

Is the Art of Parody Dead?—Implications of SCOTUS Jack Daniel’s Opinion A Year Later

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It has been a year since the Supreme Court issued its decision in the multiple-year legal battle between VIP Products LLC and Jack Daniel’s. We covered this dispute when it was back at the 9th Circuit. As a recap, VIP produced a squeaky dog toy in the shape of a Jack Daniel’s whiskey bottle called “Bad Spaniels” and claimed that its use of the recognizable marks was parody—free speech falling into the fair use exception. Jack Daniel’s contended that VIP infringed on a variety of trademarks, including the shape of the bottle, the decoration on the label and the shape of the name, and that by using these marks, VIP diluted the marks’ validity by associating them with something other than Jack Daniel’s whiskey.

This type of free speech defense had usually been evaluated using the *Rogers* and fair use tests. The *Rogers* test requires dismissal unless the complainant can show one of two things: that the challenged use of a mark “has no artistic relevance to the underlying work” or that it “explicitly misleads as to the source or the content of the work”. Rather than apply the *Rogers* test, the Supreme Court came to a conclusion it characterized as “narrow” that the *Rogers* test does not apply when an alleged infringer uses a trademark as a designation of source for the infringer’s own goods. In the Court’s words, when the alleged infringer is “using the trademark as a trademark”. *Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140, 145 (2023). Once the *Rogers* test is off the table, trademark defendants are subject to the traditional likelihood of confusion analysis. Since VIP was using “Bad Spaniels” as a trademark—they had even applied for protection—they could not use the *Rogers* test.

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