

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JONES DAY, a general partnership,)	
)	Case No. 08CV4572
Plaintiff,)	
)	
v.)	Judge Darrah
)	
BlockShopper LLC, d/b/a Blockshopper.com, <i>et al.</i>)	
)	
Defendants.)	

**BRIEF OF PUBLIC CITIZEN, ELECTRONIC FRONTIER FOUNDATION,
PUBLIC KNOWLEDGE, AND CITIZEN MEDIA LAW PROJECT AS AMICI
CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, plaintiff is abusing a trademark to suppress legitimate, non-infringing speech, with potentially significant implications for other online speakers. The Internet offers unprecedented opportunities for speakers and audiences to find each other and exchange valuable information about products, research, viewpoints, and other important topics. That exchange cannot happen if trademark holders can prevent others from using their marks, accurately, in the ordinary course of communication, to refer to the holders themselves. But that is precisely what Jones Day seeks to do here. Its effort must fail.

Lanham Act decisions recognize that trademarks do not give a markholder veto power over all uses of its mark, and for good reason. Online and off, trademarks—words, symbols, colors—are also essential components of everyday language, used by companies, consumers and citizens to share information. *See* Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 973 (1993) (“[trademarks] often provide some of our most vivid metaphors, as well as the most compelling political imagery in political campaigns [A]llowing the trademark holder to restrict their use implicates our collective interest in free and open communication.”); *see also* Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 195-96 (“Famous trademarks . . . become an important, perhaps at times indispensable, part of the public vocabulary. Rules restricting the use of well-known trademarks may therefore restrict the communication of ideas.”).

Thus, legislators and courts have taken care to ensure that trademark rights are not used to impose monopolies on language and intrude on First Amendment values. *See, e.g., Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (“Because overextension of

Lanham Act restrictions . . . might intrude on First Amendment values, we must construe the Act narrowly to avoid such a conflict.”); *CPC Int’l v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000)(“[i]t is important that trademarks not be ‘transformed from rights against unfair competition to rights to control language.’” (quoting Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1710-11 (1999))).

This case requires similar care. A large law firm with overwhelming resources seeks to use trademark law to prevent a small real estate news site from conveying accurate information about the firm and its associates. If Jones Day’s trademark theory were correct, no news site or blog could use marks to identify markholders, or links to point to further information about the markholders, without risking a lawsuit. But Jones Day is wrong. The use in question is clearly a fair use protected by the First Amendment and by the Lanham Act. Moreover, this law firm, as powerful as it may be, is hardly famous enough to deserve the extraordinary protection of the federal antidilution law. Jones Day’s federal claims are baseless and amici urge the Court to dismiss them.

INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the accompanying motion for leave to file this brief, and are not repeated here.

I. JONES DAY HAS NOT STATED AN INFRINGEMENT CLAIM.

Jones Day argues first that its trademark is infringed by the use of its name in the headline of the web pages about its associates’ real estate purchases, and the embedding of hyperlinks (in the names of the associates as they appear in the articles about their purchases), that lead to the associates’ biographies on the Jones Day web site. Plaintiff’s claim depends on its ability to show that BlockShopper’s use of the mark creates a

“likelihood of confusion” about “the origin of the product in the eyes of the purchasing public.” *Sullivan v. CBS Corp.*, 385 F.3d 772, 777 (7th Cir. 2004). Or, as the Ninth Circuit put it, “It is the source-denoting function which trademark laws protect, and nothing more.” *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 900-901 (9th Cir. 2002). Although Jones Day’s complaint includes allegations that track this language—it alleges in ¶¶ 38 and 44 that BlockShopper’s use of its marks “is likely to cause confusion among consumers about the source or origin” of the BlockShopper web site—the allegations cannot withstand a motion to dismiss for three reasons.

A. Jones Day’s Exhibits Contradict Likelihood of Confusion.

When a document is attached to or referenced in the complaint, it forms part of the complaint and hence may be considered in deciding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *IBEW Local 15 v. Exelon Corp.*, 495 F.3d 779, 782 (7th Cir. 2007). If the document contradicts the allegations in the complaint, it is the document that controls, not the bare allegations. *Forrest v. Universal Savings Bank*, 507 F.3d 540, 542 (7th Cir. 2007). “A court is not bound by the party’s characterization of an exhibit and may independently examine and form its own opinions about the document.” *Id.*

In this case, the exhibits attached to the complaint flatly contradict the allegations of likely confusion. No reasonable consumers could look at the headline in the article about Dan Malone’s purchase of a condominium, “Jones Day attorney spends \$463K on Buckingham Pl.,” or the headline about Jacob Tiedt’s transaction, “New Jones Day lawyer spends \$760K on Sheffield,” and be confused about whether they were looking at a web site sponsored by Jones Day. The use of the Jones Day name is no more confusing

about the source of that article than the use of Jones Day's name in the caption on the first page of this brief. Similarly, Internet users are generally aware that web sites link to other web sites with which they have no association, and the mere fact that a hyperlink may be followed from the name "Malone" to the biographical page about him on Jones Day's web site would not cause any reasonable viewer to think that the BlockShopper site is sponsored by Jones Day. Linking is what web sites do—that is, after all, why it is called the "World Wide **Web**."

