**Is the Lanham Act "Positive" Law? Does it Matter?**

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According to Black's Law Dictionary (8th ed. 2004): "Positive law typically consists of enacted law — the codes, statutes, and regulations that are applied and enforced in the courts." Natural law is contrasted, but common law seems the more apt antonym.

A second definition, however, is reflected, if awkwardly, in 1 U.S.C. § 204(a). It provides that text in the current version of the U.S. Code is merely prima facie evidence of the law unless the code title at issue has "been enacted into positive law." In those circumstances, "the text thereof shall be legal evidence of the laws therein contained." This language is not the apogee of lucidity, but it apparently means that lawyers run a risk when relying on, for example, 15 U.S.C. § 1052 instead of Lanham Act § 2.

This became clear to me, and countless others, only from a recent exchange of op-ed pieces between J. Thomas McCarthy and Peter Le Fevre, head of the congressional Office of Law Revision Counsel (OLRC). Some might regard 1 U.S.C. § 204(a) as reflecting a mind-numbing legal arcanum. Professor McCarthy nevertheless offers a remarkably lively summary suggesting otherwise in, *What is Positive Law? Are Some Laws More Equal Than Others?* 72 P.T.C.J. (BNA) 548 (2006).

According to Mr. Le Fevre, the current codification in Title 15 was generated by OLRC, not Congress. Thus, lawyers relying on that codification might fall prey to discrepancies between an Act that controls and code provisions that are merely prima facie evidence of the law.

Despite that, as stressed by McCarthy, significant differences between equivalent provisions in the Lanham Act and the OLRC-generated version of Title 15 seem highly unlikely. Indeed, I don't recall the last time I felt any need to consult the latter. Rather I, and presumably others, am far more apt to rely on annotated codes

generated by prominent commercial publishers. I count on such publishers to flag discrepancies — usually their corrections of minor typographic errors in legislation as enacted — regardless of whether governmentally-codified language might qualify, under 1 U.S.C. § 204(a), as "positive" law.

McCarthy is skeptical of the risk of discrepancies, and I share his skepticism. Were the law to be completely overhauled, as was the patent law in 1952 or the copyright law in 1976, renumbering would be necessary. Without that, one must wonder whether codification of the Lanham Act by Congress rather than OLRC is worth the bother. What's the point?

For years, I have told students that, unlike the situation with copyright or patent law, they could encounter either form of citation. I also point out that the dual set of statutory referents is a nuisance because neither can be derived from the other. Consider, e.g., that Lanham Act §§ 2 and 30 are the same as 15 U.S.C. §§ 1052 and 1111. The former seemed more "official" than the latter, but I did not understand why. Now I do.

A single form of citation might simplify matters, but the cost could be high if new section numbers differed from both predecessors. Necessity for that could depend on the ultimate location among code titles. As McCarthy and others have pointed out, moving trademark provisions to Title 35 has nothing to recommend it. Although both are administered by the same agency, patent and trademark law have no substance and little process in common. A separate title would be better if most Lanham Act numbering could be retained. If not, students and lawyers would confront not one but three references to any given provision — one current and two historical.

Consider, for example, the Administrative Procedure Act (APA). The APA as originally enacted was abolished and reenacted in Title 5 in 1966; *see* Pub. L. 89-554. That would have been more helpful if original numbering had been retained or modified in an obvious way. It was not. APA §§ 2-9 correspond to 5 U.S.C. §§ 551-58,

but APA § 10 was subdivided to become 5 U.S.C.§§ 701-06. Worse, APA § 12 is now 5 U.S.C. § 559, obscuring its command that the APA control absent longstanding practice or contrary requirements in statutes bearing more directly on the issue in question. The last seems to have contributed to the confusion partly resolved by *Dickinson v. Zurko,* 527 U.S. 150 (1999); *see id.* at 154.

How efforts to reenact the Lanham Act as positive law will shake out remains to be seen, but one can hope that benefits will offset the cost of necessary revisions to myriad legal documents.

Meanwhile, particularly if such efforts did not require full legislative authorization, it would be useful for Le Fevre to have OLRC alphabetize (if not to rationalize) Lanham Act § 45, 15 U.S.C. § 1127. Now, for example, “person” is defined three times; “trademark,” “service mark,” “certification mark,” “collective mark” and “mark” are defined in that order; and “abandoned” is squirreled between “use in commerce” and “dilution.” Any logic or utility in the present ordering of § 45 evades me. It seems instead designed to be as unhelpful as possible. The same can be said of 5 U.S.C. § 551 (APA definitions). On reflection, it seems remarkable that those definitions weren't alphabetized in 1966 when the APA was reenacted as "positive" law.