

No. 22-148

In the
Supreme Court of the United States

JACK DANIEL'S PROPERTIES, INC.,

Petitioner,

v.

VIP PRODUCTS LLC,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF OF NEW YORK INTELLECTUAL
PROPERTY LAW ASSOCIATION AS *AMICUS
CURIAE* IN SUPPORT OF NEITHER PARTY**

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QUESTIONS PRESENTED

The questions presented are:

1. Whether humorous use of another's trademark as one's own on a commercial product is subject to the Lanham Act's traditional likelihood-of-confusion analysis, or instead receives heightened First Amendment protection from trademark-infringement claims.

2. Whether humorous use of another's mark as one's own on a commercial product is "noncommercial" under 15 U.S.C. § 1125(c)(3)(C), thus barring as a matter of law a claim of dilution by tarnishment under the Trademark Dilution Revision Act.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

This *amicus curiae* brief is submitted on behalf of the New York Intellectual Property Law Association (“the NYIPLA”). The NYIPLA is a professional membership association of attorneys in the New York City metropolitan area whose interests and practices lie in the areas of patent, trademark, copyright, trade secret, and other intellectual property laws.

The NYIPLA’s members include a diverse array of attorneys specializing in trademark law, including in-house counsel for businesses that use, own, license, enforce, and challenge trademarks, as well as attorneys in private practice who advise a wide array of clients on trademark matters, including potential enforcement matters involving parody. Many of the NYIPLA’s member attorneys participate actively in trademark litigation, representing both owners and alleged infringers. The NYIPLA, its members, and the clients of its members share an interest in ensuring that the standards governing the enforcement of trademarks are reasonably clear and predictable.

The arguments in this brief were approved on January 13, 2023, by an absolute majority of the total number of officers and members of the Board of the NYIPLA (including such officers and Board members who did not vote for any reason including recusal), but

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

do not necessarily reflect the views of a majority of the members of the Association or of the firms or other entities with which those members are associated.

After reasonable investigation, the NYIPLA believes that no member of its Board or Amicus Briefs Committee who voted to prepare this brief on its behalf, or any attorney in the law firm or corporation of such a Board or Committee member, or attorney, who aided in preparing this brief, represents either party to this litigation. Some Committee or Board members or attorneys in their respective law firms or corporations may represent entities that have an interest in other matters which may be affected by the outcome of this litigation.

The NYIPLA takes no position on the merits of petitioner's underlying claims and files this amicus brief to address what tests and factors should be used to assess the merits in trademark cases involving uses claimed to be protected, in whole or in part, by the First Amendment.

SUMMARY OF ARGUMENT

The Ninth Circuit considered only that the challenged use of a mark contained a "humorous message" before applying the *Rogers v. Grimaldi* test to essentially dispense with a trademark infringement claim and deeming a dilution claim barred by the "noncommercial use" exclusion in the Lanham Act. This approach fails to assess myriad factors that may affect whether a challenged use of a trademark merits First Amendment protection that overrides Lanham Act infringement claims and misreads the exclusions in the statute's dilution provisions. The approach

further fails to protect all interests at stake, including those of brand owners and the public. The rationale used, if applied in other cases, risks a collapse of the current trademark law structure that is so important to maintaining both robust discussion and debate as well as fair and nondeceptive trade and commerce.

First, as to Lanham Act trademark infringement claims, anytime the challenged use contains a “humorous message,”² the Ninth Circuit’s standard would require the trademark owner to prove not only that the adversary’s imitation of the owner’s mark is likely to confuse customers (which is the standard test for infringement), but first also prove that the adversary’s imitation of the mark either is “not artistically relevant” or “explicitly misleads” consumers. This two-pronged *Rogers v. Grimaldi* test has been applied by courts for many years to reject or limit Lanham Act claims brought against expressive works like books, movies, and songs. As the district court below recognized, however, the *Rogers* standard renders it “nearly impossible for any trademark holder to prevail” and “excuses nearly any use less than slapping another’s trademark on your own work and calling it your own.”³

The strict standard of the *Rogers* test may well be appropriate to provide First Amendment protection

² While humor is involved in this case, there is no logical First Amendment rationale that would limit the Ninth Circuit analysis only to humorous messages, as opposed to any other kind of message.

³ *VIP Prods. LLC v. Jack Daniel’s Prods. Inc.*, 2021 WL 5710730, at *6 (D. Ariz. Oct. 8, 2021).

for works as expressive and speech centric as books, movies, and songs, to deter brand owners from pursuing such claims, and to provide the defense with an opportunity for a quick litigation exit. Here, however, the Ninth Circuit applied *Rogers* to a toy solely because the toy communicates a humorous message, without any further analysis. Humor or messaging alone should not close the door on a brand owner's potential Lanham Act infringement claim because nearly every trademark use communicates a message, and many are funny. Instead, especially when a challenged use is something other than classically and fully expressive in nature (book, movie, song), a fuller assessment of the brand owner's proofs on the likelihood of confusion and the adversary's proofs on its potential First Amendment defense are needed to address all relevant interests.