Perhaps, in some contexts, the "anchor text"—the text in which the link is embedded—or the text surrounding that anchor text, might misleadingly suggest sponsorship for the web site (for example, if the text said, "go **here** to see the home page of this site's owner," and the hyperlink embedded in the word "here" were to the Jones Day's web site). The same could be true of the headline of an article, such as "Jones Day sponsors this web page." But Jones Day has not alleged any such facts.¹

B. Jones Day's Allegations Lack the Specificity Needed for a Trademark Claim Against Noncommercial Speech Under the First Amendment.

Even if the exhibits did not contradict the allegations of likelihood of confusion, Jones Day's allegations are insufficiently specific to state a claim in light of the First Amendment rights implicated by this action, and the many court decisions that construe the trademark laws narrowly to avoid conflict with First Amendment rights. Courts have

¹Jones Day's complaint also seems to allege that defendants infringed its mark by placing on its web pages about the two associates facts (and photographs) that it culled from the biography pages on Jones Day's own web site. However, there is no allegation that its web site's contents constitute trademarks or have secondary meaning. This argument appears to be at odds with *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2004), which rejected an attempt to use trademark law to pursue a claim for copying a work on which the copyright had expired. If plaintiff can show that defendants took copyrighted expression and not merely facts, it should allege a copyright claim. It should not pass off potential copyright problems as a trademark claim.

repeatedly read the Lanham Act's language as limiting the trademark laws to "commercial" uses, hence avoiding conflict with First Amendment protection for noncommercial speech. *Bosley Medical v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005); *Taubman v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003); *CPC Int'l v. Skippy*, 214 F.3d 456, 461 (4th Cir. 2000). When state trademark laws do not expressly exempt noncommercial speech, they should be read in pari materia with the Lanham Act that does protect such speech, or else they are unconstitutional as applied to noncommercial uses of protected marks. *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997); *Lighthawk v. Robertson*, 812 F. Supp. 1095, 1097-1101 (W.D. Wash. 1993).

Jones Day apparently seeks to plead its way around the First Amendment by alleging that BlockShopper solicits advertising for its web site, but that fact neither makes the expression on the web site commercial speech, nor authorizes application of commercial speech standards to limit its expression. Commercial speech is speech that does no more than propose a commercial transaction. *United States v. United Foods*, 533 U.S. 405, 409 (2001); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983). The fact that noncommercial statements are made in a medium which itself carries advertising does not mean that the web site may be regulated under the standards that apply to commercial speech. "It is well settled that a speaker's rights are not lost simply because compensation is received." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988). After all, it was a paid advertisement that was held to be protected, noncommercial speech in *New York Times v. Sullivan*, 376 U.S. 254, 265-266 (1964).

The Seventh Circuit expressly endorsed this approach in *Ayres v. Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997), stating, “T-shirts are a medium of expression prima facie protected by the . . . First Amendment, and they do not lose their protection by being sold rather than given away.” *Id.* at 1015. The court distinguished government limitations on “the sale of goods that are not themselves forms of protected speech.” *Id.*

The government interest in avoiding consumer confusion about the source of goods and services, which is protected by the trademark laws, implicate the same distinction. Courts of appeals have developed various approaches to accommodate such free speech concerns. For example, in *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552-553 (5th Cir. 2001), the court drew a distinction based on whether speakers had an economic motive for the speech about the trademark holder, holding that the Lanham Act could apply if the purpose of the speech itself was to sell more products, but not if the primary purpose of the speech was to express criticism of the trademark holder. And *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989), accommodated the First Amendment interests of authors and artists through a rule governing infringement claims against artistic or literary products made for sale, such as mass publications, movies and musical recordings. Under this approach, the Lanham Act cannot be applied unless the trademark in the title “has no artistic relevance to the underlying work whatsoever or, if it has some artistic relevance, unless the title **explicitly** misleads as to the source or the content of the work.” *Id.* (emphasis added); *Mattel v. Walking Mt. Prods.*, 353 F.3d 792, 807 (9th Cir. 2003), *ETW Corp. v. Jireh Pub.*, 332 F.3d 915, 920 (6th Cir. 2003); *Westchester Media v. PRL USA Holdings*, 214 F.3d 658, 664 (5th Cir. 2000).

