

## ***Question Mark***<sup>™</sup>

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What is a trademark—when is it protectable, against whom, and why? This is, of course, the (multi-)trillion-dollar question. The answer is often determined largely by the corresponding question—what is not a mark? Both Congress and the Supreme Court agree that the protectability of an asserted mark rests on its meaning to consumers. As to how that meaning is determined, there is not much agreement at all. There are conflicting tests on determining the all-important question of distinctiveness. There is also confusion among courts—and the USPTO—as to how these various tests should be applied, and by whom. This article aims to provide a critical analysis of the existing framework of trademark distinctiveness with proposals for clarity and consistency of application.