencies that often favour foreign marks, creating an uneven playing field for Jordanian businesses. The paper first examines gaps in existing legislation and case law, highlighting ambiguities that weaken the effectiveness of dilution protection. It then looks to the well-established approaches in the United States and the European Union, drawing lessons from their legal frameworks to inform potential reforms in Jordan. Drawing on these comparative insights, the WIPO Joint Recommendation, and the US-Jordan Free Trade Agreement, the paper outlines targeted legal reforms to bring greater clarity, consistency, and fairness to Jordan’s trademark dilution doctrine. These reforms aim to align Jordan’s legal framework with international best practices while ensuring that domestic and foreign trademarks receive balanced and effective protection.

## 2. Trademark Dilution in Jordan

Trademark dilution is a legal concept that protects famous trademarks from unauthorised uses that destroy their uniqueness or damage their reputation, even if there is no likelihood of confusion, competition, or actual economic injury. When a similar, identical, or equivalent trademark is utilised in anti-competitive ways, it is said to be diluted and loses its legitimacy as a source (Handler 2016, p. 639). The concept of trademark dilution dates back to 1927 when Frank I. Schechter introduced the idea of trademark dilution in his work “The Rational Basis of Trademark Protection” (Whittaker 2006, p. 907). He stated that the establishment and protection of custom should be acknowledged as the fundamental purpose of the trademark (Schechter 1927).

There is no *per se* provision for trademark dilution in Jordan. The term ‘dilution’ is absent from the Jordanian Trade Mark Law. However, the concept of dilution, or at least words to a similar effect, is envisaged in Sections 8(12) and 25(1)(b) of the Jordanian Trade Mark Law. It may be argued that dilution-type protection exists in Jordan; however, the concept of ‘dilution’ is not fully comprehended. Also, Jordanian scholars attribute the appearance of dilution in the Jordanian Trade Mark Law to Article 16 of the TRIPS Agreement, including Mohammad Amin Naser, Tariq Hammouri, Suhail Haddadin, and Yasar Al-Hneeti (Haddadin and Naser 2013, p. 341). This is partially true. On the face of it, Section 8(12) of the Jordanian Trade Mark Law mirrors Article 16 of the TRIPS Agreement. However, there is no consensus among academics about the extent to which international law mandates protection against dilution. It is debatable whether the TRIPS Agreement requires protection against dilution or not (Ramsey 2010, p. 432). While scholars such as Correa, Gervais, Gielen, Mostert, and Schmidt-Szalewski agree that the TRIPS Agreement mandates anti-dilution protection of well-known trademarks, others, such as Dinwoodie and Dutfield, do not (Dutfield and Suthersanen 2008, p. 151). Therefore, it is conceivable why Jordanian legal practitioners relate the protection against dilution to Section 8(12) of the Jordanian Trade Mark Law. However, there is no explicit affirmation, and the US-JO

FTA ends this perplexity by mandating that the US and Jordan apply the WIPO JR, which explicitly refers to implementing the doctrine of dilution.

### 2.1. Statutory Law

As discussed in the previous section, the concept of trademark dilution is explained in Sections 8(12) and 25(1)(b) of the Jordanian Trade Mark Law. By analysing Section 8(12) one could establish the following: the first part of Section 8(12) prevents the registration of identical or similar marks when used on similar or identical products where confusion among consumers will arise. The second part prevents registration of similar or identical marks when used on dissimilar products. From the outset, it can be established that this provision is a relative ground for refusing or opposing registration. Also, the second part of the provision stipulates an exception to the principle of speciality, which protects, when the trademark is registered, against marks attached to dissimilar goods and services from the ones to which the senior mark is attached. The focus will be on the second part, which does not refer to confusion because the dilution doctrine is not concerned with confusion.

Consumer confusion is typically grounds for protection against a third party that uses a mark similar or identical to the senior one on similar or identical products. Conversely, consumers' confusion is irrelevant when protecting a similar or identical mark on dissimilar products. The law provides an exception to the principle of speciality for well-known marks, according to which the well-known trademark will be protected even when used on dissimilar goods or services. Notably, the legislation distinguishes between two types of protection for well-known trademarks: protection against consumer confusion, which arises when a mark is used on similar or identical goods and is likely to cause confusion, and protection against harm caused by use of the mark on dissimilar products in a manner that prejudices the interests of the well-known mark's owner. This distinction of preventing the registration of a well-known mark on 'dissimilar products' gives the impression that the Jordanian law intends to provide dilution-type protection without clearly or explicitly stating it (Schechter 1927, p. 828; Dogan 2006, p. 103).

It adheres to the concept and foundation of the theory of dilution that was initially articulated by Schechter's article in 1927. Schechter defined dilution as the 'gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon *non-competing goods*' (Schechter 1927, p. 825).

Moreover, under Jordanian law, protection requires that a connection be established between the owner of the well-known mark and the goods of the third party, such that consumers are likely to assume a commercial link between them. It is worth noting that mental association is an essential factor that courts rely on in assessments within the US and EU when determining whether dilution is likely to occur. However, the US and EU require mental association or a link between 'a mark or a trade name and a famous mark' and between 'the sign and trade mark', respectively. This is a crucial factor that Jordanians must consider as it limits and clarifies the scope of dilution. Courts, in both jurisdictions, established that proof of this condition does not indicate that dilution will certainly arise, but it constitutes an important element in the examination.

Jordanian trademark law has been criticised by numerous legal scholars for prioritising foreign well-known trademarks over its own regional mark. Hence, it is seen as providing extra protection to well-known foreign marks, while refusing the same protection for local trademarks and disregarding its own national interests. Mahfzah and Numan assert that Section 8(12) is a privilege for well-known foreign trademarks, as it solely confers protection to well-known foreign trademarks, whether registered in Jordan or not (Naser and Mahafzah 2017, p. 137). The authors note that the provision privileges foreign well-known trademarks by extending to them a distinct layer of protection—namely, protection from

dilution or harm without the need for confusion—thereby denying national trademarks access to this important legal safeguard (Naser and Mahafzah 2017, p. 137). Also, Naser and Mahafzah highlight the oddity of Jordanian legislation, which provides protection solely to foreign marks while ignoring national marks (Naser and Mahafzah 2017, p. 137). Arguably, this results in discrimination, as Jordanian legislation prioritises foreign rights above national rights, neglecting the protection of Jordanians' rights and interests.

The insufficient protection of local interests may inhibit competition and discourage local trademark owners from registering and enforcing their marks. While Article 6<sup>bis</sup> of the Paris Convention specifically requires member states to protect well-known marks regardless of registration status, it does not expressly mandate equal treatment between national and foreign trademark owners. However, this provision should be read in light of Article 2(1) of the Convention, which establishes the principle of national treatment, requiring member states to accord the same protection to foreign trademark holders as they do to their own nationals (Naser and Mahafzah 2017, p. 137). As Mahafzah and Numan argue, interpreting Article 6<sup>bis</sup> within this broader framework underscores the need for non-discriminatory protection for both foreign and local trademark interest (Mahafzah and Numan 2016, p. 7). On the contrary, the legislation in Jordan and, consequently, in the courts, confer more rights to foreign trademarks than to local trademarks.

Section 25(1)(b) of the Jordanian Trade Mark Law also provides an infringement ground. This section seems to mirror the provision of Section 8(12), which infers that the Jordanian law recognises that there is an exception to the principle of speciality when protecting a well-known trademark. Therefore, it is argued that this provision covers both instances; the well-known trademark owner is granted a right to protect his/her trademark from being utilised by others, whether on goods or services similar to the one that the mark is attached to or when used on dissimilar goods or services. By analysing this provision closely, one could establish that a second user is not allowed to use a similar mark to the senior mark's without the authorisation from the trademark owner. However, Naser and Mahafzah argue that 'the scope of application of the law only covers identical marks, ... the infringing mark should be identical' (Naser and Mahafzah 2017, pp. 144–45). A thorough examination of the provisions reveals that legislative ambiguity is evident from the outset, particularly in the vague and open-ended definition of 'well-known marks' under Section 2 of the Jordanian Trade Mark Law. The provision does not specify the criteria by which a mark is to be recognized as 'well-known', such as the required degree of public recognition, market share, or geographic reach. This lack of definitional clarity leaves the determination highly discretionary, without guidance on evidentiary standards or thresholds. This ambiguity is further compounded by Section 25(1)(b), which grants owners of well-known marks the exclusive right to prohibit third parties from using the mark, even when applied to dissimilar goods or services. Without a clear definition, this expansive enforcement provision risks being applied inconsistently or unfairly, potentially leading to overreach and legal uncertainty for local businesses and mark owners.

The theory of dilution protects the owner's *mark* when used by a third party, which is the connection between the senior's well-known mark and the junior's mark. Conversely, by reading Section 25(1)(b) TML, the connection referred to is to be established between *the goods of a third party* and *the well-known mark*, which suggests conventional confusion concerns. Naser and Mahafzah highlight 'the presumption of confusion means that the legislature incorporates confusion as the burden of proof in classic cases of trademark infringement on the one hand, and establishing a connection and the likelihood of damage as the burden of proof in dilution cases on the other' (Naser and Mahafzah 2017, p. 148).

Furthermore, Al-Hneeti observes that the protection afforded to well-known marks under Section 25(1)(b)—although primarily concerned with infringement—has been inter-

preted in practice as empowering the Trade Mark Registry in Jordan to take a precautionary approach by refusing the registration of marks that are identical or similar to a well-known mark, even when intended for dissimilar goods or services. While Section 25(1)(b) does not itself establish a relative ground for refusal, its expansive scope in protecting well-known marks may influence the Registry's decision-making to prevent potential conflicts (Al-Hneeti 2015, p. 152). The justification for this protection is preserving the well-known mark's singularity. The Jordanian legislator calls for the likelihood of damage; thus, actual damage is not required. However, it does not define or determine what damage the Jordanian legislator is referring to, nor is it clear how this damage could be proved. This is arguably problematic if the widely held view amongst Jordanian commentators is accepted, as this broad dilution-type protection is offered without apparent limits or defences.

## 2.2. The Doctrine of Dilution in Jordan

The conception of dilution in Jordan is clouded, which explains why the Jordanian legislator adopted an approach that is 'not based on clear, sound or logical considerations' (Naser and Mahafzah 2017, p. 142). Jordanian trademark law has been widely criticized for providing more protection to foreign marks than to Jordanian well-known marks, which Jordanian scholars describe as an awkward standard (Haddadin and Naser 2013, p. 320; Naser and Hammouri 2014, p. 320). However, in support of protecting the foreign trademark, Al-Hneeti asserts that protecting foreign trademarks is crucial due to the wide reputation of a foreign trademark; even if it is not registered or used in Jordan, the mark should be available for the owner to register in the future in Jordan (Al-Hneeti 2015, p. 43). We argue that a well-known mark does not have to be known in Jordan to be protected (Al-Hneeti 2015, p. 43). Al-Hneeti further explains that the wide recognition and fame of foreign marks should grant them the power to stop anyone from using marks similar to their own—well-known ones (Al-Hneeti 2015, p. 148). This is aligned with Mahafzah and Numan, who proclaim that Sections 2, 8(12) and 25(1)(b) incorporated in the Jordanian legislation are beneficial solely to foreign well-known marks.

