

No. 24-1016

IN THE
Supreme Court of the United States

RISEANDSHINE CORPORATION,
DBA RISE BREWING,

Petitioner,

v.

PEPSICO, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**TRADEMARK LAW SCHOLARS
AS AMICI CURIAE
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICI

Amici, listed in the Appendix, are scholars who teach, write, and practice in the field of trademark law. We have no direct interest in the outcome of this case.¹

SUMMARY OF ARGUMENT

The issue before the Court is whether trademark strength in a likely confusion analysis is a question of fact or a question of law, but this question actually bears on the confusion inquiry as a whole. Sometimes, factual issues predominate in this consideration, but sometimes legal issues do.

This conclusion may sound surprising given the phrase “likelihood of confusion,” which sounds empirical. The full version of the standard—likely confusion among a substantial number of reasonable consumers—clarifies that normative legal judgments (what is substantial, what is reasonable, and what constitutes confusion) are crucial to infringement inquiries. Infringement inquiries therefore are mixed questions of law and fact in which legal analysis can often predominate.

The hallmark of fact finding that deserves appellate deference and clear-error review is individualized adjudication. The multifactor framework to assess likelihood of confusion that courts have regularly used in the 80 years since the enactment of the Lanham Act

1. Counsel for the parties did not author this brief in whole or in part. No persons other than Amici Curiae contributed money to fund preparation or submission of this brief.

involves propositions that sound factual, but that have never—not in this case, nor in any other—been tested by factfinding at the district court level.

This includes the question of trademark strength. The theory that “suggestive marks are conceptually stronger than descriptive marks with secondary meaning, thus favoring the plaintiff more in the confusion inquiry,” is not an “adjudicative fact” found by the factfinder based on individualized evidence.

Contrary to some suggestions in Petitioner’s brief, conceptual strength inquiries do not involve direct investigation of consumer understanding of the extent to which a word functions to indicate source when applied to a product. Conceptual strength is partly empirical (involving an assessment of, *inter alia*, dictionary definitions and other marketplace uses) and partly a matter of prediction about whether people will need to use “imagination and thought” to connect a word with the goods or services at issue. No trademark is “suggestive” or “descriptive” as a state of nature; Judge Friendly accepted that his division was “rough[.]” at best. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

Furthermore, the propositions that suggestive marks are “stronger” than descriptive marks with secondary meaning, and thus that, all else being equal, a mark’s status as suggestive makes confusion more likely than if it were descriptive, are broad claims about reality.

Courts evolved the multifactor confusion test over time, and they are still adding variations for new situations—as they should be. As with many torts, the existence of

trademark infringement (given a set of adjudicative facts) is a classic mixed question of law and fact. No resolution of this case should treat either likelihood of confusion or trademark strength as a purely factual question.

ARGUMENT

I. The Development of the Multifactor Test

The Lanham Act does not specify a test for determining likelihood of confusion. William McGeeveran & Mark P. McKenna, *Confusion Isn't Everything*, 89 Notre Dame L. Rev. 253, 255 (2013). The choice of what factors to consider in a given class of cases is itself a legal one. While courts have converged in most cases on a multifactor test, they have also altered or departed from it when appropriate.

The multifactor test developed for dealing with noncompeting goods, where sales substitution due to confusion was not the primary risk. The standard for infringement by a direct competitor was simpler: were the goods and the marks identical? The decision to expand the multifactor test to competing goods cases was undertaken by the lower courts mostly without discussion.²

The only element of the multifactor test that is directly about consumer confusion is the “actual confusion” factor, which takes account of complaints, reports, surveys, and other direct evidence of consumers’ beliefs. The remaining

2. See McGeeveran & McKenna, *Confusion*, *supra*, at 254; Robert G. Bone, *Taking the Confusion Out of “Likelihood of Confusion”: Toward A More Sensible Approach to Trademark Infringement*, 106 Nw. U. L. Rev. 1307, 1331-34 & n.164 (2012).

factors provide what courts believe to be circumstantial evidence about the likelihood of confusion. They exist because most litigated cases don't involve evidence of actual confusion, which is thought to be hard to surface in court even when it exists.³

Additionally, “actual confusion” evidence itself is not dispositive about whether confusion is likely among a substantial number of reasonable consumers. Most people are confused about many things most of the time; individual confusion reports may therefore reflect idiosyncratic, unreasonable, or fleeting beliefs that do not justify liability.⁴ Consumer surveys conducted for litigation purposes are expensive and highly manipulable, so they may not be good quality evidence either.⁵ The multifactor

3. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 Calif. L. Rev. 1581, 1608, 1640-42 (2006).

4. See *Conopco, Inc. v. May Dep't Stores Co.*, 46 F.3d 1556, 1563 (Fed. Cir. 1994) (rejecting idiosyncratic confusion); Jacob Jacoby & Wayne D. Hoyer, *The Comprehension and Miscomprehension of Print Communications* 110-13 (1987) (finding that an average of 19.3% of messages in magazine ads were affirmatively misunderstood by consumers; no message was correctly conveyed to all readers); Jacob Jacoby et al., *Miscomprehension of Televised Communications* 64-73 (1980) (finding that consumers misunderstood an average of 28.3% of messages in television commercial ads; 81.3% of consumers misunderstood at least some portion of those ads, and no ad was completely understood).