The factors typically considered by courts and juries when assessing trademark infringement claims work well to strike the balance between protecting the freedom of speech and stopping the proliferation of confusing products on the market. An appropriate assessment is not whether there is a "humorous message" but whether the challenged product is likely to cause confusion. There are no First Amendment concerns that would justify permitting the proliferation of truly confusing commercial products on the market.

In fact, in recent times, many (if not most) brand owners lose when they bring infringement claims against parody products, but the outcome depends, as it should, on whether the parody is "successful," meaning the parodist's use is not confusing. Many

factors can be relevant in determining whether a parody is successful or confusing. An appropriate assessment of whether a parody product infringes a brand owner's rights by creating a likelihood of confusion takes all relevant factors into account.

Second, as to the trademark dilution claims, the Ninth Circuit's approach negates the federal dilution cause of action when applied to any defendant's "humorous" use of another's trademark to identify the source of the defendant's own commercial product, on the theory that a humorous message transforms the use in question into a "noncommercial use" insulated from dilution liability. That holding misreads the statute and equates "humorous message" with "noncommercial use" without any analysis or consideration of relevant factors on the commerciality of the use or the speech-related vs. economic-related aspects of the use. The distinction between commercial and noncommercial uses in today's world can be tricky, with many classically expressive works like movies also supporting profitable commercial businesses and many commercial products like t-shirts sold primarily for an expressive statement emblazoned across the front. But the nuances, and the issues at stake, command a fuller analysis. The dilution statute itself also provides other protections that appropriately balance any tensions between a brand owner's interests in protecting its investments and the freedom of expression. Thus, it is unnecessary to broadly interpret "noncommercial use" in the manner of the Ninth Circuit.

The Ninth Circuit's test would render the dilution statute inapplicable in any situation where an

adversary claims its use was a joke, regardless of other factors. Such an approach would prevent a brand owner from acting even as to mass-produced, poor quality products that the brand owner could prove were likely to lessen the selling power or reputation of the brand, merely because there was something funny about the products.⁴ Even if a use is found to be commercial (and thus subject to the dilution statute), the brand owner still has a steep uphill climb before it can stop a challenged use on a dilution by tarnishment theory: the equities must weigh in its favor, the mark must be famous, the owner must prove that an association arising from the similarity between the challenged use and the mark is likely to harm the reputation of the mark, and the use cannot be news reporting, news commentary, or non-trademark fair use, criticism, parody or comparative advertising. This is no easy task, nor one a brand owner is likely to take on lightly.

Brand owners face already difficult challenges in establishing Lanham Act trademark infringement and dilution claims under the long-established tests used to assess those claims, particularly when addressing uses of brands in parodies, and many expend substantial enforcement time and effort just addressing rampant counterfeiting and unauthorized uses of marks in blatant fraudulent activities. The reality is that those wishing to poke fun at brands are generally able to so in the case of “successful” parodies under the current interpretations of the Lanham Act

⁴ As with the infringement analysis, the Ninth Circuit’s reasoning would logically apply to any message, not just a humorous one.

by many courts outside of the Ninth Circuit and are certainly able to do so when the fun-poking is accomplished in songs, books, articles, movies, or other truly expressive works. The Ninth Circuit approach, however, shortcuts the appropriate analysis in cases of ordinary products and in doing so threatens the balance between trademark law goals and the First Amendment already implemented after careful thought and debate by Congress and applied appropriately in other circuits.

BACKGROUND

After a bench trial, the district court ruled in favor of petitioner Jack Daniels, using the usual likelihood of confusion and dilution tests to find that respondent VIP's BAD SPANIELS dog chew toy was likely to cause confusion with and dilute the JACK DANIEL'S marks.⁵

In an earlier decision on a summary judgment motion, the district court stated that the dog toy is **not** an expressive work for purposes of the application of the *Rogers* test because VIP makes trademark use of its adaptations of the brand owner's trademarks and trade dress to sell a commercial product, its novelty dog toy. The district court held that a novelty dog toy is not an expressive work like those to which the *Rogers* test has been applied in the Ninth Circuit.⁶ The

⁵ *VIP Prods., LLC v. Jack Daniel's Prods., Inc.*, 291 F. Supp. 3d 891 (D. Ariz. 2018).

⁶ *VIP Products, LLC v. Jack Daniel's Prods., Inc.*, 2016 WL 5408313 (D. Ariz. Sept. 27, 2016), noting that *Rogers* had been applied to expressive works like songs, movie titles, and video games and citing *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th

district court held that the First Amendment does not establish protection for VIP where the adaptation of the Jack Daniel's trademark and trade dress were engaged by VIP for the dual purpose of making an alleged expressive comment as well as the commercial selling of a non-competing product.⁷ Instead, the court held that the full Ninth Circuit *Sleekcraft* likely confusion analysis applied to assess whether the dog toy was infringing.