It is a common perception that having tougher levels of IPRs will attract foreigners to invest in Jordan, as it is a sign of the stability and prosperity of a country (Al-Hneeti 2015, p. 69; Zain Al-Deen 2015, p. 67; Nawafleh 2010, p. 143). Ultimately, this will benefit Jordan through the pursual of registration in the country, and, therefore, these tougher IPRs levels must be protected (Khashrooom 2008, p. 50). One may question domestic reluctance due to the preference to protect national trademark owners' rights and the investment made in their own country, Jordan, for the prosperity of the economy. It is debatable whether IPRs promote or inhibit economic development. Maskus illustrated that firms are less willing to invest in countries where IPRs are weak, as it indicates 'a negative dynamic externality' (Maskus 2000, p. 473). Strong IPRs could be beneficial if the law is structured to promote effective and dynamic competition.

Naser and Mahafzah criticise the Jordanian legislator's policy and suggest that Jordan must consider its national interests while meeting its international obligations (Naser and Mahafzah 2017, p. 149). It is argued that the misconceptions surrounding dilution theory in Jordan affect its implementation among Jordanian courts, leading to an extreme application of dilution. As a consequence, only foreign trademarks are conferred anti-dilution protection. In light of the unfounded approach by the Jordanian legislator, it is crucial to recommend that Jordan adopt a more balanced approach where *nationals' and foreigners' rights are protected*. Although Jordan had to adjust its national laws to adhere to international obligations, including provisions that protect foreign trademarks, the international agreements, such as Article 6<sup>bis</sup> of the Paris Convention and Article 1(1) and Article 3(1) of the TRIPS Agreement, do not mandate that a member state provides more



protection to foreigners at the expense of national interests, but to create a balance between foreign and domestic rights. After all, such treatment, arguably, goes against the principle reason for having domestic legislation that governs trademarks, i.e., to protect and regulate domestic rights and interests (Levine 2010, p. 26).

### 2.3. Case Law

A clear example of the misconception of dilution theory and the wrong implementation of the doctrine is evident in the *AMANA* case (*Amana v Adidas*, Jordanian HCJ 2011). This is a lawsuit between Amana Contracting, Steel Building, and Adidas. The plaintiff, AMANA, claimed its mark is not similar to the ADIDAS mark. However, this was disputed by ADIDAS, who explained how the AMANA logo resembles the ADIDAS logo. The owner of AMANA alleged that, since the ADIDAS mark, i.e., the word and the logo, is not used separately, it is inconceivable to think that AMANA's mark is similar. The proprietor of AMANA explained that the mark is used in steel buildings. In contrast, the ADIDAS mark is used in sports clothes, a specific type of product that is completely different from that used by AMANA, and therefore, consumers cannot overlap. Accordingly, the plaintiff argued that a link cannot be established, as consumers of the mark ADIDAS differ from those of AMANA. The Registrar has the authority to refuse or accept the application for registering a trademark in Jordan according to Sections 11(2) and (3) of the Jordanian Trade Mark Law, which states 'Subject to the provisions of this law, the registrar may refuse such application or may accept it absolutely or subject to conditions, amendments or modifications as to the mode or place of use of the trademark or as to other aspects. (iii) A rejection by the registrar to register a trademark shall be subject to appeal to the high court of justice'.

The Registrar followed the legislation, refused these claims, and accepted the ADIDAS opposition because its mark is well-known according to the Jordanian Trade Mark Law and the WIPO JR. The Registrar reasoned that ADIDAS mark is recognised among the relevant consumers in Jordan based on the sales volume in Jordan and registrations of the mark, without clarifying whether that is in Jordan or worldwide. Therefore, the Registrar recognised ADIDAS as a well-known mark and ruled that it is entitled to 'a special type of protection' (*Amana v Adidas*, Jordanian HCJ 2011). It is debatable whether the Registrar was referring to dilution-type protection in this ambiguous wording. The Registrar ruled that, although the two marks are used on non-competing goods and services, the applicant should not be permitted to register the mark, and confirmed that the ADIDAS trademark is well-known and deserves protection even when it is used on dissimilar goods or services. As a result, the AMANA proprietor was enjoined from using the trademark logo, which was deemed to be similar to the well-known mark of ADIDAS.

It is important to note that the Registrar stated that the marks are similar to the point that could cause consumers' confusion, according to Section 8(12) of the Jordanian Trade Mark Law. However, it is argued that Section 8(12) covers similar marks used on dissimilar goods or services, *but does not require confusion*; thus, the Registrar erred in its decision to consider the likelihood of confusion. Arguably, there is no requirement for the likelihood of confusion if the mark is used in relation to dissimilar products. The Registrar and Jordanian courts are believed to habitually reason their decisions based on consumers' confusion. The Registrar's stance is a prime example of a poor understanding of dilution theory.

In *Tazo v Pazo* (Jordanian High Court of Justice, 2003), the court affirmed the claimant's rights as the proprietor of a well-known trademark, granting injunctive relief to restrain the defendant from registering or using a confusingly similar mark. Notably, the court found there to be a likelihood of confusion despite the marks being registered in distinct classes—class 29 for the claimant and class 30 for the defendant—underscoring the expansive

protection afforded to well-known marks under Jordanian trademark jurisprudence. The court, in assessing the use of the mark on dissimilar goods, focused on the second part of Section 8(12), which states that the use of the mark on different goods may have an impact ‘in such a way as to prejudice the interests of the owner of the well-known mark and may suggest a connection between the owner of the well-known trademark and these goods . . .’. In this matter, the claimant argued that his mark TAZO had been registered in most countries of the world and, therefore, legal protection must be conferred.

In assessing Section 8(12), the court first analysed whether the mark is deemed well-known, according to Section 2 of the Jordanian Trade Mark Law. Section 2 states that this is a mark with international renown whose renown has surpassed the country of origin where it has been registered and which has acquired renown in the relevant sector among the consuming public in the Hashemite Kingdom of Jordan. Without an in-depth examination, the court accepted that the claimant’s mark was well-known and proceeded with Section 8(12). The court ruled that ‘the defendant’s mark is similar to that of the well-known mark and therefore this might cause harm to the claimant’s company . . .’ (Tazo v Pazo, Jordanian HCJ 2003). For this reason, the court conferred an injunctive relief to stop and prevent the defendant from using the mark. Without any clarification or solid explanation, the court decided that using a similar mark to the well-known mark would cause harm to the claimant’s company (Tazo v Pazo, Jordanian HCJ 2003).

It is contended that the court did not request proof of actual harm but decided that harm would likely occur to the claimant. The court’s decision resembles the lawsuit of Burj Al Arab (Salman Altarawneh v Jordanian Register and Jumeirah Beach Resort Co., 2007). The court decided that the mark ‘Burj Al Arab’ is a well-known trademark in compliance with the Jordanian Trade Mark Law, and, as a consequence, extra protection was granted to Burj Al Arab. Although dilution theory is related to protecting trademarks per se, as argued earlier, any harm to the mark per se leads to causing harm to the proprietor of that mark. It is argued that Jordanian courts might have understood dilution as the ultimate effect or harm to be caused to the owner, assuming that if the mark is not protected against dilution, the mark will thus lose its selling power and, consequently, that this will affect and harm the owner of that famous mark. It is argued that Jordanian courts implicitly intended to protect the mark against dilution by protecting the trademark owner, who might eventually be injured if his/her mark was allowed to be used by a second user. Consequently, this would affect the trademark owner’s business. In addition, the court stated that ‘the harm that might be caused to the claimant’s company’ could be understood to refer to the gradual fading of the commercial magnetism of a mark if others were allowed to copy it in a variety of non-competing products freely (Salman Altarawneh v Jordanian Register and Jumeirah Beach Resort Co., 2007).

It would be legitimate to criticise the Jordanian court for being brief and superficial with its examination and for not clarifying its reasoning for this decision. The court should have explained the reasons for its judgment and requested evidence of ‘the harm that might be caused to the claimant’s company’, which the court referred to. In order to improve and recommend suggestions to enhance and develop the Jordanian Trade Mark Law, it is important to shift the focus onto the US to learn from its experience to assess how the doctrine is implemented and how courts deal with it in practice.

### 3. Trademark Dilution in the US

Trademark dilution is a legally recognized concept in the USA that protects famous trademarks from unauthorised uses that diminish their distinctiveness or harm their reputation. A trademark is said to be diluted when a junior brand tarnishes the reputation of a substantially similar senior brand by associating it with some deceptively similar marks

although the sources are different (Syahroni et al. 2022, p. 2). In the United States, trademark dilution law has evolved significantly over the years, with the Federal Trademark Dilution Act (FTDA) of 1995 and its amendments providing the framework for protection. The Trademark Dilution Act (FTDA) has been replaced by the Trademark Dilution Revision Act of 2006 (the ‘TDRA’) (Swann 2023, pp. 34–85).

In the United States, trademark dilution generally takes two principal forms of harm: blurring and tarnishment. As per Section 1125(c)(1) of the Trademark Dilution Revision Act of 2006 (the ‘TDRA’), federal dilution is actionable in two situations: dilution by blurring and dilution by tarnishment, evidently removing any conception of dilution as a remedy against free-riding, unfair competition, or misappropriation (15 U.S.C § 1125 (c)(1); Dinwoodie and Janis 2006, p. 98; Starbucks v. Wolfe’s Borough 2009, p. 97).

The burden of proof is on the plaintiff to establish that the association between the plaintiff’s mark and the second user’s mark is likely to blur or tarnish the meaning of the plaintiff’s mark in the minds of the public (Dogan 2006, p. 107). Also, 15 U.S.C § 1125 (c)(2)(b) and (c)(2)(c) of the TDRA provides a definition of what constitutes dilution by blurring and dilution by tarnishment. 15 U.S.C § 1125 (c)(2)(b) also sets non-exclusive factors for the court to take into consideration when examining a case that involves dilution by blurring. The provision confers protection against dilution to the owner of a famous mark where the owner is entitled to injunctive relief against others to stop acts that would blur the mark’s distinctive character or tarnish the reputation of that mark (Long 2006, p. 1037; Foundation v. Modernica 2014, p. 647). Protection from dilution is much broader than traditional trademark protection, as the latter relates to marks on products in the same market that could cause confusion (Foundation v. Modernica 2014, 635). On the other hand, protection against dilution is granted even though confusion among consumers, competition, or actual economic harm may not exist (15 U.S.C. § 1125(c)(1)). The central inquiry is whether the junior use of the mark reduces the ability of the mark to ‘serve as a unique identifier of [the senior user’s] products and services’ (Foundation v. Modernica 2014, p. 635). In *Levi v Abercrombie* 2011 1158 the court explained that dilution and likelihood-of-confusion tests are directed at different actions. While dilution is formed to protect the mark itself, the traditional infringement test is aimed at protecting consumers from confusion (*Levi Strauss Co. v. Abercrombie Fitch* 2011, p. 1158).