Because First Amendment protection for the right to engage in the journalistic enterprise of reporting on real estate transactions found on the public record is at least as great as the protection for artistic works, the same standard should apply to such speech. A standard that rests on the speaker's subjective intent and on the noncommercial nature of the speech is particularly appropriate in a case like this one, given the huge expense of standard trademark litigation, AIPLA, *Report of the Economic Survey* 22 (2005), and the danger that a start-up like BlockShopper could be worn down by the cost of litigating against a big law firm. "A lawsuit no doubt may be used as a powerful instrument of coercion or retaliation." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 440 (1983). *Cf. Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 214 (2000) (need for clear rules in trademark law to allow summary disposition of anti-competitive strike suits). This concern demands clear rules protecting web sites like BlockShopper.com.

The *Rogers* test applies most readily to the use of the name "Jones Day" in the title of the two articles about real estate purchases by Jones Day associates, but because the **purpose** of the *Rogers* test is to avoid a conflict between trademark law and the First Amendment rights of artists, it makes sense to apply that test more generally to any use of a trademark in furtherance of non-commercial speech. Similarly, the *Amway* test can be readily applied in a case like this one because it helps protect the First Amendment rights of non-commercial speakers (even those working for a commercial enterprise) against over-extension of trademark law.

Jones Day's allegations cannot withstand a Rule 12(b)(6) motion to dismiss under either test. The allegations do not survive *Rogers* because Jones Day has not alleged that BlockShopper has used the Jones Day mark in ways that have no relevance to the

expression in which they are used. The headline of the article tells readers that the web page is about the activity of a Jones Day associate, and the hyperlink to the Jones Day web site points Internet users to a particular page where they can learn more about the associate in whose name the hyperlink is embedded. The allegations do not survive *Amway* because although Jones Day alleges that defendants intend to obtain advertising for their web site, there is no allegation that the **purpose of the specific speech** at issue under the trademark laws—the headline and the hyperlink—was to steal business from Jones Day by confusing Internet viewers about the source of the BlockShopper web site. Accordingly, the complaint for infringement and unfair competition should be dismissed.

C. BlockShopper’s Use Of the Jones Day Mark Is A Fair Use.

Finally, the defense of nominative fair use protects BlockShopper’s use of the Jones Day name. *Century 21 Real Estate Corp. v. Lendingtree*, 425 F.3d 211, 218-221 (3d Cir. 2005); *New Kids on the Block v. New America Pub.*, 971 F.2d 302, 308 (9th Cir.1992). Nominative fair use applies where, as here, “a defendant has used the plaintiff’s mark to describe the plaintiff’s product, **even if the defendant’s ultimate goal is to describe his own product**” *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1152 n.8 (9th Cir. 2002) (emphasis in original), (citing *New Kids on the Block v. New Am. Publ’g*, 971 F.2d 302, 306 (9th Cir. 1992)); *see also Illinois High School Ass’n v. GTE Vantage*, 99 F.3d 244, 246 (7th Cir. 1996) (“IHSA could not have sued Musburger or CBS for referring to ‘March Madness’ . . . even in advertising if the term were used merely for identification.”) (citing *New Kids*, 971 F.2d at 308).

The nominative fair use doctrine balances markholders’ limited property rights in a particular word, phrase or symbol against the public’s need to use a mark to refer to

their products, and prevents markholders from using trademark rights to police any and all references to their products and services. As the Ninth Circuit put it, “Most useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.” *New Kids*, 971 F.2d at 306-07.

Under the nominative fair use test, a commercial user must show that (1) the markholders’ product or service in question is not readily identifiable without use of the trademark; (2) only so much of the mark or marks was used as is reasonably necessary to identify the product or service; and (3) the user did nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. *Cairns, supra*, 292 F.3d at 1152. The Seventh Circuit has not addressed nominative fair use, but several judges of this Court embrace it. *Ty, Inc. v. Publications Int’l*, 2005 WL 464688 (N.D.Ill. Feb. 25, 2005) at * 5 to *7; *World Impressions v. McDonald’s Corp.*, 235 F.Supp.2d 831, 842-843 (N.D. Ill. 2002); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores*, 2001 WL 747422 (N.D. Ill. June 29, 2001). The 2006 Lanham Act amendments expressly incorporated the doctrine as fair use. 15 U.S.C. § 1125(c)(3)(A).

