

## *Willfulness*

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"Willfulness" or "willful" conduct is not normally a critical element of an intellectual property claim. However, willfulness often plays an important role in determining remedies, especially in trademark law. (For example, the Lanham Act invokes willfulness expressly in its exposition of remedies for counterfeiting, and for trademark dilution. Courts invoke willfulness when determining monetary remedies under Section 35(a), as well as when determining whether a case is "exceptional" for the purpose of awarding attorney's fees.) Unfortunately, courts have not consistently defined what "willfulness" means, and some statutory uses (especially in the trademark dilution statute) further obscure the meaning of the term. Does "willful" mean "intentional"? If so, intent to do what? (In this regard, the "willful intent" provision of the federal dilution statute would be particularly obtuse.) Does "willful" mean "with knowledge"? If so, knowledge of what? That one's action is infringing? Or something else? Focusing primarily on trademark law, this article will examine the many uses of willfulness, including some uses of willful or intentional action in determining infringement. The article will use both case law and jury instructions (as well as secondary sources and studies) to illustrate the inconsistencies and linguistic problems with the term. The article will further discuss some implications for trademark law, particularly the specter of ever-increasing damage awards for possibly less than highly blameworthy conduct.

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