### 3.1. The Scope of Dilution in the US

The American legislation explicitly specifies certain uses exempted from the scope of dilution under Section 1125(c)(3) (Fhima 2011, p. 14). The TDRA creates three defences based on the defendant’s (1) “fair use” (with exceptions), (2) “news reporting and news commentary”, and (3) “noncommercial use” (*Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* 2007, pp. 252, 266). These defences are essential in order to protect defendants from a broad application of the dilution laws, as was acknowledged in legislative discussions preceding the enactment of the TDRA (U.S. House of Representatives 2005, p. 15). The reason for listing these defences is to create a balance between free speech and trademark rights (U.S. House of Representatives 2005, p. 7). Ultimately, such a potent legal tool must not be granted randomly to any famous mark, but only to marks that truly deserve anti-dilution protection. As dilution is offered by neglecting important factors that the traditional infringement test considers, i.e., consumers’ confusion, competition, or actual economic injury, it is necessary to restrict such a powerful weapon; otherwise, dilution would arguably interfere with the rights of others. A reckless use of dilution, according to Long, is likely to prevent ‘honest discussions and criticism of famous trademarks by others’, as well as to ‘create a social cost in the form of diminished truthful speech’ (Long 2006, p. 1066).



It is important to refer to case law and the legislation to clarify the importance of including it within the Jordanian TML defences and safeguards to dilution. The TDRA Section 1125(c)(3) lists exclusions from the reach of dilution. The first exception where dilution by blurring or dilution by tarnishment is not actionable is fair use, ‘including a nominative or descriptive fair use, or the facilitation of such fair use of a famous mark by another person. . .’. The Supreme Court has confirmed that descriptive fair use is an affirmative defence (*International Information Systems v. Security University* 2016, pp. 153, 165). Further, nominative use is a ‘use of another’s trademark to identify the plaintiff’s goods or services. It is called ‘nominative’ because it ‘names’ the real owners of the mark’. In *Tiffany*, the defendant used the TIFFANY mark in such a way as to not to create an association with its product. Still, the mark was used directly to advertise and identify the availability of authentic TIFFANY merchandise on eBay’s website (*Tiffany v. eBay* 2010, pp. 93, 112). The District Court in *Tiffany* rejected Tiffany’s argument that eBay infringed the mark Tiffany by using it on the eBay website and by purchasing sponsored links containing the mark on Google and Yahoo! Further, it explained that ‘the doctrine of nominative fair use allows a defendant to use a plaintiff’s trademark to identify the plaintiff’s goods so long as there is no likelihood of confusion about the source of the defendant’s product or the mark-holder’s sponsorship or affiliation’ (*Tiffany v. eBay* 2010, pp. 93, 102). Another example of fair use is advertising or promotion that permits consumers to compare goods or services (15 U.S.C. § 1125(C)(3)(A)(i)). Comparative advertising highlights the link between the senior’s mark and the junior’s goods; however, the purpose is to express that the junior’s goods are better ([Fhima 2011](#), p. 232). Moreover, 15 U.S.C § 1125(c)(3)(c) states that protection against dilution does not cover ‘any non-commercial use of a mark’. This clarifies that any conduct or use of the famous mark or the trade name is permitted as long as this conduct is related to non-commercial uses. Accordingly, only when defendants use a term as a mark or trade name will they be faced with potential liability for dilution ([Dogan and Lemley 2008](#), p. 554). The gist behind this is to prevent dilution law from being used as a tool against newspapers, artists, dictionaries, and people who use trademarks as part of their mode of expression ([Dogan and Lemley 2008](#), p. 555).

### 3.2. Dilution by Blurring

Dilution by blurring is defined under 15 U.S.C. § 1125 (c)(2)(B) of the TDRA as ‘the association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark’. Franklyn, drawing on McCarthy’s explanation of dilution by blurring, illustrates that a famous mark loses its distinctiveness—and thus its power as a brand identifier—when other companies are permitted to use identical or similar marks on unrelated goods. This weakening of the mark’s unique commercial appeal is what constitutes ‘blurring’ ([Franklyn 2005](#), p. 119).

In *Starbucks*, the court gave classic examples of blurring, ‘hypothetical anomalies as Dupont shoes, Buick aspirin tablets, Schlitz varnish, Kodak pianos, Bulova gowns,’ etc. (*Tiffany v. eBay* 2010, 93, 111; *Starbucks v. Wolfe’s Borough* 2009, p. 97; *Foundation v. Modernica* 2014, 635; *Louis Vuitton Malletier S.A. v. Hyundai Motor America* 2012, p. 1611). The primary concern in blurring actions is to prevent ‘the whittling away of an established trademark’s selling power through its unauthorized use by others’ (*Starbucks v. Wolfe’s Borough* 2013, p. 198; [Beebe 2006](#), p. 1149; [Franklyn 2005](#), p. 119).

The TDRA lists factors to be considered in a federal trademark dilution claim under Section 43I of the Lanham Act (15 U.S.C. § 1125(c)(2)(b)):

- (i) The degree of similarity between the mark or trade name and the famous mark;
- (ii) The degree of inherent or acquired distinctiveness of the famous mark;

- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark;
- (iv) The degree of recognition of the famous mark;
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark;
- (vi) Any actual association between the mark or trade name and the famous mark.

Upon proving that the mark is famous, the first factor to examine when considering whether there is a likelihood of dilution is ‘association’. The latter is expressly stated in the definition of dilution by blurring and dilution by tarnishment in the Trademark Dilution Revision Act 2006, § 1125(c)(1)(b); i.e., the association arising from the similarity between a mark or trade name and a famous mark (*Levi Strauss Co. v. Abercrombie Fitch* 2011, p. 1158). The similarity between the senior and junior mark establishes the association which is referred to as the ‘bridge’ (*Fhima* 2011, pp. 65, 76). The District Court in *Starbucks* found that the first factor, the similarity of the marks, was in favour of Black Bear. The Court elaborated that ‘although “Ch”arbucks is similar to “St”arbucks in sound and spelling, the marks were only minimally similar when presented in commerce (*Starbucks v. Wolfe’s Borough* 2013, p. 198). This is evident where Charbucks marks are viewed on the packaging, which include the phrases ‘Charbucks Blend’ or ‘Mister Charbucks’. The Court added, ‘the Charbucks line of products is presented as either “Mister Charbucks” or “Charbucks Blend” in packaging that displays the “Black Bear” name in no subtle manner’ (*Tiffany v. eBay* 2010, pp. 93, 111; *Starbucks v. Wolfe’s Borough* 2009, p. 106; *Levi Strauss Co. v. Abercrombie Fitch* 2011, p. 1158). This is a favoured strategy as it limits dilution, hence suggesting that minimal similarity does not trigger dilution. If dilution is envisaged as a negative impact on the market, accepting minimal similarity will increase the drawbacks of applying dilution theory. Unless there is some sort of mental association, dilution is unlikely to ensue. Franklyn elucidated that satisfying a mental association must not lead courts to establish that dilution may occur, as this condition is insufficient to succeed in dilution claims (*Franklyn* 2005, p. 150). An important lesson for Jordan to learn from the US experience is that, even if the two marks are similar, this is not enough to succeed in a dilution claim, as the plaintiff must still submit evidence regarding ‘all relevant factors in determining the presence of dilution by blurring’ (*Starbucks v. Wolfe’s Borough* 2009, p. 107; *Foundation v. Modernica* 2014, p. 644).

### 3.3. Dilution by Tarnishment

It is an ‘association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark’ (15 U.S.C. § 1125(c)(2)(c)). Unlike dilution by blurring, there is no standard test for dilution by tarnishment (*Fhima* 2011, p. 175; *Sun* 2014, p. 791). Dilution by tarnishment could generally arise ‘when the plaintiff’s trademark is linked to products of shoddy quality or is portrayed in an unwholesome or unsavoury context likely to evoke unflattering thoughts about the owner’s product’ (*Dinwoodie and Janis* 2006, p. 99; *Tiffany v. eBay* 2010, p. 93). Long explains that, on the harm side of the social-welfare equation, the relationship between unauthorised third-party use and the mark’s loss in value to the trademark holder is the strongest and most direct under the tarnishment theory of dilution (*Long* 2006, p. 1057). Ultimately, the protection against dilution by tarnishment is to prevent any damage to the positive associations attached to the mark (*Burstein* 2008, p. 1191; *Olson* 2012, p. 694). Handler elaborates that the few cases in which dilution by tarnishment has been established have tended to involve ‘unsavory’ uses of famous marks (*Handler* 2016, p. 640; *Burstein* 2008, p. 1190). As mentioned, courts have no defined scope to follow when determining dilution by tarnishment. However, Stibbe illustrates that the decision of the *Starbucks* case offered

valuable insights for future dilution by tarnishment claims (Stibbe 2013, p. 267). Stibbe points out that ‘a plaintiff trying to prove tarnishment would need to present evidence, not just that the junior mark is unsavory, but that the association has diminished the positive impressions of its own senior product’ (Starbucks v. Wolfe’s Borough 2009, p. 110; Stibbe 2013, p. 267). The submission of survey results is considered robust evidence. In *Starbucks*, the court explained that Charbucks’ line of coffee was not an inherently unwholesome, unsavoury, or poor product line but was more similar to the high-quality coffee Starbucks offers; therefore, Starbucks’s claim for tarnishment was undercut (Stibbe 2013, p. 267).

#### 4. Trademark Dilution in the EU

The term ‘dilution’ does not appear in EU legislation, (Whittaker 2006, p. 929) nor in the UK Trade Mark Act (McCarthy 2004, p. 1172; Senftleben 2009, p. 75; Dinwoodie 2004, p. 925; Intel Corp v CPM UK 2009, p. 1079); however, the question of whether dilution is envisaged under EU trademark law was resolved in Europe through the illustration provided by the Court of Justice of the European Union (CJEU) in the *Adidas* case (Whittaker 2006, p. 930; Adidas-Salomon AG v. Fitnessworld Trading 2004, paras 36–39; Cornish et al. 2010, p. 791). The Trade Mark Directive (TMD) and the UK Trade Mark Act refer to ‘detriment’. Dilution is found in Article 5(2) of the TMD 2008, and Article 10(2)(c) of the TMD (EU) 2015/2436; it applies where a third-party uses a mark with reputation without due cause that takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark. Article 10(2)(c) of the TMD provides against the registration of a junior mark where the sign is identical to or similar to the senior mark used for identical, similar, or dissimilar products when the use by the junior trademark ‘without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark’.

##### 4.1. Case Laws

The CJEU in *Adidas* (Adidas-Salomon AG v. Fitnessworld Trading 2004, p. 401) followed closely the opinion of AG Jacobs on the meaning of dilution by blurring in that ‘the essence of dilution in this classic sense is that the blurring of the distinctiveness of the mark means that it is no longer capable of arousing immediate association with the goods for which it is registered and used’ (Adidas-Salomon AG v. Fitnessworld Trading 2004, p. 412). In understanding the concept of dilution, the court relied on the explanation provided by Schechter on how a second user could dilute the mark’s distinctiveness (Adidas-Salomon AG v. Fitnessworld Trading 2004, p. 413).