Jones Day’s own complaint and exhibits establish the nominative fair use defense barring Jones Day’s trademark claim. The Jones Day name is used to identify the employer of the two associates who engaged in the real estate transactions, and to express the hyperlink that takes an internet user to the particular page on the Jones Day web site where their biographical sketches can be found. Complaint Ex. D. It would be very difficult to refer to that employer without use of the mark—“a large multinational law firm” would hardly suffice. *See generally New Kids*, 971 F.2d at 307 (“For example, one

might refer to ‘the two-time world champions’ or ‘the professional basketball team from Chicago,’ but it’s far simpler (and more likely to be understood) to refer to the Chicago Bulls.”). BlockShopper has used only so much of the plaintiff’s mark as is necessary to accomplish those legitimate objectives. For example, unlike the counterclaim defendant in *World Impressions*, defendants used the words “Jones Day” only in the same typescript as the rest of their headlines, rather than using the distinctive lettering shown in Exhibit A to the Complaint. And, defendants have not otherwise implied a sponsorship by or affiliation with Jones Day. Indeed, BlockShopper refers to any number of employers in its articles, from hospitals to chemical companies. Complaint, Ex. C. It is not reasonable to infer that BlockShopper readers would suppose that BlockShopper is affiliated with any of these employers, any more than a reader might imagine that Apple, Inc. endorsed a profile about Steve Jobs on a finance website—even if information for the profile were taken from an Apple annual report and linked to Apple’s web site. Nor does a link to Jones Day change the analysis: “The mere appearance on a website of a hyperlink to another website will not lead a web user to conclude that the owner of the site he is visiting is associated with the owner of the linked site.” *Knight-McConnell v. Cummins*, 2004 WL 1713824, *2 (S.D.N.Y. July 29, 2004).

II. JONES DAY HAS NOT STATED A CLAIM FOR DILUTION.

Neither can Jones Day state a cause of action for dilution. As a threshold matter, its mark is not sufficiently famous under a recent amendment to federal antidilution law. And even if it were, no less than three statutory defenses doom the dilution claim.

A. “Jones Day” Is Not A Famous Mark Under the Newly Amended Lanham Act.

Amici acknowledge that Jones Day is famous within a large subset of the public: lawyers, many of the people who hire them, and judges. But that is not the kind of fame that merits protection under the Lanham Act’s antidilution provisions. In 2006, the Lanham Act was amended to clarify that a mark is only “famous” if it is “widely recognized by the general consuming public of the United States” as a designation of the source of goods or services of the mark’s owner. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (2006); see also *Top Tobacco, L.P. v. North Atlantic Operating Co.*, 509 F.3d 380, 384 (7th Cir. 2007) (recognizing that the 2006 amendments “eliminated any possibility of ‘niche fame’”). Thus, marks that merely enjoy “niche fame” in specialized markets can no longer satisfy the “difficult and demanding” requirements of federal antidilution law. McCarthy, McCarthy On Trademarks and Unfair Competition, § 24:104 (4th ed. 2008)

The revision “made it clear to courts that dilution was a law to be applied sparingly.” Dogan & Lemley, *The Trademark Use Requirement in Dilution Cases*, 24 SANTA CLARA COMP. & HIGH TECH. L J. 541, 548 (2007). That sparing application is essential to prevent markholders from wielding dilution claims, which can be brought against even non-confusing and noncompetitive uses, as weapons to suppress speech, and interfere with the efficient operation of the marketplace. *Id.* at 543-44. Thus, it is crucial that courts follow Congress’s mandate to limit dilution doctrine to truly famous marks. See McCarthy, § 24:68 (“The antidilution remedy was intended to apply only in unusual

and extraordinary cases [and] be reserved for a small, elite group of truly renowned marks.”).²

Jones Day’s allegations do not support its claim to true fame. Virtually every factual allegation Jones Day offers to support its allegation of famousness is based on surveys of lawyers, corporations, and Jones Day clients. Complaint ¶¶ 15-19. These allegations go to support famousness within a niche market—the market for legal services—but not with the general public. Even the injunction against diluting behavior that Jones Day cites, *id.* ¶ 18, was issued in 2005, before the Lanham Act was revised to exclude niche fame.

