

Supreme Court's Jack Daniel's Decision Clarifies That Traditional Trademark Use "Does Not Receive Special First Amendment Protection," Even When it Has Expressive Message

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Humor matters, but it's not the most important thing when considering a trademark infringement or dilution claim. In a [decision](#) with references to *The Hangover Part II*, Aqua's song "Barbie Girl" (good luck not getting that stuck in your head if you grew up in the 90's...), Tommy Hilfiger, and Harley-Davidson, the Supreme Court clarified the interaction of First Amendment protections, on the one hand, and trademark infringement and dilution claims involving "expressive works," on the other hand.

The bottom line is this: where an accused infringer uses a trademark like a trademark (*i.e.*, to designate the source of its goods or services), the traditional likelihood of confusion analysis applies, even if the mark is also used in an expressive manner. First Amendment considerations like parody and commentary might impact that analysis, but there's no threshold First Amendment consideration (like the *Rogers* test discussed below) that would prevent or bar this traditional analysis. Further, marks used in connection with commentary, criticism, and parody are not exempt from dilution claims when the mark is being used to designate the source of goods or services.

As discussed in a prior [TMCA blog post](#), this case arises out of Jack Daniel's trademark infringement and dilution claims against VIP Products based on its "Bad Spaniels" dog toy. The Jack Daniel's bottle and VIP dog toy are shown here:

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