



*Expansion and Contraction with
the TDRA:
A **VERY** Preliminary Look*

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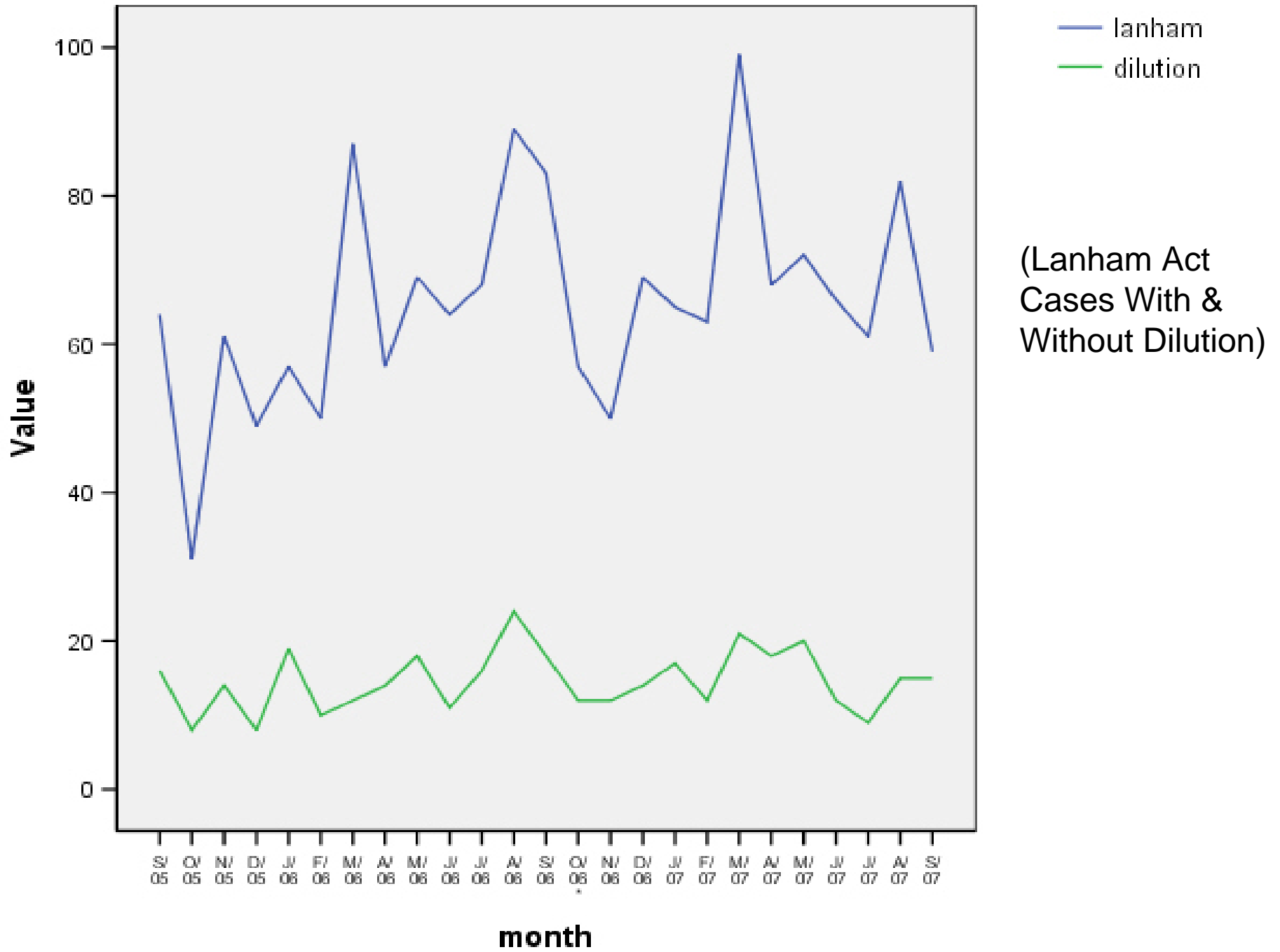


Clarifications in the TDRA

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

Key Changes

- Likelihood of dilution rather than actual dilution +
- Niche or limited geographic fame is not sufficient --
 - Fame under the TDRA:
 - Mark is “widely recognized by the general consuming public of the United States as a designation of source”





Why Do We See Little Change?