VIP appealed the adverse bench trial judgment. The Ninth Circuit disagreed with the district court on the issue of whether the dog chew toy is an expressive work because the toy communicates a humorous message. The circuit court therefore reversed the district court's judgment on the dilution claim, vacated the judgment on trademark infringement, and remanded for further proceedings.⁸

Jack Daniels immediately sought and was denied rehearing *en banc*, arguing that the designation of a commercial novelty product as an "expressive work" "erroneously reaches ordinary commercial products creatively marketed by their manufacturers, thus

Cir. 2013) (*Rogers* test is reserved for expressive works); *E.S.S. Entm't 2000 Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) (*Rogers* balancing test only applies to artistic works); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (applying *Rogers* to a song); and *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (applying *Rogers* to a photograph).

⁷ *VIP Prods., LLC v. Jack Daniel's Prods., Inc.*, 2016 WL 5408313 (D. Ariz. Sept. 27, 2016).

⁸ *VIP Prods. LLC v. Jack Daniel's Prods., Inc.*, 953 F.3d 1170 (9th Cir. 2020).

producing an exception that swallows the traditional rules governing trademark infringement.” Jack Daniels further argued that this analysis “also unnecessarily injects constitutional issues into routine cases and threatens the public’s ability to avoid confusion, as well as trademark owners’ ability to protect their marks.”⁹ Jack Daniel’s petition for certiorari followed, which was denied.¹⁰

On remand, the district court’s inevitable decision that Jack Daniel’s must lose under the *Rogers* test followed shortly thereafter, with the district court noting that it appears to be “nearly impossible for any trademark holder to prevail under the *Rogers* test.”¹¹ Jack Daniel’s appealed to the Ninth Circuit, securing summary affirmance to seek further review *en banc* or via a petition for certiorari.¹² The request for *en banc* review was denied and a mandate issued on May 18, 2022. Jack Daniels again petitioned for certiorari, which this Court granted on November 21, 2022.

⁹ Jack Daniels’ Petition for Rehearing and Petition for Rehearing *En Banc*, filed in *VIP Products LLC v. Jack Daniels Props., Inc.*, No. 18-16012 (9th Cir. Apr. 14, 2020 (Dkt 63-1 at 6)).

¹⁰ *Jack Daniel’s Props., Inc. v. VIP Products LLC*, 141 S. Ct. 1054 (2021).

¹¹ *VIP Prods. LLC v. Jack Daniel’s Props., Inc.*, 2021 WL 5710730 (D. Ariz. Oct. 8, 2021).

¹² *VIP Prods. LLC v. Jack Daniel’s Props., Inc.*, 2022 WL 1654040 (9th Cir. Mar. 18, 2022).

ARGUMENT

I. *Rogers v. Grimaldi* Should Not Replace the Likelihood of Confusion Analysis for Lanham Act Infringement Claims Involving Ordinary Products.

There is no strict liability standard preventing the unauthorized use of another's trademark. Instead, the defendant's use must trigger liability under trademark statutes prohibiting infringement or dilution or via common law unfair competition claims. For infringement claims, the federal Lanham Act prevents an unauthorized use of a registered or unregistered mark when the use is likely to cause confusion as to origin, affiliation, sponsorship, or approval.¹³ Courts determine if confusion is likely using multi-factor assessments, weighing various factors that differ in some respects but are generally similar from circuit to circuit.¹⁴ State trademark

¹³ 15 U.S.C. § 1114 (2012) (protecting registered marks against uses that are “likely to cause confusion, or to cause mistake, or to deceive”); 15 U.S.C. § 1125(a)(1)(A) (2012) (protecting unregistered marks against use of any “word, term, name, symbol, or device, or any combination thereof” that is “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [the user] with another person, or as to the origin, sponsorship, or approval of [the user’s] goods, services, or commercial activities by another person”). The plaintiff must also, as a threshold matter, establish that the plaintiff owns valid trademark rights.

¹⁴ In the Ninth Circuit, eight factors guide the inquiry into whether a defendant's use of a mark is likely to confuse consumers: (1) the similarity of the marks; (2) the strength of the plaintiff's mark; (3) the proximity or relatedness of the goods or services; (4) the defendant's intent in selecting the mark; (5) evidence of actual confusion; (6) the marketing channels used;

claims sounding in infringement or unfair competition require a similar analysis to answer essentially the same question: will the relevant consumers be confused?¹⁵