In another case of *L’Oréal v Bellure NV*, the court elaborated on the meaning of detriment to the distinctive character of the mark with regard to reputation, which is also referred to as ‘dilution’, ‘whittling away’, or ‘blurring’ (*L’Oréal v. Bellure* 2009, p. 1031; *Specsavers International Healthcare v. Asda Stores Ltd.* 2012, p. 392). Such detriment is caused when that mark’s ability to identify the goods or services for which it is registered is weakened, since use of an identical or similar sign by a third party leads to dispersion of the identity and hold upon the public mind of the earlier mark (*L’Oréal v Bellure NV* 2009, p. 1031; *Specsavers International Healthcare v Asda Stores Ltd.* 2012, p. 393). AG Jacobs continues to explain the second type of dilution, tarnishment (Adidas-Salomon AG v. Fitnessworld Trading 2004, p. 401). He explains that the term ‘tarnishment’, or ‘degradation of the mark’ in the EU version means a detriment to the repute of the mark (Adidas-Salomon AG v. Fitnessworld Trading 2004, paras 36–39; *Intel Corp v. CPM UK* 2009, para 33). When explaining detriment to the reputation of the mark, AG Jacobs relied on the *Claeryn/Klarein* case (*Claeryn/Klarein* 1975) and the decision of the Benelux Court of Justice (*Sabel BV v Puma AG* 1997, pp. 295–97). This case is concerned with

two identically pronounced marks: ‘Claeryn’ used in relation to Dutch gin and ‘Klarein’ used for a liquid detergent. Accordingly, there is a high chance of establishing association between the two marks, as when drinking the ‘Claeryn’ gin, consumers will be reminded of the liquid detergent, therefore associating gin with an unsavoury or unfavourable sensation of drinking a liquid detergent. For this reason, the court held that the ‘Klarein’ mark had infringed the ‘Claeryn’ trademark (*Adidas-Salomon AG v. Fitnessworld Trading* 2004, p. 412). Another example that illustrates the meaning of detriment to the mark’s reputation was provided by AG Sharpston in *Intel* (*Intel Corpn v CPM UK* 2009, p. 1079).

It is also important to explore another form of dilution that is specified in the TMD, which exists in the EU but not in the US; i.e., ‘taking unfair advantage of the mark with reputation’ in Article 5(2) of the TMD 2008 and Article 10(2)(c) TMD 2015 (*Franklyn* 2005, p. 120; *Fhima* 2011, p. 189; *Dinwoodie* 2014, p. 7). The court in *Adidas* referred to ‘taking unfair advantage of the distinctiveness of the reputed mark’ and ‘taking unfair advantage of the reputation of the reputed mark’ as free-riding (*Adidas-Salomon AG v. Fitnessworld Trading* 2004, p. 413). This covers instances where a second user exploits the mark’s reputation by free-riding on the coattails of a famous mark or when it attempts to trade upon its reputation (*Adidas-Salomon AG v. Fitnessworld Trading* 2004, p. 412). Free-riding does not cause harm to the senior’s mark but offers a junior user a chance to obtain an advantage over the reputation of the senior’s mark to boost the junior user’s business. This explanation is also followed in *Intel* (*Intel Corpn v CPM UK* 2009, p. 1088) and the *Wolf* case (*Environmental Manufacturing v Office for Harmonisation in the Internal Market* 2012, para 47).

The courts in *L’Oreal* (*L’Oréal v Bellure NV* 2009, p. 304) and subsequently in the *Wolf* (*Environmental Manufacturing v Office for Harmonisation in the Internal Market* 2012, para 48) took into consideration a list of factors when assessing whether there is free-riding. Specifically, the court stated that it is necessary to undertake a global assessment that includes the intention to take advantage for promotional purposes of the distinctive character and repute of the mark, the strength of the mark’s reputation and the degree of its distinctive character, the degree of similarity between the signs at issue, the nature and degree of proximity of the goods or services concerned, and the fact, if established, that there was a likelihood of dilution or tarnishment of the mark (*L’Oréal v Bellure NV* 2009, p. 304; *Environmental Manufacturing v Office for Harmonisation in the Internal Market* 2012, para 48). In the recast Directive 2015, Article 10(2)(c) requires (i) that the two marks, i.e., the senior and the junior mark, be identical or similar; (ii) that the mark be used on identical, similar, or dissimilar goods or services to the ones the senior mark represents; (iii) that the senior mark has a reputation in the member states; (iv) that the use of that sign be without due cause; and (v) that the use of the mark takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark. In determining the similarity between two marks, an examination of visual, aural, or conceptual similarity is required (*Adidas-Salomon AG v. Fitnessworld Trading* 2004, para 28). The similarity between the two marks will create an association, a link, or, in other words, will call the earlier mark to the mind of the average consumer (*Specsavers International Healthcare v Asda Stores Ltd.* 2012, p. 393; *Franklyn* 2005, p. 1168). It is noteworthy that both the US and the EU require ‘association’ between the marks, and dilution cannot occur without it (*Fhima* 2011, p. 23). Establishing a ‘link’ is only one step in the process; it is insufficient for establishing either dilution or unfair advantage (*Senftleben* 2011, p. 52; *Environmental Manufacturing v Office for Harmonisation in the Internal Market* 2012, p. 54).

EU courts appear to extend the dilution analysis by imposing additional conditions not explicitly stated in the Directive. The cumulative nature of these requirements means that failure to satisfy any one condition leads to the dismissal of the dilution claim. This

strict approach closely parallels the US framework in its application of the dilution doctrine. We argue that, although the court in *Davidoff* (*Davidoff & Cia SA v Gofkid Ltd.* 2003, 490) expanded the scope of protection to include situations where a junior user employs a similar mark in relation to goods or services that are identical, similar, or even dissimilar to those of the senior mark, this broader interpretation—now aligned with the Trade Marks Directive 2015—is balanced by a stringent evidentiary requirement. Specifically, the claimant must demonstrate a change in the economic behaviour of the average consumer (*Intel Corp v CPM UK* 2009, p. 1080).

#### 4.2. The Scope of Dilution in the EU

Although the EU, in a similar fashion to US legislation, exempts certain uses from the liability of dilution, arguably, there is no clear list of defences under Article 10(2)(c) of the Directive 2015. The Directive 2008 and the recast Directive 2015 explicitly refer to only one defence found in Article 5(2) and Article 10(2)(c), respectively, that is, the use of a mark with reputation with due cause. It may be argued that the language is unclear and vague about what constitutes due cause. Therefore, the extent and scope of this defence could be said to depend upon the court's perception, as there are limited sources on the concept of 'due cause' ([Bicknell 2014](#), p. 403). Initially, it was pointed out that 'without due cause' means 'without justifiable reason' ([Bicknell 2014](#), p. 403). However, it is important to note that there is an explicit reference in the recast TMD 2015 that is deemed an expanded limitation to what is found in Article 5(2) TMD 2008, namely Recital 27 of the TMD 2015, which refers to freedom of expression and freedom of competition ([Senfleben et al. 2014](#), p. 344). It could be argued that, although the TMD 2015 refers to protecting fundamental rights and freedoms, the references can be understood as a general call without emphasising them when applying the law. The framing of the references of fundamental rights, freedom of expression, and competition is merely mentioned in the recital without including it in the provision when dealing with dilution claims. Hence, it is argued that there is potential found in the TMD 2015 to strike a balance between the interests of trademark proprietors and competitors.

Article 5(2) of the TMD 2008 and, similarly, the recast TMD 2015 under Article 10(2)(c) provide that for a senior user to succeed in a dilution claim, the use by others must be 'without due cause'. The Court of Justice referred to *Interflora* (*Interflora Inc v Marks and Spencer* 2013, p. 835) in regards to the meaning of 'due cause', explaining that if there is use by a third party of a similar mark to the mark with reputation without imitating the goods or services to which the reputed mark is attached to, without causing detriment to the repute or distinctive character of the reputed mark and without adversely affecting the functions of the trademark concerned—an alternative to the products to which the mark with reputation is attached to—it must be concluded that 'such a use falls, as a rule, within the ambit of fair competition in the sector for the goods or services concerned and is thus not without due cause' (*Leidseplein Beheer v Red Bull* 2014, p. 446).

It is established that there are certain lessons that Jordan can learn from the experiences of the US and EU, along with the avoidance of any errors undertaken by these jurisdictions, for instance, where the law has been vague on certain terminologies, as is the case with TMD in reference to 'due cause'. It is essential to note that the examination of the court's analysis of dilution claims in both jurisdictions is solely derived from the ideal approaches of courts in determining the likelihood of dilution. The gist is for Jordan to learn from their optimum approaches in dealing with dilution. Ultimately, it is not advised to copy and paste dilution theory from both the TDRA and TMD onto the Jordanian Trade Mark Law, but to obtain the best outcomes of those experiences to enhance the Jordanian legislation. Ultimately, clearer and specific provisions that assist in overcoming the ambiguity of the



Trade Mark Law are recommended, along with facilitating a better application of the doctrine of dilution in Jordan.

## 5. Recommendations

### 5.1. Anti-Dilution Protection

The Jordanian Trade Mark Law lacks explicit provisions defining dilution and its various forms, creating significant interpretative challenges. We argue that, in order to develop a precise and contextually appropriate definition, it is essential to examine how dilution is addressed in the Trademark Dilution Revision Act (TDRA) in the United States, the Trade Marks Directive (TMD) in the European Union, and the WIPO Joint Recommendation (WIPO JR). Hence, we propose a definition informed by US and EU experiences while ensuring it aligns with Jordan's legal and commercial landscape.

The definitions of dilution by blurring and dilution by tarnishment are primarily influenced by US law, given its explicit statutory provisions delineating these concepts. In contrast, the TMD provides only implicit guidance, necessitating reliance on EU case law to clarify the scope and application of dilution. Judicial interpretations within the EU offer valuable insights into key elements that should be incorporated into a Jordanian framework. Although the WIPO JR provides minimal substantive input on defining dilution, it remains relevant in shaping a holistic and internationally coherent definition.

The proposed definition refines the conceptualisation of dilution by integrating terminology that captures its core mechanisms. Terms such as “association” and “mental link”—rooted in the TDRA and reinforced by EU case law—are incorporated to reflect the jurisprudential emphasis on a “link” or “call to mind” standard. This approach draws inspiration from Beebe's analysis, which critiques the breadth of the term “association” in the TDRA, highlighting its potential to offer limited judicial guidance. By synthesising these legal frameworks, the proposed definition ensures greater doctrinal clarity and practical applicability within the Jordanian legal system (Beebe 2006, p. 1165). Therefore, the method of including both the terms ‘association’ and ‘mental link’ is believed to be more comprehensive, as ‘association’ and ‘mental link’ refer to the mental connection established in the minds’ of the average consumer, ‘a “mental connection [of] relational significance”, between the plaintiff's mark and the defendant's mark’, which is a result of the similarity between the two marks (Beebe 2006, p. 1166). Therefore, the following definitions are recommended for the Jordanian legislator to incorporate within the Jordanian Trade Mark Law, which is a proposition on the meaning of *dilution by blurring*: the association or a mental link arising from the similarity between a mark or trade name and a well-known mark that impairs, harms, or causes detriment to the distinctive character of the well-known mark.