5. *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 163-65 (2023) (Sotomayor, J., concurring) (cautioning courts regarding the manipulability of survey evidence); Daryl Lim, *Trademark Confusion Revealed: An Empirical Analysis*, 71 Am.

test therefore prioritizes the circumstantial evidence of mark strength, mark similarity, and relatedness of the parties' goods and services.

Courts have properly recognized that the multifactor test is ill-suited for a number of situations, including comparative advertising, other kinds of “nominative” fair use,⁶ resale of legitimate goods,⁷ noncommercial speech, and the like. Such cases regularly involve situations where two key factors—strength of the plaintiff’s mark and the similarity of the term used by the defendant to that mark—do not make confusion more likely. For example, “Pepsi is better than Coke” is not likely to confuse even though Coke is unquestionably a strong mark and the goods compete directly. Using the multifactor test in

U. L. Rev. 1285, 1313-14 (2022) (“Constructing a robust survey is dauntingly hard. . . . As a matter of justice between the parties, the staggering costs of surveys put defendants at a disadvantage.”); cf. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P’ship*, 34 F.3d 410, 416 (7th Cir. 1994) (criticizing “the survey researcher’s black arts” and noting that surveys do not involve real consumption decisions); John P. Liefeld, *How Surveys Overestimate the Likelihood of Consumer Confusion*, 93 Trademark Rep. 939 (2003).

6. See, e.g., *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992) (defining nominative fair use); *Century 21 Real Est. Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005) (adopting different variant of defense); *Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153, 168 (2d Cir. 2016) (adding Third Circuit factors to multifactor test).

7. See, e.g., *Iberia Foods Corp. v. Romeo*, 150 F.3d 298 (3d Cir. 1998) (applying a “material difference” test, in accordance with general practice).

comparative advertising cases would distort the confusion inquiry rather than aid it. Choosing a test is itself a legal question about the application of the law to the facts of a specific case. This Court did precisely that in holding that the multifactor test was appropriate in *Jack Daniel's*.

Context matters even in cases where the multifactor test is more appropriate. That is because the elements of the multifactor test involve general claims about reality, not just case-specific claims. In the language of the Federal Rules of Evidence, many inputs into the confusion factors are not adjudicative facts.⁸ They combine predictions about the world with normative claims. These general statements about when confusion is more likely are not subject to factual development at the district court level. Properly understood, the multifactor test is thus a mixed question of law and fact,⁹ and review must

8. The usual contrasting term is the misnomer “legislative facts.” See Hannah Walser, *Interpretive Facts: Textualism, Empiricism, and the Law-Fact Divide*, 101 Ind. L.J. 1071, 1089 (2026) (“[S]uch facts often involve estimates of probability, inferences about causation, and other exercises of judgment or evaluation—judgment constrained by empirical evidence, but judgment nonetheless.”). Many factors and subfactors in the multifactor confusion test are those kinds of predictions. Cf. *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality opinion) (holding that “the issue of whether there is a correlation between advertising [of alcohol] and consumption [of alcohol] is a legislative and not an adjudicative fact question” because “[i]t is not a question specifically related to this one case or controversy,” and because it depends upon “social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning.”).

9. As are many tort-style inquiries. Cf. *Dellums v. U.S. Nuclear Regul. Comm’n*, 863 F.2d 968, 972 n.5 (D.C. Cir. 1988)

sometimes go beyond clear error in order for there to be meaningful appellate review of the non-adjudicative facts that shape its application.¹⁰

As Judge Newman explained in a prescient dissent, searching appellate review is required in many trademark cases because trademark cases ask far more of factfinders than to identify specific historical facts. “[T]he broad range of reasonable fact-finding as to historical facts and familiar legal issues like negligence is not appropriate for issues infused with technical legal meaning, issues with which juries are almost completely unfamiliar.” *Samara Bros. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 135 (2d Cir. 1998) (Newman, J., dissenting in relevant part), *rev’d*, 529 U.S. 205 (2000).

Deciding trademark cases is not like deciding who caused a car accident. Such who-hit-whom cases involve much more of a division between facts and law. The issues in trademark law are intertwined. As Judge Newman

(“The question of causation or redressability . . . usually is an issue of predictive fact. As such, it is not at all clear to us that it should or can be treated as an historical fact. . . . Predictive facts seem technically more like mixed questions of law and fact. Perhaps more accurately, . . . they involve as much policy as law.”).

