LEGAL UPDATES

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U.S. Supreme Court Holds Parody Trademarks to Likelihood of Confusion Standard

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On June 8, 2023, the U.S. Supreme Court issued its decision in *Jack Daniel's Properties, Inc. v. VIP Products LLC*, holding that parody trademarks do not receive special First Amendment protection when they function as trademarks. The Court held that the typical likelihood of confusion test applies to infringement claims involving parody marks used as source indicators. Similarly, the Court held that no noncommercial use defense applied to the dilution claim, again because VIP Products LLC used its marks as indicators of the source of goods.

VIP had argued that its "Bad Spaniels" dog toys, which featured similarities to Jack Daniel's whiskey bottles, could not infringe Jack Daniel's rights in its trade dress. VIP reasoned that its dog toys were parodies and creative works that should receive heightened First Amendment protection under the so-called *Rogers* test. However, at various points, VIP did claim trademark rights in the name "Bad Spaniels," its logo, and its product trade dress.

The Supreme Court, in this unanimous decision authored by Justice Kagan, pointedly remanded for the lower courts to evaluate such use under the typical likelihood of confusion standard, holding that *Rogers* does not apply. The Court provided no guidance for evaluating brands used in creative works where those brands do not function to indicate the source of goods or services. However, the concurrence authored by Justice Gorsuch questioned much about the *Rogers* test and its underpinnings. Also, the concurrence authored by Justice Sotomayor cautions that litigants should design sound surveys in trademark litigation, particularly where parody is at issue.

Next, the case returns to the Ninth Circuit, which will likely remand to the District Court for the District of Arizona to conduct the likelihood of confusion

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analysis and evaluate the dilution claim without the possibility of a noncommercial use defense.

What this means to you

While humorous trademarks do not receive heightened First Amendment protection when used as marks, courts will still consider parody as part of the likelihood of confusion test. The Supreme Court has directed that whether a parody trademark infringes another mark depends on the usual considerations in the likelihood of confusion test, such as the similarity of the marks and the similarity of the goods or services, and parody trademarks used as trademarks are subject to dilution claims. Accordingly, people and companies considering adopting a parody trademark, as with any trademark, would do well to consult an attorney experienced with trademarks. Additionally, litigants preparing or challenging survey evidence in trademark disputes may look to Justice Sotomayor's concurring opinion for guidance in the appropriate design and weight of such surveys.

Contact us

If you have a question as to the implications of this case or any related matter, please contact Daan Erikson, Cori Stedman, or your Husch Blackwell attorney.

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