In addition, the following is a recommendation on the meaning of *dilution by tarnishment* to be included within the Jordanian Trade Mark Law: the association or a mental link arising from the similarity between a mark or trade name and a well-known mark that impairs, harms, or causes detriment to the reputation of the well-known mark.

These definitions are suitable for Jordan because both dilution by blurring and dilution by tarnishment are arguably likely to occur when a third party uses a similar sign to a well-known mark or trade name on any goods or services without the consent of the well-known owner, causing detriment or harm to the well-known mark's distinctive character or reputation. It is suggested to maintain the use of the term “well-known” marks in Jordan. Although this is different from the term used by US and EU law, it corresponds with the term used by the WIPO Joint Recommendation (World Intellectual Property Organisation (WIPO) (1999)). In addition, the scope of dilution is expanded to cover situations where there is no harm, such as instances where a third party takes unfair advantage of the well-known mark. Although the validity of this argument might be

challenged (Beebe 2006, p. 1165), dilution is commonly understood to take two forms: one that harms the distinctiveness or reputation of the trademark (often referred to as ‘blurring’ or ‘tarnishment’), and another that allows other traders to unfairly benefit from its reputation without authorisation—known as ‘free-riding’ (Franklyn 2005, p. 117). Free-riding is closely linked to dilution and is considered a type of dilution in the European Union, as well as the justification for dilution protection in the United States (Johnson 2024, pp. 185–212). Although the scope of dilution might be wider in this instance, the recommended list of conditions is deemed strict. Therefore, it is argued that, although the scope of dilution is wide, the threshold to obtain protection against dilution is high. Also, the reason to recommend these suggestions is to raise awareness among Jordanian courts in making a considerable and thorough examination when dealing with dilution claims before granting such strong protection.

Essentially, the use by a third party would give an unfair advantage to the junior user rather than cause harm to the senior mark, as mentioned both in Article 10(2)(c) of the Directive 2015 and Article 4(1)(b)(iii) WIPO JR. This form of protection is referred to as free-riding (Adidas-Salomon AG v. Fitnessworld Trading 2004, pp. 412–13). However, there is no clear definition of free-riding in the TMD. The court in *Adidas* clarified that free-riding occurs when a second user exploits a famous mark’s reputation by free-riding on the coattails of a famous mark or an attempt to trade upon its reputation (Adidas-Salomon AG v. Fitnessworld Trading 2004, pp. 412–13). It does not cause harm to the senior mark but gives a junior user a chance to obtain an advantage of the reputation of the senior mark to boost the junior user’s business (Intel Corp v CPM UK 2009, p. 1093). The TDRA lacks any reference to free-riding nor the meaning of this type of protection. Ultimately, the suggested definition of free-riding is influenced by the TMD, the interpretation of free-riding by the courts, and the provisions of the WIPO JR (Adidas-Salomon AG v. Fitnessworld Trading 2004, p. 412). Accordingly, the suggested definition is comprehensive, which provides clarity on the meaning of free-riding for the Jordanian legislator to adopt and include within the Jordanian Trade Mark Law: to take unfair advantage of the distinctive character or reputation of the mark, where the junior user free-rides on the coattails of the well-known mark by using a similar mark to that well-known mark in order to benefit from its distinctive character and reputation without the consent of the owner of the well-known mark.

These definitions aim to clarify the meaning of dilution and how it could be triggered. For instance, one of the elements that must be proved in dilution cases is an association between the junior mark and the well-known mark. If there is no association between the senior mark and the sign, dilution is unlikely. Therefore, the definition must mention similarity as an important factor that triggers dilution. Accordingly, the association between the marks could result in a detriment to the distinctive character of the well-known mark, referred to as dilution by blurring. Similarly, in the definition of dilution by tarnishment, the third party targets the reputation of the well-known mark rather than its distinctiveness. Additionally, regarding dilution by tarnishment, the foundations of establishing the likelihood of dilution must exist, i.e., an association between the two marks and similarities.

#### Likelihood of Dilution

It is recommended for Jordan to adopt the likelihood of dilution rather than actual dilution as observed in the US. For instance, in the US, the TDRA abandoned requesting actual dilution, which was implemented in the FTDA, to demand the likelihood of dilution. Actual dilution infers that the unauthorised user of the trademark inflicts harm on the senior’s trademark, rather than there being potential harm or an assumption of harm. Ultimately, requiring ‘actual dilution’ narrows the scope of the doctrine of dilution. Although the FTDA demanded ‘actual dilution’, the FTDA was supplanted by the TDRA

requiring ‘likelihood of dilution’. On the other hand, the TMD 2008 and the recast TMD 2015 maintained its position in demanding ‘actual dilution’. Arguably, Jordan should adopt ‘actual dilution’, which reflects the EU position; however, it is problematic for Jordan to adopt an approach different from the US one. In addition, Jordan must adhere to the WIPO JR, which mandates likelihood of dilution under Article 4(1)(b)(ii): ‘the use of that mark is likely to impair or dilute. . .’, as well as under the same Article (iii), ‘the use of that mark would take unfair advantage of the distinctive character . . .’. Evidently, the US and the WIPO JR are all in favour of likelihood of dilution. Therefore, Jordan would be in a critical position if it were to mandate actual dilution following the EU approach, particularly due to its bilateral agreement with the US, namely the US-Jo FTA, in order to adhere to the WIPO JR.

Acknowledging that Jordan must comply with the WIPO JR through the US-Jo FTA, raises the question whether Jordan should also mandate anti-dilution protection to cover instances where the use of the mark is used on similar products or non-competitive products, or both situations. In the TDRA, protection against dilution is granted to famous marks—whether a junior user had used the famous mark on competitive or non-competitive products—which also reflects on Schechter’s views. On the other hand, in the EU, the TMD 2008 did not stipulate detriment to the mark with reputation covers instances where the junior user uses the mark with reputation on similar or identical goods and services; however, the court expanded the scope of dilution to include uses of the mark with reputation on similar or dissimilar products. The courts’ approach is compatible with Article 10(2)(c) the recast Directive 2015, which explicitly stipulates the use of the junior user of the mark with reputation, ‘irrespective of whether it is used in relation to goods or services which are identical with, similar to, or not similar to, those for which the trademark is registered. . .’. Furthermore, Article 4(1)(b) of the WIPO JR demands protection against dilution, regardless of the goods and/or services for which a mark is used. The US, the EU, and the WIPO JR apply dilution where another user uses a similar mark to a famous mark, a mark with reputation or a well-known mark, respectively, on similar or dissimilar goods or services. It may be argued that, ideally, if a junior user uses a similar mark to the senior trademark in relation to similar or identical products, the likelihood of confusion should be the remedy to assess trademark infringement, as this approach limits the scope of dilution. However, this has been ignored when it is related to well-known and famous trademarks, as seen in the examples of the EU and the US. In addition, due to the bilateral agreement with the US, the US-JO FTA, Jordan must adhere to the WIPO JR provisions to cover instances of similar and dissimilar products. Arguably, granting anti-dilution to instances where the senior user’s trademark is merely used on dissimilar goods and/or services limits and narrows the scope of dilution.

This paper stands in favour of limiting dilution because, on the face of it, dilution goes against the foundations of trademark law. The basis of trademark law is to protect consumers from confusion; however, dilution theory is not concerned with consumer’s confusion. Also, the doctrine of dilution is known to be a harsh and potent legal tool, which creates monopolies with regard to trademarks. In addition, it ‘spans junior uses across all product markets’ and ‘could chill competition throughout the market, prevent legitimate use, and create monopolies in trademarks’ (Fhima 2008, p. 631). Arguably, the scope of dilution has considerably expanded when compared to Schechter’s views. It may be contended that if the dilution doctrine is not strictly applied, its extent of application will be limitless. However, as mentioned earlier, Jordan must adhere to the WIPO JR, and, thus, apply the ‘likelihood of dilution’ standard. Accordingly, Jordan is obligated to expand the scope of dilution to cover instances where the junior user uses a mark similar to that of the well-known one in relation to competitive or non-competitive products. It is argued,

since Jordan has to adhere to the US and the WIPO JR, it is suggested to recommend a compulsory list of conditions to be included within the Jordanian Trade Mark Law in order to balance the wide extent of the doctrine of dilution with a strict approach in granting protection against dilution. This approach is believed to enhance the application of dilution theory in Jordan and terminate courts that excessively grant protection against dilution.

### 5.2. Requirements to Examine the Likelihood of Dilution

In determining whether a likelihood of dilution might occur and for legal practitioners to follow in order to succeed in a dilution claim, the following suggested conditions must be thoroughly examined. These conditions are applicable in determining whether dilution by blurring, dilution by tarnishment, and/or free-riding are likely to be triggered. It is suggested that the owner of the senior mark must present evidence, not merely demonstrating that the junior mark is portrayed in an unwholesome or unsavoury context, but which submits survey evidence. Although this argument might be challenged as surveys might be considered to increase litigation costs, this proof is robust evidence as it precisely defines whether dilution is likely to occur. Moreover, courts must not accept any survey evidence, but that which clearly illustrates that the junior user is likely to tarnish the reputation of the senior's mark.

It is noteworthy that US law adopts a flexible approach by listing conditions that the court *may or may not* take into account when assessing a dilution claim under Section 1125(c)(2)(b). Although courts are not required to examine each factor on the list, they have been following a stricter approach. This is evident in *Starbucks*, where the court did not grant protection against dilution because the claimant did not provide enough evidence to fulfil *every* factor of the list of conditions (*Starbucks v. Wolfe's Borough* 2009, 97). This infers that, although the legislation is flexible, the courts in the US tend to be strict and cautious when dealing with dilution claims, which is an example that the Jordanian courts should learn from. The US approach appears to have a proper effect on the statutory language itself as a metric for limiting the grant of dilution protection. It may be argued that this approach is perhaps derived from knowledge and a longer experience of dealing with the dilution doctrine. The US example shows that anti-dilution protection must be solely conferred to truly strong marks that prove the likelihood of dilution or 'impairment'.

Furthermore, the WIPO JR explicitly protects well-known trademarks against dilution and mandates the application of the likelihood of dilution. However, there is no reference to conditions or requirements that could assist courts in determining whether there is a likelihood of dilution. Accordingly, this allows Jordan to apply dilution more flexibly, by mandating restricted conditions for determining whether there is a likelihood of dilution. This could be achieved by learning from the examples of the US and the EU, and subsequently adopting what is suitable for Jordan. Therefore, the following list of conditions is suggested to be adopted and incorporated within the Jordanian Trade Mark Law in examining likelihood of dilution: (i) the distinctiveness of the mark, (ii) the degree of recognition, (iii) the exclusive use of the well-known mark, (iv) the degree of similarity between the two marks, (v) a link, and (vi) change in the economic behaviour of the average consumer.