10. See *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986) (“We are far from persuaded . . . that the “clearly erroneous” standard of Rule 52(a) applies to the kind of “legislative” facts at issue here.”); cf. Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 Wm. & Mary L. Rev. 251, 255 (2016) (arguing for an intermediate standard of review for “legislative facts,” depending on “the degree of adversarial testing (broadly construed) to which the legislative facts had been subjected”).

explained, “[i]t is not a matter of giving less deference to a jury’s fact-finding, reached within an allowable scope. Rather, it is a matter of recognizing that the scope of allowable fact-finding is narrower. . . . Otherwise, we are ceding to juries broad authority to determine the substantive scope of the law on topics such as antitrust, copyright, trademark, and, in this case, trade dress.” *Id.* at 135-36. *Wal-Mart* is an excellent example of a case in which legal questions predominated: a jury found that a product design was protectable because it was inherently distinctive, but this Court held that product design cannot be inherently distinctive, and that, to better promote competition, any doubts about whether something is product or packaging should be resolved by treating it as product design. 529 U.S. at 216.

This Court’s more recent ruling in the *Jack Daniel’s* case shows the vital role of appellate review to protect parody and other forms of protected expression. *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023). On remand, the legal signal sent by the Court’s focus on confusion about source and skepticism about survey evidence in parody cases changed the district court’s reading of the facts even absent any further evidence. Given that many trademark owners make overreaching claims, the Court should preserve the flexibility appellate courts have historically used in reviewing confusion claims to protect both competition and speech.¹¹

11. *Cf. TikTok v. Garland*, 604 U.S. 56, 83 (2025) (Gorsuch, J., concurring) (observing that litigation over an analytic framework may “take on a life of its own and do more to obscure than to clarify the ultimate” questions).

Whatever the resolution of this case, therefore, Amici urge the Court not to collapse the various considerations that go into confusion inquiries—including the “strength of the mark” factor in the multifactor test—into pure adjudicative fact. Doing so would hamper courts’ ability to develop the law of trademark as they have done for the past nearly eighty years under the Lanham Act. It would also raise the cost of trademark litigation by making it harder to resolve cases at summary judgment, which systematically advantages better-resourced parties in ways that harm free competition and free speech. *See* Glynn S. Lunney, Jr., *Trademark’s Judicial De-Evolution: Why Courts Get Trademark Cases Wrong Repeatedly*, 106 Calif. L. Rev. 1195, 1202, 1236, 1261-62, 1272 (2018); William McGeeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 Wash. L. Rev. 713, 745–53 (2015); *cf. Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 214 (2000) (“Competition is deterred ... not merely by successful suit but by the plausible threat of successful suit[.]”).

II. Strength Specifically is a Mixed Question

Like the other factors in the multifactor test, neither the strength of the plaintiff’s mark nor the division of the strength factor into marketplace and conceptual strength are mentioned in the Lanham Act’s prohibition on likely confusion. Courts developed these heuristics to help in predicting whether claimed confusion is actionable. They are not adjudicative facts but rules of general application, in the sense that they are “established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those

developed in a particular case.” *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

Likewise, the *Abercrombie* spectrum for evaluating the conceptual strength of word marks is not specified by the statute. It was created by Judge Friendly as a synthesis of prior cases and has been refined over time. The thought is that consumers will not immediately recognize descriptive terms as trademarks, and only experience over time can lead them to see the terms as indicators of source. By contrast, suggestive, arbitrary, and fanciful terms are less necessary for competitors and more likely to be recognized immediately as source indicators. The *Abercrombie* spectrum concededly doesn’t work well for non-word marks like images or product packaging, much less product design.¹²

Courts generally take for granted the propositions (1) that a mark that is further towards the “fanciful” side of the *Abercrombie* spectrum is conceptually stronger, and one that is highly descriptive is conceptually weaker, and (2) that this conceptual strength bears monotonically on the likelihood of confusion.¹³

12. See *Wal-Mart*, 529 U.S. at 216; *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 242-43 (5th Cir. 2010) (*Abercrombie* spectrum a poor fit to evaluate distinctiveness of image).

13. See, e.g., *Nutri/Sys, Inc. v. Con-Stan Indus.*, 809 F.2d 601, 605 (9th Cir. 1987) (“Arbitrary or fanciful marks (*i.e.*, Kodak) are called ‘strong’ marks, whereas descriptive or suggestive marks are ‘weak.’” (citation modified)); *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999) (suggestive marks are presumptively weak).

Courts did not develop these categories based on empirical research. Consumers on their own have no particular reason to know or care whether a mark is arbitrary, fanciful, suggestive or descriptive, or what those terms mean for trademarks. This is why genericity surveys have to train consumers on the difference between a brand name and a common name before asking them questions about whether a word is generic—and, notably, neither “brand” nor “common” are the terms used in trademark law.¹⁴

The law’s preference for inherently distinctive marks¹⁵—and for fanciful (made-up) or arbitrary marks over suggestive and descriptive marks that say something about the product or service at issue—reflects both a prediction that consumers will immediately understand the mark at issue to identify source¹⁶ and also a legal

14. See, e.g., *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 915 (E.D. Va. 2017), *aff’d sub nom. United States Patent and Trademark Office v. Booking.com B. V.*, 915 F.3d 171 (4th Cir. 2019), *aff’d*, 591 U.S. 549 (2020) (explaining the process of training survey respondents so they can understand the questions).