**A. For Parody to Be Found Infringing,
Confusion Must Be Likely**

There is also no absolute “parody defense” to a trademark infringement claim, nor should there be. Proof of likely confusion is key to an analysis of whether a parody product infringes. Whatever the defendant’s intent, if likelihood of confusion is not established by the brand owner, then the brand owner has no infringement claim. Even with no absolute parody defense, common sense suggests it is difficult to prove that a “successful” parody, i.e., one that immediately communicates that the parodist is making a commentary about another brand through humor or criticism, is likely to cause confusion and

(7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers of the defendant’s product. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). In the Second Circuit, the eight *Polaroid* factors are used: 1) the strength of plaintiff’s mark; 2) the similarities in the marks; 3) the proximity of the products; 4) the likelihood that plaintiff will bridge any gap between the products; 5) defendant’s intent; 6) evidence of actual confusion; 7) the sophistication of the purchasers; and 8) the quality of defendant’s products. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

¹⁵ See, e.g., *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 n.2 (9th Cir. 2002) (likelihood-of-confusion test also governs state law claims of unfair competition).

thus meets the test for trademark infringement. Indeed, as Professor McCarthy notes in his treatise:

A few parodies will constitute trademark infringement — most will not. Categorizing an accused use of another’s trademark as “parody” does not in and of itself deflect a charge of trademark infringement. The cry of “parody!” does not magically fend off otherwise legitimate claims of trademark infringement. . . . There are confusing parodies and non-confusing parodies. What they have in common is an attempt at humor through the use of someone else’s trademark. A non-infringing parody is merely amusing, not confusing.¹⁶

If commentary in the form of humor or criticism is recognized and obvious (making the attempt at parody “successful”), then consumers are not likely to be confused. Most brand owners do not make fun of or criticize their own brands or license others to do so. Thus, proving an infringement case against such a “successful” parody is challenging. This common sense is borne out in the caselaw: most brand owners who elect to pursue an infringement claim against a parody lose, particularly in recent years, even when courts apply the standard likelihood of confusion test.¹⁷

¹⁶ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31.153 (5th ed. 2019) [hereinafter *McCarthy Treatise*].

¹⁷ See Kathleen E. McCarthy, *Free Ride or Free Speech? Predicting Results and Providing Advice for Trademark Disputes*

On the other hand, if it is difficult to detect the commentary and instead only the brand attributes are readily apparent in the parodist's product (making the attempt at parody "unsuccessful"), confusion could very well be likely. As with many Lanham Act issues, the focus in such cases involving ordinary products should and will be on proofs directed to how the use is perceived by the public, as discussed in I.C., *infra*.

B. The Development of the *Rogers* Test to Address Infringement Claims for Expressive Works

When addressing parody, in addition to the potential difficulties with proving the elements of the underlying trademark claims, free speech considerations can come into play. The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."¹⁸ "Parody" has been recognized as a form of artistic expression and it has been generally recognized by the courts per the *Rogers* test that, where artistic expression is involved, "the public interest in avoiding consumer confusion must be balanced against the public interest in free speech."¹⁹ Thus, the First Amendment right can conflict with and trump the aims of trademark laws in some circumstances.

Involving Parody, 109 Trademark Reporter 691 (July-August 2019) [hereinafter K. McCarthy Article].

¹⁸ U.S. Const. amend. I.

¹⁹ *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 414 (S.D.N.Y. 2002).

Over the years, courts have viewed this potential conflict between protecting trademarks and protecting speech interests in different ways. The Second Circuit upheld an injunction against the use of Dallas Cowboys cheerleader uniforms in a pornographic film in 1979, describing trademark rights as property rights and putting those rights ahead of speech concerns, stating:

Plaintiff's trademark is in the nature of a property right [] and as such it need not "yield to the exercise of First Amendment rights where adequate alternative avenues of communication exist."²⁰

Ten years later, the *Rogers* test at issue here was offered when the Second Circuit tossed the "alternative avenues" test and recognized that the public interest in free expression might outweigh Lanham Act claims even if some confusion occurred, rejecting a right of publicity claim against a movie title:

[T]he Lanham Act ... should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.²¹

In 2002, the Ninth Circuit stated that trademark law and First Amendment goals conflict when the trademark transcends its core, identifying purpose

²⁰ *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979) (citations omitted).

²¹ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

and begins to stand for something in our culture more than just the original product alone, as was the case with the BARBIE trademark for dolls, which was permitted to be used in the title and body of a song commenting, among other things, that “life is plastic”:

Limited to this core purpose — avoiding confusion in the marketplace — a trademark owner’s property rights play well with the First Amendment. “Whatever first amendment rights you may have in calling the brew you make in your bathtub ‘Pepsi’ are easily outweighed by the buyer’s interest in not being fooled into buying it.” Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. Rev. 960, 973 (1993).