#### 5.2.1. The Distinctiveness of the Mark

This crucial element must be incorporated into the Jordanian Trade Mark Law and examined by courts when determining a likelihood of dilution. In principle, the Jordanian law requires the mark to be distinctive to be registered, a crucial element that must be proved. Hence, it is a fundamental factor that must be proved upon granting anti-dilution protection. However, it is important to differentiate between finding distinctiveness for trademark eligibility, i.e., the capacity for a mark to distinguish, and distinctiveness for

dilution purposes, i.e., the harm that dilution is allegedly assumed to prevent. In determining the distinctiveness of the mark, Jordanian courts shall require the differential distinctiveness to be inherent or acquired to be eligible for anti-dilution protection, as it is one of the purposes underlying anti-dilution. It is suggested that anti-dilution protection will be granted to inherent or acquired distinctiveness. An inherent distinctive mark is 'one whose signifier cannot reasonably be understood to be descriptive or decorative of the product to which it is affixed' (Beebe 2004, pp. 621–69). On the other hand, marks that acquired distinctiveness will qualify for trademark protection only if their producers can show that they have "acquired" distinctiveness through use in the marketplace and by advertising a "secondary meaning" as a designation of the source (Beebe 2004, pp. 670–71). Beebe suggests that consumer confusion surveys test the mark's inherent distinctiveness—essentially tests of comparative similarity (Beebe 2004, pp. 670–71). He further states that 'in the absence of reliable survey evidence, the most important factor in estimating the differential distinctiveness of the plaintiff's signifier is its acquired distinctiveness, its fame, renown and notoriety' (Beebe 2004, p. 676). Accordingly, if the mark is descriptive, the plaintiff must prove that it has acquired 'secondary meaning' to protect it against dilution (New York City Triathlon, LLC v NYC Triathlon Club 2010, p. 5). It is suggested that in examining whether a mark has acquired distinctiveness through secondary meaning, Jordanian courts will consider the following factors: (i) length and manner of use of the mark, (ii) volume of sales, (iii) amount and manner of advertising, (iv) nature of use of the mark or trade dress, (v) direct consumer testimony, and (vii) the defendant's intent in copying the [mark] (Test Masters educ. Servs v Robin Singh educ. 2015, p. 7). If the mark is inherently distinctive, it is less of a burden to prove it, whereas if the mark is descriptive, the owner will have to fulfil the abovementioned factors.

### 5.2.2. The Degree of Recognition

Building on the premise that the mark is well-known, this condition assesses the degree of the mark's recognition. In principle, dilution is granted to specific marks which are widely known and famous. Therefore, it is recommended that Jordanian courts carefully investigate how famous the mark is and how widely it is known. However, this raises the question: should the mark be known among a specific public sector or within the general consuming public? As argued earlier, scholars lack consensus on whether dilution is mandated within the international agreement, namely the TRIPS Agreement. Therefore, recommending the degree of the mark's recognition among the general consuming public of Jordan does not contradict Jordan's obligation internationally.

Furthermore, dilution grants a strong monopoly to one party; the owner must prove that their mark is worthy of anti-dilution protection. It is argued that the general consuming public must widely recognise the mark because anti-dilution is 'an extraordinary right that only extraordinary marks deserve' (Beebe 2006, p. 1158). Protection against dilution must not be conferred to any famous mark, but to a mark that fulfils all the conditions required. In other words, a highly reputed mark would be capable of proving renown among the general consuming public, and this is precisely the type of marks Jordan must only be granting anti-dilution protection to. Upon acknowledging that dilution has a negative effect on new entrants, it follows that it must be cautiously applied in order to avoid any distortion within the market, where the doctrine of dilution grants such a potent tool to be in the hands of famous mark owners that allows them to control it. Therefore, in order to be circumspect in applying the doctrine of dilution, the Jordanian legislator must abandon the requirement for marks to have renown among the relevant public. This recommendation reflects the relevant requirements found in 15 U.S.C. 1125 (C)(2)(A) and Article 4(1)(c) WIPO JR. The TDRA limits anti-dilution protection to famous marks. It is



important to bring to the attention of the Jordanian legislator that a developed country such as the US restricts dilution to certain and specific marks, whether by stipulating it within the legislation or by the way courts implement it.

In addition, the WIPO JR calls for a standard similar to the US one, i.e., limiting the protection against dilution to specific marks, although in a convoluted way. Article 2 of the WIPO JR stipulates that to determine whether a mark is 'well-known', the court must assess the knowledge or recognition of the mark among the relevant consuming public. However, if the claim before the court is in regard to dilution, the court is given a more flexible approach to take into consideration the general consuming public in determining whether a mark is well-known. Therefore, the TDRA and the WIPO JR both endorse a rigorous threshold to overcome. While the US and the WIPO JR adopt a more stringent approach in demanding fame among the public at large, Section 2 of the Jordanian Trade Mark Law stipulates that knowledge shall be among the relevant sector of the public. It is recommended that the Jordanian legislator abandon niche fame and demand a higher standard of fame than that included in the Jordanian legislation under Section 2. Therefore, it is suggested that Jordan follow the US and the provisions of the WIPO JR, by mandating reputation among the general consuming public of Jordan, especially since the WIPO is enforced in both the US and Jordan. Arguably, limiting the scope of dilution lessens its drawbacks in Jordan. Most importantly, Jordanian legislation supersedes what the TRIPS Agreement requires; Section 2 of the Jordanian Trade Mark Law demands 'international renown', a condition that is not found in the TDRA, TMD, nor in the WIPO JR. For this reason, it is suggested that this condition must be abandoned. In addition, the requirement of 'international renown' stipulated in the Jordanian legislation and enforced by the courts is evidently a biased treatment that is in favour of foreign trademarks. Ultimately, this condition serves to protect foreign trademarks against dilution.

The following is a suggested list of conditions which the court could take into consideration when assessing the degree of recognition:

- (i) The use of the mark can be determined by examining the duration, extent, and geographical area of the sales of goods or services or any use of the mark;
- (ii) Promoting and advertising the mark can be considered by examining the duration, extent, and geographical reach of advertising and publicity of the mark by the trademark owner.

Evidently, a mark is eligible for anti-dilution protection when it is famous or, as the Jordanian legislator stipulated, 'well-known'. It is argued that the degree of recognition can be proved by analysing the mark's promotion, advertising, and the use of the mark, in other words, the mark's strength. In proving the degree of recognition, first and foremost, the mark should be in wide commercial use in Jordan for Jordanians to be familiar with it. Further, the use of the mark should be evaluated by the amount of time it has been used, i.e., how long the owner has been using the mark. Also, examination of the geographical use of the mark indicates whether the mark has reached a wide area in Jordan or a limited one. It follows that if the mark has been used in many different cities in Jordan and for a long period of time, the mark's renown has reached various regions and consumers. On the contrary, a mark that has been used in one region or a mark that has been used for a limited time would make a less convincing case that the mark has met this requirement establishing that it is widely known. Unless the owner carries out extensive promotion and marketing of the mark, enabling Jordanian consumers to become familiar with it in a short period, it would be difficult to establish that the mark is widely known. Therefore, promoting, advertising, and marketing the mark can all indicate how effectively the owner has familiarised consumers with the mark. No doubt, if a mark has not been promoted or used for a certain period, it is not convincing that it can be known among the general

consumer in Jordan. Similarly, the duration, scope, and geographical area where the mark has been used must be examined to establish whether promoting the mark achieved its purpose, and whether Jordanians are familiar with it. Ultimately, it is within the court's discretion to decide whether other evidence is valuable to prove that the mark has fulfilled this condition, i.e., the degree of recognition. Notably, the 'promotion' factor is important in US and the EU legislation, as well as in the WIPO recommendations, as a requirement for proving a mark's renown. Additionally, the domestic use of a mark in the US is an essential factor, without which protection against dilution is not conferred.

#### 5.2.3. Exclusive Use of the Well-Known Mark

Is the mark used in commerce? Does the proprietor use it exclusively? To establish a likelihood of dilution, the owner of the famous mark must prove 'the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark' (U.S.C. §1125 (c)(2)(B)(iii)). It is suggested that Jordanian legislators shall require this factor for examination by the courts. The owner of a famous mark, or, as adopted by Jordanian law, the owner of a well-known mark, must prove that he/she exclusively uses the mark. This establishes that other traders do not generally use the mark, but the proprietor of the mark solely utilises it. If other traders use the same mark, it is inconceivable that the owner of the mark will be granted anti-dilution protection. The gist is to assess whether or not the mark in question is widely used in trade, in which case the likelihood of another association having a diluting effect diminishes. Accordingly, anti-dilution protection cannot be conferred to different owners of the same mark but to one owner, the proprietor of an exclusive mark that requires protection against dilution. In addition, the use must be in commerce. Anti-dilution protection is not triggered in instances where a third party uses a mark that is similar to the well-known mark for non-commercial purposes. Anti-dilution protection is not triggered in instances where a third party uses a mark that is similar to the well-known mark for non-commercial purposes. Therefore, the Jordanian legislator must be explicit about this condition; the mark is exclusively used by its owner, and courts should consider this factor when examining the likelihood of dilution.

#### 5.2.4. The Degree of Similarity Between the Two Marks

Are the two conflicting marks similar? How similar are they? Are they too similar to be triggered in the mind of consumers, or are they slightly similar, which would not allow a 'link' to be established? The similarity condition is an integral element within the process of determining dilution; without it, there could be no dilution. Therefore, the judge must examine the similarity of the marks thoroughly to establish that dilution might occur; the judge must examine if the two marks are similar enough to be triggered in the mind of consumers to cause 'consumers to "think for a moment" before recognising that the senior mark refers to the goods of the senior mark's owner' (Beebe 2006, p. 1149). To assess the similarity between the marks, it is suggested that minimal similarity must be neglected. A minimal similarity indicates a relatively low likelihood of an association that could not induce dilution. On the other hand, if the marks were similar, this leads to association.

The US experience in dilution is of paramount importance to learn from. The court's decision in *Starbucks* concluded there is no similarity between 'Charbucks' and 'Starbucks' (*Starbucks v. Wolfe's Borough* 2009, p. 106). This case provides profound insight for manifold reasons. First, despite the widespread use and renown of the Starbucks mark around the world, the court did not prevent Charbucks from pursuing the use of its trademark. The court reasoned that the two marks display only minimal similarity. The two marks are similar in sound; however, the courts examined how marks are presented to consumers and decided upon this and other factors. It is believed that Jordanian courts must follow

this example and thoroughly examine the two involved marks before irrationally deciding on their similarity and automatically granting anti-dilution protection. Based on Jordan's current practice, it can be hypothesised that if the same lawsuit between Charbucks and Starbucks were brought before Jordanian courts, they would automatically grant anti-dilution protection to Starbucks upon finding some similarity between the two marks. This is because Jordanian courts often focus primarily on the existence of any degree of similarity—especially in sound or wording—without conducting a detailed analysis of how the marks are actually perceived by consumers or considering additional factors such as the overall presentation of the marks, their context of use, or the likelihood of harm to the distinctiveness of the senior mark. Unlike the multi-factor approach employed by the US courts under the TDRA, Jordanian courts have not consistently applied a structured, evidence-based framework when assessing dilution claims. Therefore, this case from the US experience is important; it demonstrates that there is a long and in-depth list of conditions that must be thoroughly examined before concluding that there is a similarity and, hence, a potential likelihood of dilution. Second, in analysing the similarities between the two marks, the US process is starkly different from what is practised in Jordan. The court in *Starbucks* considered the trademark as a whole and as it is presented to consumers. It is unrealistic solely to rely on finding a word that might remind consumers of another mark or similarity in respect of a few letters of the senior mark to decide that two marks are similar. In assessing whether two marks are similar, it is important to analyse the whole mark as it is presented to the public. Third, the court in *Starbucks* confirmed that the similarity element is not, by itself, sufficient to grant protection against dilution. The court considered every factor on the list stipulated in the TDRA before determining whether there was a dilution by blurring, which is not the approach that Jordanian courts tend to undertake. Therefore, Jordanian courts must thoroughly examine all the suggested factors before granting extended protection.