- Many incidental mentions
- Most tacked on to a laundry list of other claims
- Cases generally turn on traditional infringement

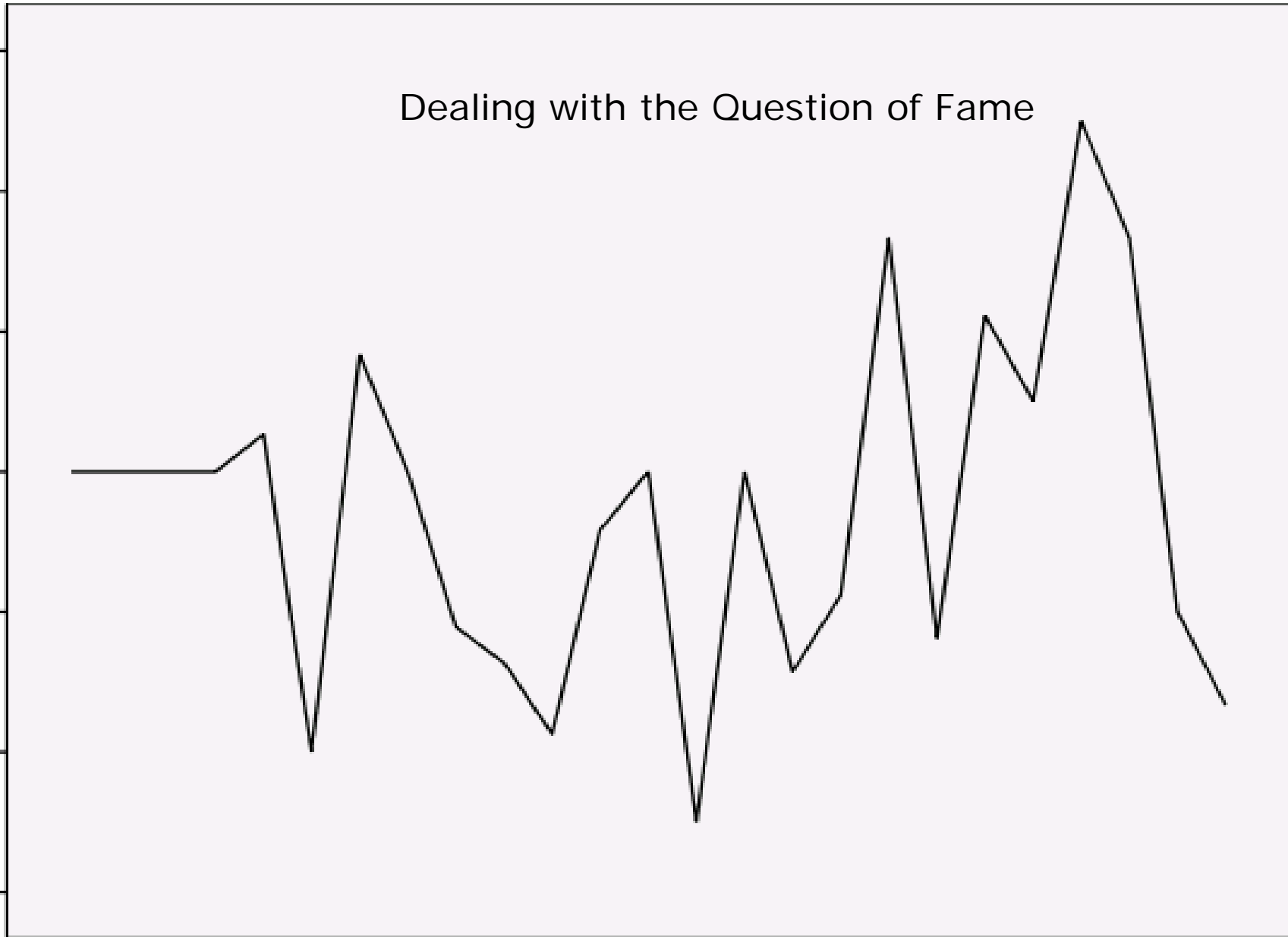
Dealing with the Question of Fame

Value pctfame

80.00
70.00
60.00
50.00
40.00
30.00
20.00

S/O 5 C/O 5 N/O 5 D/O 5 J/O6 F/O 6 M/O 6 A/O 6 M/O 6 J/O6 J/O6 A/O 6 S/O 6 C/O 6 N/O 6 D/O 6 J/O7 F/O 7 M/O 7 A/O 7 M/O 7 J/O7 J/O7 A/O 7 S/O 7

month



Sorting Through What Constitutes a Famous Mark

- In the past 6 months:
 - famous: Nike (2)
 - “for dummies”
 - Levi-Strauss
 - Audi
 - but also Global Van Lines
 - Chem-Dry
 - (possibly: Tempur-Pedic)

And what doesn't

- Tyler Green
- Air Cargo News
- Cosi's

- Not quite clear how to apply the indicators of what constitutes fame:
(e.g., court in Cosi's merged fame factors and "likely to cause blurring" factors)



Expansion of Dilution Through Change from Actual to Likelihood of Dilution

- Few cases thus far turning on evidence of “likelihood of dilution”
- One survey case published on the issue in the past 11 months



The Puzzle:

Why so little evidence of activity?

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

And/Or

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

Long-Term Effects of TDRA?