The only allegation that even comes close to supporting Jones Day’s claim of famousness is a purely conclusory assertion that, as a result of its unspecified marketing efforts, “the general public” has come to associate “high quality legal services” with the Jones Day firm. *Id.* ¶ 16. But this simple assertion falls short of the new statutory definition of famousness, even at the pleading stage. On a motion to dismiss, the Court must accept as true all well-pleaded allegations in the complaint as well as inferences reasonably drawn from them, but it need not accept “conclusory allegations concerning the legal effect of facts set out in the complaint.” *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 730 (7th Cir. 1994); *see also Challenger v. Local Union No. 1*, 619 F.2d 645, 649 (7th Cir. 1980) (“A motion to dismiss admits only allegations of fact, not

² Indeed, the International Trademark Association, the drafter and originator of the Trademark Dilution Revision Act, stressed this very point in testimony before Congress supporting the Act: “dilution is meant to be a special remedy for only a narrow class of famous marks, and against only a narrow class of uses” Testimony of Anne Gundelfinger, President, International Trademark Association, before House Subcommittee on the Courts, the Internet and Intellectual Property, Committee on the Judiciary, Feb. 17, 2005 (109th Cong. 1st Sess.), 2005 WL 408425.

legal conclusions.”). Further, the factual allegations must be enough to “raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (citation omitted).

Jones Day may be famous on LaSalle Street and even Wall Street, but it is not reasonable to infer that the firm is also known on Main Street. The dilution claim should be dismissed for this reason alone.

B. The Challenged Speech Is Protected by the NonCommercial Speech, News Reporting and Fair Use Exemptions.

Even if Jones Day has alleged famousness within the meaning of the Lanham Act, three statutory defenses bar its dilution claims.

First, as explained above at 8-10, BlockShopper’s use of the mark is clearly nominative fair use, and therefore exempt from liability. 15 USC § 1125(c)(3)(A).

Second, Section 1125(c)(3)(B) exempts “*all forms* of news reporting and news commentary” from federal anti-dilution claims. 15 U.S.C. § 1125(c)(B) (emphasis added) *cf. Illinois High School Ass’n*, 99 F.3d at 246 (“IHSA could not have sued Musburger or CBS for referring to ‘March Madness’ in a news program (including a program of sports news)) (citing *L.L. Bean v. Drake Publishers*, 811 F.2d 26 (1st Cir. 1987)). This exemption was crafted for the precise reason highlighted here: absent such a safe harbor, it would be difficult for any source of which the trademark owner disapproves to provide accurate information to the public. Further, the exemption applies to any article that “is written for the purpose of conveying information to the public”—whether the article is published by a less traditional online news source or brick and mortar media. *Bidzirk LLC v. Smith*, 2007 WL 3119445 (D.S.C. Oct. 22, 2007) (news reporting exemption

applied to article on blog regarding eBay auction listing company); *see also generally Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (“[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (newsgatherer’s privilege applies if reporter had intent to use materials to disseminate information to the public and such intent existed at the inception of the newsgathering process); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (same). Indeed, courts in this Circuit have not hesitated to apply traditional news privileges to “nontraditional” reporters. *See, e.g. Desai v. Hersh*, 954 F.2d 1408, 1412 n. 3 (7th Cir. 1992) (finding the reporter’s privilege applicable to book author under Illinois’ statutory definition of reporter); *Builders Assoc. of Greater Chicago v. County of Cook*, 1998 WL 111702, *5 (N.D. Ill. Mar. 12, 1998) (holding advocacy group’s information-gathering for political purposes as privileged where it was gathered with the intent to disseminate the information to the public).

BlockShopper’s articles provide “real estate news and market data” and “daily news stories” about who is “buying and selling” real estate. Complaint, Ex. C. BlockShopper publishes statistics on local real estate sales and foreclosures, *id.*, as well as information about the people who are buying and selling. *Id.*, Exs. C, D. In short, it conveys information to the public. The fact that it accepts advertising does not change that primary activity, any more than the New York Times’ reliance on advertising to pay the bills would deprive the newspaper of the news reporting exemption.

Third, for reasons set forth above at 5-6, the speech at issue is noncommercial for purposes of the Lanham Act. It is therefore exempt from liability under section 43(c)(3)(C), which protects “any noncommercial use of a mark.” 15 U.S.C. §

1125(c)(3)(C); *see also Mattel Inc. v. MCA Records*, 296 F.3d 894, 907 (9th Cir. 2002) (use of Barbie trademark in a song fell within noncommercial use exemption even though song was marketed for profit).³

BlockShopper's speech lies firmly within the section 1125(c)(3) safe harbors. Jones Day has not and cannot state a claim for dilution.

CONCLUSION

Defendants' motion to dismiss should be granted.

Respectfully submitted,

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³ Amici do not discuss the complaint's state law claims, except to note their skepticism that they can survive First Amendment scrutiny, just as the federal trademark claims would offend the First Amendment even if otherwise valid under trademark law.