It is further argued that Jordanian courts must assess the similarity of trademarks based on visual, aural, and conceptual criteria. For instance, when conducting a visual comparison, courts should avoid fragmentary analysis and instead evaluate the marks as a whole, considering how they are presented to the public. This approach minimises the risk of finding similarity based solely on a few shared letters. Additionally, courts must recognise that identifying some resemblance between two marks does not automatically satisfy the requirements for dilution nor eliminate the need to assess other essential conditions. A more rigorous evidentiary standard is essential to prevent hasty conclusions regarding trademark similarity. Courts should base their decisions on strong, reliable, and substantial evidence, such as consumer surveys, rather than relying on subjective determinations. While some may argue that expert opinions should take precedence over surveys, this raises concerns about the definition, qualifications, and credibility of an expert—particularly regarding their area of specialisation and methodological expertise. Unlike expert testimony, which reflects the perspective of a single individual, consumer surveys capture multiple viewpoints, engaging the public and offering a broader empirical foundation for judicial decision-making. Incorporating survey evidence can also mitigate potential judicial bias toward foreign well-known trademarks by discouraging courts from granting protection based on minimal similarity alone.

Additionally, Jordanian courts must assess whether the similarity between two marks is sufficient to create an association in the minds of consumers. Comparative insights from US and EU jurisprudence demonstrate a more nuanced and structured approach to similarity assessment. A persistent issue in Jordanian trademark law is the tendency to automatically confer protection on foreign trademarks once minimal similarity is established. While similarity is a critical element in dilution claims, it should not be the sole determinant

of the outcome. To ensure a fair and balanced legal framework, Jordanian courts should systematically evaluate visual, aural, and conceptual similarities before concluding that dilution is likely (*Adidas-Salomon AG v. Fitnessworld Trading* 2004, para 28; *Star Industries v Bacardi Company Ltd.* 2005, p. 373; *Guthrie Healthcare Sys v Contextmedia* 2014, p. 7992). It is essential for courts to analyse the two marks as a whole and avoid partial examination. A mere formal examination of the similarity of the marks is insufficient (*Beebe* 2006, p. 1149). Therefore, Jordanian courts must not accept minimal similarity between the two marks and should deem it insufficient in dilution claims. The next factor to examine is whether the similarity between the two marks causes a mental association in the mind of the relevant consumer.

#### 5.2.5. Mental Association ‘Link’

Another condition that courts are called to assess is whether the similarity of two marks triggers a link in the minds of consumers. Whether using the US term ‘association’, or the EU one, ‘call to mind’, or a ‘link’, they all indicate the same meaning, where the average consumer, upon seeing the junior’s mark, associates it with the senior’s mark. Jordan should follow the EU and US in demanding proof of ‘association’ between the junior and senior marks. Establishing a ‘link’ is an essential condition that must be proved when examining a likelihood of dilution, as, without it, dilution cannot occur. However important it is in proving a ‘link’, this condition alone is insufficient to conclude that there is a likelihood of dilution. This element is essential to assess because it indicates whether consumers who are familiar with the senior mark are reminded of it when confronted by the junior mark. Therefore, Jordanian courts should be aware of this, as they commonly grant dilution-type protection on the grounds that a third party is using a mark similar to a well-known mark—not only without a thorough analysis of the similarity of the two marks as a whole but also without analysing whether the similarity, if proved, is likely to establish a link in the mind of consumers.

In addition, it is necessary to bring to the Jordanian courts’ attention that ‘association’ is different to ‘confusion’ when establishing a ‘link’. The burden of proof rests with the plaintiff to establish that association between the plaintiff’s mark and the second mark is likely to either cause dilution by blurring or tarnish the meaning of the plaintiff’s mark in the minds of the public. In addition, the ‘link’ must be examined from the perspective of the average consumer. The Jordanian legislator needs to include a definition of the ‘average consumer’ in the Trade Mark Law, who is reasonable, well-informed, and reasonably circumspect and observant. Additionally, the following is a suggested list of factors that courts should consider when examining ‘association’: (i) the degree of the similarity between the conflicting marks. This is essential because if there is no similarity, a link can never be established. The more similar the marks are, the more likely it is for a link to be established in the mind of consumers. The court must analyse (ii) the nature of the goods or services for which the conflicting marks are used and (iii) the degree of closeness or dissimilarity between those goods or services. These two factors are important in such an examination because, if the conflicting marks are similar and the nature of the goods is also similar, it will facilitate the establishment of a link in the mind of consumers. On the other hand, if the products differ, the link is less likely to be triggered. Ultimately, the courts must thoroughly examine whether the association might arise in this situation. Finally, (iv) the relevant sector of the public and (v) the strength of the earlier mark’s reputation must also be examined by the courts.

It is important to highlight that, when examining whether a ‘link’ exists, the relevant sector of the public is central to the assessment. This differs from the examination of whether a mark is well-known, which focuses on recognition by the general consuming

public. To qualify for protection against dilution, a mark must demonstrate renown among a broad consumer base. In contrast, the establishment of a 'link' depends on whether the relevant consumers of the junior mark associate it with the senior mark. Even where the goods or services are dissimilar, a mental association may still arise if the senior mark is sufficiently distinctive and well-known. Thus, the absence of overlap in product categories or market sectors does not preclude the possibility of dilution. What matters is whether the average consumer, upon encountering the junior mark, is reminded of the senior mark. Without this mental connection, dilution is unlikely to occur. The courts must examine the survey evidence when assessing the association and similarity of the two marks. It is crucial that courts rely on compelling evidence. The court must examine the survey evidence; as learned from the US experience in *Starbucks*, the court initially accepted a survey as proof of evidence of actual association. However, the court disregarded it because the survey did not examine the two marks as a whole (*Starbucks v. Wolfe's Borough* 2009, 181). After examining whether a link could be established in the average consumer's mind, the court must also demand evidence of a change in the economic behaviour of that average consumer.

#### 5.2.6. Change in the Economic Behaviour of the Average Consumer

This is another crucial element recommended to be included in the Jordanian Trade Mark Law, which would have to be examined along with the other suggested factors in determining whether a likelihood of dilution might occur. It is only found in the EU and is regarded as a high-threshold requirement for claimants, as it demands proof of an actual or likely change in economic behaviour. The court in *Intel*, (*Intel Corp'n v CPM UK* 2009, p. 1079) and other courts that followed this approach, such as in *Wolf* and *32Red*, required evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered resulting from the use of the later mark, or a serious likelihood that such a change would occur in the future as proof that the use of the later mark is or would be detrimental to the distinctive character of the earlier mark (*WHG Ltd. v. 32Red Plc* 2012, p. 305). It is suggested that Jordanian legislation follow the EU's approach by including this condition, requiring objective evidence that there is or will consequently be a change in the economic behaviour of the average consumer of the goods or services to which the earlier mark was registered upon the use of the later mark (*Comic Enterprises Ltd. v Twentieth Century* 2016, 949). This can be established where 'the proprietor of the earlier mark has shown that the mark's ability to identify the goods or services for which it is registered and used is weakened since the use of the later mark leads to dispersion of the identity and hold upon the public mind of the earlier mark'.

Furthermore, the CJEU in *Wolf* established that even if consumers notice the similarity of the junior's mark to the senior's mark, this is itself insufficient to establish detriment or risk of detriment to the distinctive character of the earlier mark within the meaning of Article 8(5) of Regulation No 207/2009 (*Starbucks v. Wolfe's Borough* 2009, para 37). Therefore, for a successful dilution claim, either by blurring or by tarnishment, the claimant must show that such a change in economic behaviour by the average consumer has actually happened or is likely to happen in the future (*Iron & Smith v Unilever* 2015, 1025). This factor is not found in any of the compared legislations; however, it is mandated among courts in the EU. This factor is not adopted within the US nor the WIPO JR. However, no explicit provision prohibits incorporating such a factor within the Jordanian Trade Mark Law to enhance the application of the dilution theory in Jordan.



### 5.2.7. Intention to Create Association

This factor is found within the TDRA. Commentators believe that the dilution protection law was triggered by the defendant's bad faith in using the famous mark in the first place (Luepke 2008, p. 802). According to Luepke, 'they see dilution protection as a result of the intention to protect against others' free rides rather than to protect the property of the owner of the famous trademark' (Luepke 2008, p. 802). It is believed that this element could bring scepticism to the analysis carried out by Jordanian courts when determining the likelihood of dilution, particularly that intent is a subjective state of mind (Mostert 1996, p. 124). It is strongly believed that the element of finding 'intention to create association' will create more problems in implementing dilution theory. It is argued that Jordanian courts may misuse and misinterpret this factor. The common understanding of dilution theory in Jordan is to provide automatic protection to foreign trademarks, which are considered well-known marks. Accordingly, this factor of 'intention to create association' will facilitate this misconception and support courts' decisions in protecting foreign trademarks, hypothetically justifying this protection to inhibit any mark coming close to the aura of the well-known mark, ultimately impeding junior users from taking unfair advantage of the senior's mark. However, recommending abandoning the requirement of examining 'intention to create association' is balanced by suggesting expanding the scope of dilution to encompass 'free-riding'. Although the TDRA refers to the requirement of 'intention to create association', Jordan's position in acknowledging free-riding as one of the types of dilution is equivalent and sufficient.

Another explanation for the abandonment of requiring 'intention to create association' is that this factor establishes a connection between the junior user's bad intent and the free-riding concept (Luepke 2008, p. 831). Also, it offers the possibility of including misappropriation in determining whether a junior user likely dilutes a mark (Luepke 2008, p. 831). Therefore, it is suggested that repetition be avoided and that dilution should be included explicitly to cover free-riding cases. Furthermore, it is anticipated that a junior user has most likely used the senior's mark to create an association. However, there is also a chance that the junior user had accidentally used a similar mark to the senior's mark.