15. See, e.g., *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 609 (7th Cir. 1986) (inherently distinctive marks are “favored”).

16. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992); *Savannah Coll. of Art & Design, Inc. v. Sportswear, Inc.*, 983 F.3d 1273, 1282 (11th Cir. 2020); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1352 (Fed. Cir. 2010) (“Inherent distinctiveness does not depend on a showing that consumers *actually* identify the particular mark with the particular business. . . . [I]f the mark is inherently distinctive, it is presumed that consumers will view it as a source identifier.”); Graeme B. Dinwoodie, *Trade Mark Law As A Normative Project*, 2023 Sing. J. Legal Stud. 305, 314-15

incentive to businesses to select marks that pose less risk of hampering competition.¹⁷ Giving inherent strength weight in the confusion inquiry provides part of that incentive.

To the extent that there is empirical research, it does not support *Abercrombie*’s categories. Instead, that research strongly suggests that the *Abercrombie* spectrum misunderstands how people actually process information about products and services.¹⁸ Nonsense

(“Inherently distinctive marks are protected upon the basis that they *are likely* to act as source-identifiers. . . . [This ‘predictive’ inquiry] is an educated guess about what reality will be when the mark is used.” (footnotes omitted) (citing J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 8.02[4] (5th ed. 2022))).

17. See, e.g., *Chippendales*, 622 F.3d at 1352; *Blau*, 781 F.2d at 609; Dinwoodie, *Normative Project*, *supra*, at 315.

18. See, e.g., Chiranjeev S. Kohli & Rajneesh Suri, *Brand Names That Work: A Study of the Effectiveness of Different Types of Brand Names*, 10 Mktg. Mgmt. J. 112, 117 (2000) (finding that arbitrary names consistently performed the worst overall in key dimensions of likability, recall, and recognition); Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 Ariz. St. L. J. 1033, 1038 (2009) (demonstrating that “descriptive marks are no less source-indicating than suggestive, arbitrary, and fanciful marks” and “that it is the non-lexical cues of typical trademark use (e.g., the location and size of the mark) that cause consumers to find descriptive marks to be source-indicating”); Jake Linford, *Are Trademarks Ever Fanciful?*, 105 Geo. L.J. 731, 735 (2017) (arguing that the category “fanciful” has no empirical reality); Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 Ohio St. L.J. 1367 (2015) (using linguistic evidence to argue that consumers perceive suggestive

marks used for products on Amazon, like BSTOEM or ZGGCD, are fanciful and thus at the top end of the “inherently distinctive” category, but they are not memorable or easily distinguishable from other nonsense marks and thus not useful to consumers in helping them remember products with which they have had good or bad experiences—that is, they are not good at performing actual trademark functions.¹⁹

But whether the *Abercrombie* spectrum’s ranking of marks is correct is less important here than the recognition that the placement of a mark on the conceptual spectrum is not a pure question of adjudicative fact, nor is how much weight to give it in the confusion analysis. Indeed, juries are regularly simply told that strength matters monotonically—stronger always means more likelihood of confusion. This instruction makes the weight of strength in the confusion inquiry more like a legal conclusion than a factual question.²⁰

and descriptive terms as fundamentally similar); Dustin Marlan, *The Arbitrary Myth: Challenging Trademark Law’s Elevation of Arbitrary Marks*, 41 Berkeley Tech. L.J. 555, 561 (2026) (“consumer research demonstrat[es] that arbitrary marks underperform on measures of recall, recognition, and likeability, trailing not only fanciful marks but also suggestive and even descriptive ones”).

19. Note, *Fanciful Failures: Keeping Nonsense Marks Off the Trademark Register*, 134 Harv. L. Rev. 1804, 1806 (2021).

20. See, e.g., Ninth Cir. Jury Instructions Comm., *Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit* § 15.19, at 446 (2025 ed., current through June 2026) (last visited Sept. 9, 2026) (“The strength of a trademark is determined by its distinctiveness and recognition in the marketplace. The stronger a mark is, the greater the scope of

Moreover, apparent conceptual strength based on dictionary definitions isn't the end of the assessment of the strength factor. McCarthy, a leading trademark authority, treats the existence of a crowded market as a separate input into the assessment of "relative strength." 1 McCarthy, *supra*, § 11:85 ("A mark that is hemmed in on all sides by similar marks on similar goods or services cannot be very 'distinctive.' It is merely one of a crowd of similar marks. In such a crowd, customers will not likely be confused between any two of the crowd and may have learned to carefully pick out one from the other.").²¹

McCarthy does not take a position on whether crowding is (1) evidence about market strength because consumers are likely to know that a term is common across different sources, or (2) evidence that, whatever conceptual distinctiveness might have been theoretically possible, the term is now a dead metaphor (e.g., "king size") no longer requiring thought or imagination to connect to the goods or services at issue. Both are reasonable explanations for why crowding matters. That is because both conceptual and marketplace strength are loose constructs, not natural categories; like the other factors, they bear on each other.

protection the law provides."); Fifth Cir. Civil Jury Instructions, *Trademark Infringement: Specific Preliminary Instructions To The Jury* ch. 14.11, at 17 (2024) https://www.lb5.uscourts.gov/juryinstructions/Fifth/2024Civil_Ch14_Trademarks.pdf (last visited Sept. 9, 2026) (same).