The problem arises when trademarks transcend their identifying purpose. Some trademarks enter our public discourse and become an integral part of our vocabulary. . . . Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law.²²

²² *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (applying the two prongs of the *Rogers* test to conclude that the parodist’s use of Barbie is not an infringement of the brand owner’s trademark: 1) the use of Barbie in the song title is relevant to the underlying work, namely, the song itself, because the song is about Barbie and the values the parodist claims Barbie represents; and 2) the song title “Barbie Girl” does not explicitly mislead as to the source of the work as it does not,

More recently, the Fourth Circuit chastised a brand owner seeking to use trademark law to stop criticism of the brand. The parodist distorted the brand name of the revered civil rights organization from “National Association for the *Advancement* of Colored People” to “National Association for the *Abortion* of Colored People” in connection with images and articles commenting on what was, in the parodist’s view, the NAACP’s stance supportive of abortion rights. The Court of Appeals found that the brand owner had no viable trademark claim against the parodist, noting that trademark law is not the proper vehicle for combatting speech with which one does not agree.²³

These cases and most others applying *Rogers* or similar analyses involved works that were clearly artistic and expressive at their very core — movies, songs, opinion pieces, and articles appearing on websites.²⁴ In instances like the NAACP case, the brand owner’s remedy can be phrased as “more speech” as opposed to the suppression of the speech of

explicitly or otherwise, suggest that it was produced by the brand owner. Also, on the dilution claim, the song Barbie Girl is fully protected under the First Amendment because it is not a purely commercial work and therefore falls within the noncommercial use exemption to the then applicable Federal Trademark Dilution Act of 1995).

²³ *Radiance Found., Inc. v. NAACP*, 786 F.3d 316 (4th Cir. 2015).

²⁴ See cases collected in Lynn M. Jordan and David M. Kelly, *Another Decade of Rogers v. Grimaldi: Continuing to Balance the Lanham Act with the First Amendment Rights of Creators of Artistic Works*, 109 Trademark Reporter 833 (Sept.-Oct. 2019).

the parodist via an injunction.²⁵ In other words, if a brand owner does not like the parodist's viewpoint (particularly a viewpoint expressed on the parodist's website and opinion pieces even if that view point is advertised aggressively), the thought goes, the brand owner can run its own advertising and public awareness campaign.

The *Rogers* assessment and analysis may indeed make sense where the challenged use is so intertwined with purely expressive and artistic speech as it is in the context of books, articles, opinion pieces, movies, and songs. Congress has, in fact, commented on and blessed *Rogers v. Grimaldi* when applied to such artistic or “expressive” works. In the 2019 House report addressing the inclusion of a rebuttable presumption of irreparable harm in the Trademark Modernization Act, the Committee stated:

[T]he Committee intends and expects that courts will continue to apply the *Rogers* standard to cabin the reach of the Lanham Act in cases involving expressive works. The Committee believes that the adoption by a court of a test that departs from *Rogers*, including any that might require a court to engage in fact-intensive inquiries and pass judgment on a creator's “artistic motives” in order to evaluate Lanham Act claims in the expressive-works context would be contrary

²⁵ See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”) (Brandeis, J., concurring).

to the Congressional understanding of how the Lanham Act should properly operate to protect important First Amendment considerations, and upon which the Committee is relying in clarifying the standard for assessing irreparable harm when considering injunctive relief.²⁶

Of course, the language cited above does not address exactly what an “expressive work” is or should be, nor does it suggest that ordinary products with funny messages fall into the *Rogers* realm.

The inappropriateness of the Ninth Circuit’s use of the strict *Rogers* analysis in a case involving a commercial business using the mark as a brand is demonstrated in more recent Ninth Circuit applications of the doctrine. In a 2022 decision, for example, the Ninth Circuit affirmed a lower court’s summary judgment dismissal of a trademark infringement claim brought by plaintiff Punchbowl, an online party and event planning service, against defendant AJ Press’s use of Punchbowl News as the ongoing brand name for its online news publication about politics. While reasonable minds could conclude that a Punchbowl online party planning service and a Punchbowl News service were not likely to be confused given the differences in the businesses and applying the usual likelihood of confusion factors (perhaps even on a motion to dismiss), the decision was based only

²⁶ Report 116–645 of the House Judiciary Committee on the Trademark Modernization Act of 2020 to accompany H.R. 6196, at 20 (Dec. 14, 2020).

on a *Rogers* analysis.²⁷ If the defendant’s use of the brand name Punchbowl News constitutes protected expression that is artistically relevant because political insiders refer to the Capitol as the “punchbowl” and is not explicitly misleading as to its source, then nearly any defendant’s use that has some connection or meaning ascribed to its selected brand name would get a pass. This is not the correct application of the relevant First Amendment and trademark principles.

**C. An Assessment More Robust than the
Rogers Test Is Required to Assess
Infringement Claims for Products**

Even more difficult questions often arise in the context of novelty products, like those at issue here. However, when the purveyor of the novelty product is building its own commercial brand around the equity built by another brand owner, in doing so, the novelty product purveyor may be creating confusion. As with many other trademark issues, the issue of the ordinary consumer’s understanding of the impression that the use of a mark conveys is key.²⁸ Sometimes, this issue can be decided summarily.²⁹ In other cases,

²⁷ *Punchbowl, Inc. v. AJ Press, LLC*, 52 F.4th 1091 (9th Cir. 2022).