It is recommended that in determining a likelihood of dilution an examination of the suggested factors shall be assessed in sequence. Arguably, the mark's fame acts as a gatepost to acquire protection against dilution. In contrast, a change in the economic behaviour of the average consumer is a gatepost in determining the likelihood of dilution. The difficulty of the assessment increases accordingly; if the senior user proves a change in economic behaviour, it is indisputable that there is a likelihood of dilution. However, before a final decision before the court, an analysis of whether the use by a third party is with or without due cause must be examined.

### 5.3. Defences

It is essential to point out that certain uses are exempted from the liability of dilution. Thus, this strong monopoly must be monitored closely in order not to prevent others from using the well-known mark in a fair manner. The TDRA, §1125 (c)(3) stipulates exceptions to anti-dilution protection, which include (i) fair uses, such as advertising or promotion that allows consumers to compare the products, as well as parodying and commenting on the famous mark; (ii) news reporting and news commentary; and (iii) any non-commercial use of a mark. On the other hand, the TMD refers only to 'without due cause' Article 10(2)(c) of the Directive 2015. Also, the WIPO JR states in Article 4(1)(b)(ii) that 'the use of that mark is likely to impair or dilute in an unfair manner the distinctive character of the well-known mark'. The WIPO JR, in the explanatory notes on Article 4.4, uses wording regarding an 'unfair manner', implying that third-party use of a well-known mark which is not contrary

to honest commercial practice (e.g., reference to a well-known mark for review or parody) does not constitute dilution.

It is understood that any action undertaken by a third party using a mark similar to the reputed mark must be ‘without justifiable reason’ in order for it to give rise to liability for dilution (Bicknell 2014, p. 403). It is argued that the EU stance on its own is insufficient, because there is little explanation on the meaning of ‘without due cause’. This type of constructive ambiguity around this undefined concept arguably could give Jordanian courts the opportunity to develop defences as and when they see fit. Therefore, it is suggested that the Jordanian legislator adopt a combination of the US and the EU approaches, along with a reference to the recommendations of the WIPO as a comprehensive defence to nullify triggering dilution. Furthermore, it is recommended that ‘non-commercial use of a mark’, which is found in the TDRA, should *not* be one of the conditions of defences because not only does it limit the scope of defences but also because it raises issues, such as those parody uses, which are deemed fair, unless they are connected to a commercial use of the mark, in which case, parody will be inhibited. For this reason, it is important to keep defences unrestricted, because they aim to limit the scope of anti-dilution protection. Therefore, unconditional defences allow third parties to practise their rights freely.

It is suggested that Jordanian courts should consider whether a third party’s use of a mark similar to a reputed mark occurs in the context of fair competition, particularly where the use does not imitate the goods or services for which the reputed mark is registered. However, the dissimilarity of goods or services alone should not be treated as a defence to a dilution claim. Instead, courts should assess whether the use takes unfair advantage of, or is detrimental to, the distinctive character or repute of the earlier mark. Moreover, when evaluating whether the use is ‘without due cause,’ courts should consider whether the third party’s use is likely to cause consumer confusion. A likelihood of consumer confusion may indicate that the third party’s use is unjustified, and thus falls within the scope of ‘use without due cause’ (Comic Enterprises Ltd. v Twentieth Century 2016, p. 947). Although testing consumers’ confusion is irrelevant to dilution theory, it is arguably important to rely on the consumer’s perspective in deciding whether it is fair or unfair. In addition, it will examine whether the use by a third party is an alternative option without affecting the functions of the senior trademark and without causing confusion to consumers. It could also be suggested that courts take into account a few elements that the court had followed in EU (Leidseplein Beheer v Red Bull 2014, p. 446), for instance (i) how that sign has been accepted by and what its reputation is with the relevant public; (ii) the degree of proximity between the goods and services for which that sign was originally used and the product for which the mark with a reputation was registered; and (iii) the economic and commercial significance of the use for that product of the sign which is similar to that mark (Leidseplein Beheer v Red Bull 2014, para 46).

With regards to injunctive relief, it is recommended that Jordan include that dilution is applied where the use of the well-known mark by a third party is taken in an ‘unfair manner’. Therefore, actions that are exempted from the liability of dilution, such as when a third party uses a similar mark to the senior mark in a fair use, should *not* be deemed contrary to honest commercial practice. For more clarification, it is suggested to include a non-exhaustive list of examples that could assist courts in determining fair use and honest commercial practices: namely, news reporting and news commentary, parodying, criticising or commenting upon the famous mark’s owner or the goods or services of the famous mark’s owner, and advertising or promotion that permits consumers to compare goods or services.

#### 5.4. Injunctive Relief

Following the recommended definitions of the types of dilution, the Jordanian Trade Mark Law should consider stipulating an injunctive relief to specify the right granted to the well-known trademark owner upon a successful dilution claim. The following suggestion is not only influenced by the TDRA but also reflects on the wording of the TMD. Although the TMD lacks an explicit legal reference, it is essential for Jordan to follow the example of the TDRA to stipulate a clear provision of injunctive relief. This specifies what rights are conferred to the owner of a well-known mark upon a successful claim in dilution. It stipulates what actions are regarded as dilutive, i.e., dilution by blurring or dilution by tarnishment, or where there is an unfair advantage of the distinctive character or reputation of the senior mark. It is argued that the suggestion of injunctive relief is comprehensive, as it covers what dilution aims to protect, the scope of dilution, and the rights conferred to the owner of a well-known mark upon a successful dilution claim. Therefore, it is recommended to include the following within the Jordanian Trade Mark Law.

The well-known trademark owner shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods and services, any sign where another person without due cause commences in an unfair manner the use of a mark or trade name in commerce on similar or dissimilar goods or services that is likely to cause dilution by blurring or dilution by tarnishment, or would take unfair advantage of the distinctive character or reputation of the mark. In determining whether there is a likelihood of dilution, the court shall consider all factors: (i) the distinctiveness of the mark, (ii) the degree of recognition, (iii) exclusive use of the well-known mark, (iv) the degree of similarity between the two marks, (v) a link, (vi) change in the economic behaviour of the average consumer, who is reasonable, well-informed, and reasonably circumspect and observant, and (vii) whether the use by a third party is without due cause. The court will consider if the use affects the functions of the trademark concerned or causes consumer confusion; accordingly, the use is without due cause if the third-party use of a well-known mark is not contrary to honest commercial practice (e.g., reference to a well-known mark for review or parody), and thus the use does not constitute dilution.

It may be argued that the concept of dilution should not apply in instances of double identity—i.e., where an unauthorised third party uses an identical mark on identical goods or services—since such cases are more appropriately addressed under traditional trademark infringement rules. While dilution protection in both US law and under the EU Trade Marks Directive 2015 provides additional safeguards for well-known marks, its purpose is to extend protection, even in the absence of confusion or direct competition. Therefore, dilution should not be conflated with infringement, and its scope must be carefully preserved to apply in cases involving dissimilar goods or services, where the harm lies in blurring or tarnishing a mark's distinctiveness rather than causing confusion. McCarthy contends that triggering 'dilution' on similar and competitive goods or services is a *harmful* instrument 'to the balance of free and fair competition' (McCarthy 2004, p. 1177).

It is recommended to avoid incorporating within the Jordanian Trade Mark Law the wording found in the TDRA; 15 U.S.C. § 1125(1)(c)(1) 'regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury'. Although it holds true that the concept of dilution is not concerned with those instances, as mentioned above. It is recommended that the Jordanian Trade Mark Law avoid adopting such a reference as it indicates explicitly that dilution disregards the foundation of trademark law and thus infers a stronger monopoly should be granted to foreign marks. In other words, if the Jordanian Trade Mark Law adopts the TDRA example to state 'regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury', arguably, this is a stronger justification for courts to grant automatic protection

to foreign marks against dilution. Alternatively, including such reference will maximise the drawbacks of applying dilution in Jordan. In addition, this illustrates that dilution is a potent legal tool that powerful brand names may use to control the market. The exclusion of such references is influenced by EU law and WIPO JR. Therefore, it is recommended that the EU example and the provisions of the WIPO JR be followed to exclude such references from the Jordanian Trade Mark Law. In addition, it is important not only to be clear and explicit when suggesting a reformation of the law but also to adopt what is deemed relevant, suitable, and appropriate for Jordan.

## 6. Conclusions

The deficiencies in the Jordanian Trade Mark Law regarding dilution protection manifest in three critical ways. First, the law's inherent ambiguity has resulted in judicial practices that disproportionately favour foreign trademarks, granting them dilution protection while systematically excluding domestic trademarks from equivalent safeguards. Second, this protection is conferred automatically upon recognition of a mark as well-known, typically favouring foreign trademarks without requiring a rigorous evidentiary assessment. Third, Jordanian courts fail to conduct a thorough and structured examination of whether a mark qualifies as well-known or whether there exists a genuine likelihood of dilution. The absence of a clear doctrinal and statutory framework has led to arbitrary and inconsistent judicial interpretations, undermining the fundamental principles of fairness and non-discrimination in trademark law.

Rectifying these deficiencies requires substantive legal reforms that recalibrate Jordan's approach to dilution protection. The analysis draws on the well-established frameworks of the United States and the European Union, alongside the normative guidance provided by the WIPO Joint Recommendation, to highlight the necessity of refining Jordanian law. Introducing clear statutory definitions, structured evidentiary requirements, and a more disciplined judicial methodology would enhance legal certainty and ensure a more equitable application of dilution protection. We argue that, given the exceptional nature of anti-dilution protection, it must be applied with precision and caution, ensuring that it is granted only in cases where a mark demonstrably satisfies the established legal criteria. The comparative analysis highlights that, unlike the European Union, the United States provides explicit statutory definitions for dilution by blurring and dilution by tarnishment, offering a more structured approach to judicial application. While both jurisdictions impose rigorous evidentiary requirements, the European legal framework compensates for the absence of explicit statutory definitions by requiring additional judicial scrutiny, thereby restricting dilution protection to marks that clearly merit it. Moreover, the European model incorporates broader dilution-related protections, such as free-riding, which are absent from the United States' Trademark Dilution Revision Act but explicitly endorsed by the WIPO framework. Despite these differences, the jurisprudential approach in the United States and the European Union consistently maintains a high evidentiary threshold, ensuring that dilution protection is not granted indiscriminately or without due legal scrutiny. This approach stands in stark contrast to Jordan, where dilution protection is conferred arbitrarily and often in the absence of meaningful judicial examination.

Although the United States and the European Union adopt distinct legislative and judicial approaches to dilution, their common objective remains the same: safeguarding well-known trademarks from dilution while preventing the doctrine's misuse through excessive or indiscriminate application. Their commitment to judicial restraint underscores the need for Jordan to adopt a similarly measured and principled approach. Reforming Jordan's Trade Mark Law in accordance with international best practices enhances doctrinal coherence and judicial consistency, aligning it with global standards in trademark

protection. This recalibration eliminates the existing bias that privileges foreign trademarks over domestic ones and introduces essential statutory and evidentiary safeguards that limit dilution protection to marks that genuinely warrant such status. Establishing a framework that is both rigorous and balanced ensures that dilution protection is applied judiciously, preserving the integrity of Jordan's trademark system while fostering a legal environment that promotes equitable treatment of both foreign and domestic trademarks.

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