21. See also 1 McCarthy, *supra*, § 11:76 ("One way a mark is 'weak' is that it is known only by a few dedicated customers because it is the subject of few sales and little advertising or promotion. Another way a mark may be 'weak' is that there are many similar marks used by others, resulting in a 'crowded' trademark marketplace.") (footnote omitted).

For example, early in the Internet era, many businesses used terms or images relating to dogs known for their ability to “fetch” or “retrieve.” Given the connection delays then common, these terms, which might have seemed suggestive or even arbitrary for software in the abstract, were so useful that they were properly classified as descriptive. *Labrador Software, Inc. v. Lycos, Inc.*, 32 F. Supp. 2d 31, 33-34 (D. Mass. 1999). “Rise” could be subject to a similar analysis. While the population of the crowd of similar marks in any given case is an adjudicative fact, the *meaning* of that density in the overall context of an infringement inquiry—how market crowding interacts with the abstract conceptual strength of the mark—is not.

Additionally, in particular cases, the strength of a mark may actually help the defendant, not the plaintiff. Especially in situations involving parody or comparative advertising involving well-known marks, consumers know what a mark should look like, so strength should *decrease* the likelihood of confusion in those situations.²² Likewise, in so-called “reverse confusion” cases, courts require more conceptual strength and *less* marketplace strength in order to favor a plaintiff.²³ This is another

22. See, e.g., *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 261-62 (4th Cir. 2007); *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 416 (S.D.N.Y. 2002); Barton Beebe & C. Scott Hemphill, *The Scope of Strong Marks: Should Trademark Law Protect the Strong More than the Weak?*, 92 N.Y.U. L. Rev. 1339, 1364-66 (2017).

23. See, e.g., *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 231 (3d Cir. 2000); Jeremy N. Sheff, *Reverse Confusion and the Justification of Trademark Protection*, 30 Geo. Mason L. Rev. 123, 144-46 (2022).

example of how the legal significance of a factual finding varies situationally.

III. Adjudicative Facts Bear on Likelihood of Confusion But Do Not Map Directly To the Likelihood of Confusion Factors

Although the Court did not grant certiorari on other aspects of the multifactor confusion test, we discuss them here in order to place the strength inquiry in its broader context. The complexity begins with the concept of likely confusion. Likely confusion isn't possible confusion.²⁴ Nor is likely confusion shown by the existence of confusion among a few people out of thousands.²⁵

Instead, courts look for likely confusion among an appreciable number of reasonable consumers. This requires making a number of legal as well as factual judgments²⁶: For example, the threshold for actionable

24. See, e.g., *Sorensen v. WD-40 Co.*, 792 F.3d 712, 726 (7th Cir. 2015) ("Possible confusion is not enough; rather, confusion must be 'probable.'" (citing 4 *McCarthy* § 23.3)).

25. See, e.g., *Water Pik, Inc. v. Med-Sys, Inc.*, 726 F.3d 1136, 1150 (10th Cir. 2013) ("We have consistently recognized, however, that isolated, anecdotal instances of actual confusion may be de minimis and may be disregarded in the confusion analysis."); *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 173 (7th Cir. 1996) (Posner, J.) ("[P]laintiff's evidence that two consumers (out of how many thousands?) may have been misled cannot by itself be thought to create a contestable issue of likelihood of confusion even if the evidence ... is admissible and credible.").

26. See Graeme B. Dinwoodie & Dev S. Gangjee, *The Image of the Consumer in EU Trade Mark Law*, in *The Images of the Consumer in EU Law: Legislation, Free Movement and*

confusion can be lowered if confusing the products at issue would have potential health consequences.²⁷ By contrast, the threshold should be raised when the defendant’s use is plausibly parodic, engaged in social commentary, or otherwise affirmatively beneficial to substantial numbers of consumers.²⁸ Such decisions are consequential for categories of subsequent litigants, not tailored to an individual case.

In a multifactor test, the factors often bear on one another. Meaningful appellate review therefore may

Competition Law 339, 345 & n.26, 353 (Dorota Leczykiewicz & Stephen Weatherill eds., 2016) (explaining connection to tort law’s reasonable person; noting that “almost all conceptions of the consumer—as circumscribed by the applicable legal tests—reflect a blend” of normative and empirical judgments); Dinwoodie, *Normative Project*, *supra*, at 308-09 (“[B]ecause trade mark law does not seek to prevent all forms of confusion, the consumer protection rationale presents a series of essentially normative questions regarding the nature and level of confusion that should be actionable, along with questions about the forms of consumer understanding that are properly protected against such confusion. . . . You need to know *what* you are measuring—and *why*—before you devise rules for doing so.”).