²⁸ See, e.g., *Hana Financial, Inc. v. Hana Bank*, 135 S. Ct. 907 (2015) (holding that a jury should make the determination of whether a prior use of a trademark creates the same commercial impression as a later use because this inquiry operates from the perspective of an ordinary purchaser or consumer.)

²⁹ *Id.* at 911 (recognizing that “[if] the facts warrant it, a judge may decide a tacking question on a motion for summary judgment or for judgment as a matter of law.”)

the fact finder must assess many factors relevant to the likelihood of confusion and relevant to the expressive rights, if any, of the challenged user.

Using the Ninth Circuit's analysis, it does not take much to sidestep entirely the issue of how the public perceives the challenged product. Humor or messaging alone should not close the door on a brand owner's potential Lanham Act infringement claim because nearly every trademark use communicates a message, and many are funny. Instead, especially when a challenged use is something other than classically and fully expressive in nature (book, movie, song), a fuller assessment of the brand owner's proofs on the likelihood of confusion and the adversary's proofs on its potential First Amendment defense are needed to address all relevant interests.

The factors typically considered by courts and juries when assessing trademark infringement claims work well to strike the balance between protecting the freedom of speech and stopping the proliferation of confusing products on the market. An appropriate assessment is not whether there is a "humorous message" but whether the challenged product is likely to cause confusion. In recent times, many (if not most) brand owners lose when they bring infringement claims against parody products,³⁰ but the outcome depends, as it should, on whether the parody is "successful," meaning the parodist's use is not confusing.

³⁰ See, e.g., *Louis Vuitton Malletier SA v. My Other Bag*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016), *aff'd*, 674 F. App'x 16 (2d Cir. 2016), *cert. denied* 138 S. Ct. 221 (2017).

Many factors can aid in determining whether a parody is successful or confusing, including (a) how clear it is that the parodist's product was not authorized by the brand; (b) the nature of the challenged product and common uses of parody in the relevant industry; (c) the reasons why, if any, the parody targets the brand; (d) the nature of the brand's products including particularly whether or not the brand licenses a variety of products and/or licenses products similar to those sold by the parodist; and (e) survey evidence indicating how the public actually perceives the parodist's use of the mark.³¹

The survey evidence presented by the petitioner here, for example, is one factor that differentiates the present case from many other cases involving parody novelty products.³² Where other evidence of public perception of the term is overwhelming, survey evidence, while still relevant to the analysis, may not be required or may be properly discounted or even disregarded by the trier of fact. In addition, survey evidence may at times be directed to the wrong question or subject to valid criticisms in terms of methodology or format. Properly constructed

³¹ See K. McCarthy Article, *supra* note 14, 109 TMR at pp. 709-713 (outlining factors influencing results in trademark parody cases).

³² *Id.* at pp. 705-708, analyzing differences in facts between the VIP lower court decisions enjoining parody dog toys and the CHEWY VUITON parody dog toy decision cited in note 35, *infra*, noting the subject case and another case involving respondent VIP's products (*Anheuser-Busch, Inc. v. VIP Prods. LLC*, 666 F. Supp. 2d 974 (E.D. Mo. 2008)) as rare examples of brand owner victories, in part because of unrebutted survey evidence presented by the brand.

consumer surveys, on the other hand, can be critical evidence. As explained by Professor McCarthy, consumer perception is key:

To an extent not true in other fields of law, in trademark and false advertising disputes the perceptions of large groups of ordinary people are key factual issues. Both trademark validity and infringement turn largely on factual issues of customer perception.

6 McCarthy Treatise, § 32.158.

II. The Lanham Act’s Dilution Exclusion for “Noncommercial Use” Requires More than Just a “Humorous Message.”

Unlike infringement claims, there is a “fair use” defense to federal dilution claims for at least some parodies. The federal dilution statute excludes from its coverage parodies involving “fair use” of a famous mark “other than as a designation of source” for the parodist’s own goods or services (as well as “any noncommercial use of a mark”). The “fair use” defense does not apply when the parodist uses the mark in the parody as its own trademark. Still, the brand owner must prove that the parody is likely to dilute the distinctiveness of the brand owner’s mark either by blurring or by tarnishment.³³

Dilution by blurring is often difficult to describe or identify, much less prove that it is likely to

³³ McCarthy Treatise, § 24:126 (citing cases where brand parodies were found not to be diluting).

happen.³⁴ In the context of parodies, some courts have indicated that the parodies actually help reinforce the fame and distinctiveness of the brand being parodied, rather than “blur” that distinctiveness.³⁵ The parody thus, in these courts’ eyes, actually serves to call out and reinforce the fame of the brand in the public’s eye rather than detract from that fame. The brand potentially becomes even more distinctive, since the brand’s fame and stature has been confirmed, in a way, by the reference to the brand in the parody. After all, the parody only works if consumers recognize the brand that is the subject of the joke.

Dilution by tarnishment is easier to comprehend and to explain than dilution by blurring and can be broadly described as the general association of the mark with something that has a negative effect on the brand reputation.³⁶ Common sense suggests that

³⁴ See, e.g., McCarthy Treatise, § 24:67 (“Because it is largely a theoretical and almost ephemeral concept, the legal theory of ‘dilution’ is exceedingly difficult to explain and understand. Misunderstanding is rampant.”).

³⁵ *Louis Vuitton Malletier, S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 267 (4th Cir. 2007) (“Indeed, by making the famous mark an object of the parody, a successful parody might actually enhance the famous mark’s distinctiveness by making it an icon. The brunt of the joke becomes yet more famous.”).

³⁶ For example, tarnishment was described as “generally aris[ing] when the plaintiff’s trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product. In such situations, the trademark’s reputation and commercial value might be diminished because the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods, or because the defendant’s use reduces the trademark’s reputation and standing

associating a brand with an unsavory image or topic is likely to tarnish that brand. But actually, dilution by tarnishment may not be any easier to prove than dilution by blurring in a parody context. If the parody is obvious in the sense that the criticism or humor is immediately apparent, then the use of the brand in the parody may not really change the public perception of the brand's reputation at all.³⁷ Perhaps consumer perceptions of a brand's reputation actually improve when a parodist attempts to criticize the brand if, for

in the eyes of consumers as a wholesome identifier of the owner's products or services" and is "usually found where a distinctive mark is depicted in a context of sexual activity, obscenity, or illegal activity." *Deere v. MTD*, 41 F.3d 39, 43-44 (2d Cir. 1994) (footnote omitted).

³⁷ In the Sixth Circuit at least, a brand owner faced with a defendant's use involving "sex-related products" may have an advantage in a dilution by tarnishment case. In *V Secret Catalogue, Inc. v. Moseley*, 605 F.3d 382, 389 (6th Cir. 2010), the Sixth Circuit affirmed the lower court's ruling in favor of the brand owner on a dilution by tarnishment claim even while stating that "the tarnishing effect of the [defendant's] mark on the senior [VICTORIA'S SECRET] mark is somewhat speculative." The onus was put on the defendant to rebut with its own evidence what the court termed a strong inference of tarnishment arising from use of the defendant's VICTOR'S LITTLE SECRET mark on sex-related products. Judge Karen Nelson Moore dissented, noting that the statute does not relieve plaintiff of its burden of proof and "the majority sanctions an almost non-existent evidentiary standard and, in the process, essentially eliminates the requirement that a plaintiff provide some semblance of proof of likelihood of reputational harm in order to prevail on a tarnishment claim, despite the plain language of 15 U.S.C. § 1125(c)(2)." *Id.* at 395. Professor McCarthy agrees with the dissent, noting that "[n]either the 2006 TDRA nor its legislative history contains a hint of anything supporting such a presumption." McCarthy Treatise, § 24:89.

example, the parody actually serves to highlight the brand's positive features in the consumer's mind or if the parody has the effect of making the brand's fan base even more loyal.³⁸ Again, as with infringement claims, the issue depends on public perception.

For a dilution claim to succeed, mere proof of association between the brand and the parody is not enough when, in a blurring case, the court sees the "operative question" as "whether the *kind* of association [the parodist] creates . . . is likely to impair the distinctiveness of the [brand owner's] marks"³⁹ or in a tarnishment case, the court sees "the determinative inquiry" as "whether that association is likely to harm" the brand owner's reputation.⁴⁰ Some proof that the association is likely to impair or harm the brand is needed. Such proofs may not be obvious or readily available as to a parody that is perceived as a mere joke in the form of a non-competitive product like a dog toy using a play on words to mimic the brand of a luxury product.⁴¹ On the other hand, a

³⁸ See, e.g., discussion of public perception evidence relating to Starbuck's dilution by tarnishment claim as to defendant's mark CHARBUCKS in the second of three Second Circuit opinions in that litigation: *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 110-11 (2d Cir. 2009).

³⁹ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 439 (S.D.N.Y.), *aff'd*, 674 F. App'x 16 (2d Cir. 2016).

⁴⁰ See, e.g., *Moseley*, 605 F.3d at 395 (Moore, J., dissenting); *Starbucks*, 588 F. 3d at 110 ("That a consumer may associate a negative-sounding junior mark with a famous mark says little of whether the consumer views the junior mark as harming the reputation of the famous mark.").