27. See, e.g., *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 715-17 (3d Cir. 2004); *Syntex Lab’ys, Inc. v. Norwich Pharmacal Co.*, 437 F.2d 566, 569 (2d Cir. 1971); 3 McCarthy, *supra*, § 23:32.

28. See, e.g., *Prestonettes, Inc., v. Coty*, 264 U.S. 359, 367-68 (1924) (consumers’ interests in repackaged legitimate goods); *Yankee Pub. Inc. v. News Am. Pub. Inc.*, 809 F. Supp. 267, 273 (S.D.N.Y. 1992) (consumers’ interests in parody and commentary); Jeremy N. Sheff, *Veblen Brands*, 96 Minn. L. Rev. 769, 783-86 (2012) (discussing “non-confused consumers”); Michael Grynberg, *Trademark Litigation As Consumer Conflict*, 83 N.Y.U. L. Rev. 60, 77-85, 90-91 (2008) (same).

require evaluating how district courts (or the Trademark Trial and Appeal Board) applied and weighed the different factors. Such review would have been difficult had the test’s application been treated as a purely factual matter. In one recent example, the Trademark Trial and Appeal Board used a narrow definition of relevant goods and services when assessing whether the market was “crowded” for purposes of strength, and then a broad definition when assessing whether the parties’ offerings were related enough that consumers would think they were affiliated. This, the Federal Circuit held, was a legal error. *Apex Bank v. CC Serve Corp.*, 156 F.4th 1230, 1235-36 (Fed. Cir. 2025).

Factor interactions are common. For example, mark similarity is an obvious example of a fact-specific inquiry, similar to trademark tacking in *Hana Financial, Inc. v. Hana Bank*, 574 U.S. 418, 420 (2015). The similarity must be sufficient, in context, to make confusion likely. A factfinder may need to determine whether and how descriptive or generic elements, or stylistic differences, matter. Differences and similarities in “sight, sound, and meaning” are all relevant.²⁹

But there is also an interaction between similarity and a crowded market. Crowding lessens the weight of similarity.³⁰ As noted above, no matter how “strong” a

29. See, e.g., *George & Co. LLC v. Imagination Ent. Ltd.*, 575 F.3d 383, 396 (4th Cir. 2009).

30. See, e.g., *One Indus., LLC v. Jim O’Neal Distrib., Inc.*, 578 F.3d 1154, 1164 (9th Cir. 2009) (“When similar marks permeate the marketplace, the strength of the mark decreases.”); *Fla. Int’l Univ. Bd. of Trs. v. Fla. Nat’l Univ., Inc.*, 830 F.3d 1242,

mark is conceptually in theory, it may still provide only narrow exclusion rights if many market participants use the same or similar metaphors or associations in their own marks. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 672 (2004) (“It is rather a mark’s distinctiveness from other marks, its salience, that makes consumers aware of it and that will affect whether consumers are likely to confuse it with a junior, similar mark.”). This kind of interaction between factors is another reason that appellate review often must go beyond clear error to fully evaluate a party’s legal arguments, even when examining mark similarity relies on adjudicative factfinding.

The one-to-one comparison required in *Hana Bank* for determining whether a single trademark maintained a continuous commercial impression is related to the similarity question in an infringement inquiry. However, the former scenario is far less complex, because assessing whether a mark retained a continuous commercial impression over time doesn’t additionally require a one-to-many comparison. Whether a Labrador retriever logo redesigned to be more or less realistic is commercially continuous with the prior version may not require consideration of the other logos in the marketplace. All that is required is a determination of whether the newer mark is sufficiently close to the former mark that we can call it the same mark. But an infringement dispute over

1258 (11th Cir. 2016) (given a crowded field, the disputed names “are not particularly distinct to consumers”); 2 McCarthy, *supra*, § 11:88 (4th ed. 2015) (sufficient evidence of third-party use of similar marks can “show that customers . . . ‘have been educated to distinguish between different . . . marks on the basis of minute distinctions’”).

two sellers’ dog logos uses similarity only as one input into the broader question of confusion, so effects of the level of similarity and kind of similarity are highly dependent on the other factors. In other words, *Hana Bank* concerned only the claimant’s *priority*: when did it first use “the mark”? That question is antecedent to likely confusion, which concerns the *scope* of the rights that come with ownership.

Likewise, the construct of the “reasonable” consumer from whose perspective likely confusion is assessed is often both empirical and legal. Trademark law requires consumers to be “reasonable”—they have to be more careful to distinguish among providers of real estate services than of candy bars. This is often a normative inquiry, not an empirical one.³¹ Reasonable consumers must be more careful when purchases are more important, and the law does not inquire whether most consumers are reasonable consumers. Reasonability under the circumstances is a classic mixed question of law and fact, requiring “the application of a legal standard” to each case.³²

Other mixed questions include the “actual confusion” factor. Although this seems on its fact to be a purely empirical assessment, its boundaries are regularly adjusted as a legal matter. Courts regularly say that evidence of actual confusion is usually hard to find,

31. See Michael Grynberg, *The Consumer’s Duty of Care in Trademark Law*, in *Research Handbook on Trademark Law Reform* 326, 330-31 (Graeme B. Dinwoodie & Mark D. Janis eds., 2021).

32. *Hana Bank*, 574 U.S. at 423.

because consumers rarely bother complaining even if they ultimately figure out that they were confused. For that reason, courts say that no inference should be made from its absence.³³ This assumption that deceived consumers stay silent is not based on actual evidence of consumer complaint behavior. Courts then modify this rule with the proposition that, if the parties have coexisted for a long time, the absence (or minimal amount) of reported confusion weighs against the plaintiff.³⁴ If the plaintiff is wealthy enough, the court can infer that failure to conduct a confusion survey weighs against the likelihood of confusion.³⁵

Courts also differ on whether misdirected calls or messages, when a consumer is looking for one entity but contacts the other, constitute evidence of trademark confusion or just errors in typing.³⁶ Courts differ about the

33. See, e.g., *Brookfield*, 174 F.3d at 1050; *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 291 (3d Cir. 2001) (“[I]t is difficult to find evidence of actual confusion because many instances are unreported.”); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1544 (11th Cir. 1986) (“It is likely that many consumers who were confused never realized they had been confused and that many of those who did realize they had been confused chose not to spend the time to register a complaint.”).

34. See, e.g., *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842-43 (9th Cir. 2002).

35. See, e.g., *Mushroom Makers, Inc. v. R. G. Barry Corp.*, 441 F. Supp. 1220, 1231 (S.D.N.Y. 1977), *aff’d*, 580 F.2d 44 (2d Cir. 1978); *Merriam-Webster, Inc. v. Random House, Inc.*, 35 F.3d 65, 72 (2d Cir. 1994); see also 5 McCarthy, *supra*, § 32:195 (discussing negative inferences from absence of survey evidence).

36. Compare, e.g., *Appliance Liquidation Outlet, L.L.C. v.*

import of questions from consumers about whether two entities are connected—some find evidence of confusion, while others find that the querying consumer understood that she didn’t have enough information to know for sure and thus was not confused about source.³⁷ These are not the kinds of factual propositions that are tested by an individual factfinder; they are legal rules about how to assess facts.

The “intent” factor, too, requires legal choices to go along with factual inquiries. Some courts say that a defendant’s knowledge of the plaintiff’s mark is sufficient to find bad faith where there is some similarity; others say that knowledge is not enough.³⁸ Some courts say

Axis Supply Corp., 105 F.4th 362, 382 (5th Cir. 2024) (finding a “repeated and persistent flood of mistaken inquiries” by relevant consumers to be evidence of actual confusion), *with, e.g., Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 636 (6th Cir. 2002) (consumers were merely “inattentive or careless when attempting to find the e-mail address for [defendant], rather than confused about the source of the ear thermometers.”).

37. *Compare, e.g., Int’l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1090 (7th Cir. 1988) (inquiries regarding the relationship between plaintiff and defendant’s product “constitute[d] probative evidence of a likelihood of confusion”), *with, e.g., Fisher Stoves, Inc. v. All Nighter Stove Works, Inc.*, 626 F.2d 193, 195 (1st Cir. 1980) (instances of consumers “ask[ing] if the two companies were affiliated” were evidence of consumers “ha[ving] the difference in source clearly in mind”).

38. *Compare, e.g., Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 603 (6th Cir. 1991) (“Understandably, courts have held that use of a mark with knowledge of another’s prior use of the mark supports an inference of intentional infringement.” (collecting cases)), *with, e.g., Sorensen*, 792 F.3d at 731 (“Mere

that intentional copying is bad faith, while others hold that—especially with respect to features that might have non-trademark functions—intentional copying merely shows a desire to compete, not an intent to confuse.³⁹ And reverse confusion cases use a still different definition of bad intent.⁴⁰ Each of these definitions requires different factual proof, and so it is important to know which tilt the confusion inquiry in a plaintiff’s favor and which do not. Moreover, the proposition that intended acts are more likely to succeed than unintended acts, which is why bad intent is said to make confusion more likely, is once again a general proposition not tested by individualized factfinding.⁴¹

knowledge of someone else’s mark is insufficient to show intent to pass off.” *See also* 3 McCarthy, *supra*, § 23:115 (collecting cases).

39. *See, e.g., Paddington Corp. v. Attiki Importers & Distributors, Inc.*, 996 F.2d 577, 587 (2d Cir. 1993) (“Where such prior knowledge is accompanied by similarities so strong that it seems plain that deliberate copying has occurred, we have upheld findings of bad faith.”). *But see, e.g., Craft Smith, LLC v. EC Design, LLC*, 969 F.3d 1092, 1106 (10th Cir. 2020) ([W]hen a competitor copies a product’s design, its purpose is not necessarily to confuse consumers, but to copy the aspects of that product that make it more functional.”).