⁴¹ See, e.g., *Louis Vuitton v. Haute Diggity Dog*, 507 F.3d at 252.

competitor's advertisement that uses alterations to mock and belittle a brand's mascot, even if amusing, may be shown to have crossed the line.⁴²

Relying only on the presence of a "humorous message" to completely deny any further assessment of a dilution claim, as the Ninth Circuit did below, on the theory that the "humorous message" invokes the dilution statute's "noncommercial use" exclusion ignores the structure of the statute and imparts meaning to "noncommercial use" that is inconsistent with logic and with First Amendment case law on commercial vs. noncommercial speech.⁴³

There is a huge spectrum of types of uses that might be challenged by a trademark owner under the dilution statute. The line between what is commercial or noncommercial grows murkier with the development of additional media forms, new and different products promoted as "art," and even new

⁴² *Deere v. MTD*, 41 F.3d 39, 46 (2d Cir. 1994).

⁴³ Other courts, including this Court, have provided much more robust analysis in cases involving how to identify commercial speech. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (assessing whether the challenged material is an advertisement, refers to a specific product, and whether the speaker has an economic motive); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (looking to *Bolger* and other cases to find use of the Barbie mark in the song Barbie Girl falls within the noncommercial use exemption to the prior dilution statute, the FTDA); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 90 (2d Cir. 1998) (Bad Frog's labels featuring a frog "giving the finger" are not wholly protected noncommercial speech because they at most link a product to a current debate, which is not enough to convert a proposal for a commercial transaction into "pure" noncommercial speech).

“worlds,” as evidenced by pending disputes involving use of marks in virtual worlds, in “metaverses” and in connection with the sale and transfer of digital assets via non-fungible tokens (NFTs).⁴⁴ For the trademark dilution law to have meaning and practical application, the “noncommercial use” exclusion should apply to pure speech that is fully protected by the First Amendment and not to toys or other goods merely because they may include a “humorous message.” Courts have had no problem ensuring that protected speech is not impacted by dilution laws.⁴⁵

⁴⁴ *Vans, Inc. v. MSCHF Product Studio, Inc.*, 2022 WL 1446681 (E.D.N.Y. Apr. 29, 2022) (granting temporary restraining order; declining to apply *Rogers* to allegedly artistic parody of Vans sneakers sold as shoes) (appeal pending); *Hermès Int’l v. Rothschild*, 590 F. Supp. 3d 647 (S.D.N.Y. 2022) (denying motion to dismiss claims asserted against METABIRKIN NTFs although *Rogers* test applies where the amended complaint includes sufficient allegations of explicit misleadingness either as a function of likelihood of confusion under the *Polaroid* factors or under Rothschild’s own theory of the explicitly misleading analysis; trial scheduled for January 30, 2023, although on January 12, 2023, the district court permitted defendants to file another motion to dismiss); *Yuga Labs, Inc. v. Ripps*, 2022 WL 18024480 (C.D. Cal. Jan. 16, 2023) (denying motion to dismiss; *Rogers* test did not apply to trademark claims relating to defendant’s sale of a collection of NFTs pointing to the same online digital images as the plaintiff’s BAYC collection, which amounted to commercial activities designed to sell infringing products, not expressive artistic speech protected by the First Amendment; even if *Rogers* test applied, defendant’s activities were not artistically relevant but a “pretextual expressive work meant only to disguise a business profiting from another’s trademark” and were explicitly misleading).

⁴⁵ *Radiance Found., Inc. v. NAACP*, 786 F.3d 316 (4th Cir. 2015); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302 (N.D.

Whether humorous toys or other commercial goods are subject to the dilution statute and likely to cause dilution, however, remains an issue to be addressed after passing through the remainder of the robust and significant hurdles a brand owner must overcome before establishing a viable dilution cause of action.

CONCLUSION

For the foregoing reasons, the analysis used by the Ninth Circuit misapplies the relevant considerations. If including a “humorous message” with use of a mark on a product is all that it takes to revert to *Rogers v. Grimaldi* in an infringement matter or to consider the use noncommercial such that a dilution claim is precluded, nearly every use of a mark on a product or as a brand can be excused regardless of its effect on the public or the brand owner, or the depth and significance, if any, of the speech concerns involved.

Accordingly, the NYIPLA respectfully urges the Court to remand this case with instructions to conduct a traditional analysis of the trademark infringement claims via an assessment of the likelihood of confusion factors *and* other factors potentially relevant to First Amendment considerations, which strikes an appropriate balance when addressing ordinary products that may be likely to cause confusion. Similarly, to the extent the court below must assess

Ga. 2008) (anti-Walmart messages using Walmart logos to convert name to WalQueda and Walocaust noncommercial speech even though t-shirts and merchandise were offered for sale).

the applicability of the “noncommercial use” exclusion to a Lanham Act dilution claim, the NYIPLA respectfully requests this Court to require the court below to conduct a more detailed assessment of First Amendment considerations.

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