40. *See* Sheff, *Reverse Confusion*, at 148-151.

41. It is probably more persuasive to see bad faith as a separate normative consideration about the defendant’s conduct rather than an actual empirical claim about confusion. *See* Bone, *supra*, at 1347, 1350-52; Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 Stan. L. Rev. 761, 810-11 (2013); *cf.* Beebe, *Empirical Study of the Multifactor Tests*, *supra*, at 1628-31. The very lack of clarity in the case law about this question suggests the need for appellate oversight.

Because these questions recur in multiple cases, it is important for courts to be able to provide predictable answers—precisely the situation in which clear error review alone can be insufficient to produce coherent law.

IV. The Multifactor Test Creates a Variably Mixed Question of Law and Fact

The Sixth Circuit explained why the overall multifactor test is a mixed question in *Sterling Jewelers, Inc. v. Artistry Ltd.*, 896 F.3d 752, 755 (6th Cir. 2018), noting that it has “factual components (e.g., what evidence of confusion has been shown?) and legal components (e.g., what counts as cognizable confusion?).” As it further noted, “[e]ach factor presents a question of law and fact, not math. As potential proxies for the kind of confusion that the Lanham Act prohibits, each factor’s relevance and relative importance will depend on the facts of each case.” *Id.* at 756.

This presents a challenge for review. As this Court explained:

The appropriate standard of review for a mixed question depends “on whether answering it entails primarily legal or factual work.” Some mixed questions require a court to “expound on the law” by “amplifying or elaborating on a broad legal standard.” When applying the law involves developing legal principles for use in future cases, appellate courts typically review the decision *de novo*.

Bufkin v. Collins, 604 U.S. 369, 381 (2025) (citation modified).

In trademark cases, courts are sometimes immersed in facts. But they are often enough also, or even predominantly, relying on normative claims about the scope of trademark law or factual propositions that weren't tested before the factfinder. Additionally, predictive inquiries into the factors that cause likely confusion are often refined over time in ways that give guidance to market participants, who are often sophisticated commercial entities. *Cf. id.* at 384-85 (use of objective reasonable person standard favors de novo review); *see also id.* at 399-400 (Jackson, J., dissenting) ("As a general matter, this Court has long treated the application of a legal standard to a given set of facts as an exercise that poses a legal question.").⁴² For example, the circuits have, with decades of experience, reached consensus that so-called "keyword advertising"—using trademarks as paid-for search terms to offer competing goods or services—is not infringing.⁴³ This was only possible because appellate

42. *Cf.* Timothy B. Dyk, *The Role Of Non-Adjudicative Facts In Judicial Decisionmaking*, 76 Stan. L. Rev. Online 10, 26 (2023) (arguing that the use of "[b]road statutory language" in the Patent Act delegated to courts the role of developing and using non-adjudicative facts in their tests); Justin Hughes, *The Respective Roles of Judges and Juries in Copyright Fair Use*, 58 Hous. L. Rev. 327, 348 (2020) (though copyright fair use determinations are case by case, "there is also no question that fair-use jurisprudence is a body of 'auxiliary legal principles' developed through precedent, suggesting de novo review of the overall fair-use conclusion").

43. *See, e.g., Deltona Transformer Co. v. NOCO Co.*, --- F.4th ---, No. 24-13590, 2026 WL 2236806, at *8 (11th Cir. Aug. 4, 2026); *Lerner & Rowe PC v. Brown Engstrand & Shely LLC*, 119 F.4th

courts were able to consider how to weigh the various factors in a repeating situation, using general principles of law.⁴⁴

A judge-made, multifactor test with substantial policy components may often be predominantly a question of law, despite key factual components. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021), explained that the “judge-made origins” of copyright fair use, “as well as modern courts’ use of the doctrine, makes clear that the concept is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its application may well vary depending upon context,” 593 U.S. at 20. The inquiry is necessarily case by case because uses differ, and thus a mixed question of law and fact. *Id.* at 23-24.

Where, as in *Google*, appellate review is concerned with “legal work” that “provide[s] general guidance for future cases,” *id.* at 24, de novo review is appropriate. Given the multiple legal judgments embedded in balancing the factors and subfactors when they point in substantially different directions, that is often the case in trademark law as well. Justice Kennedy’s statement that “[t]he common-law method instated by the fair use provision

711, 719, 721-26 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 2732 (Mem) (2025); *1-800 Contacts, Inc. v. JAND, Inc.*, 119 F.4th 234, 249-55 (2d Cir. 2024); *Jim S. Adler, P.C. v. McNeil Consultants, L.L.C.*, 10 F.4th 422, 428-29 (5th Cir. 2021); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242-43 (10th Cir. 2013).

44. See *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011) (addressing “internet troika” of factors in light of non-case-specific facts about consumer familiarity with Internet).

of the copyright statute presumes that rules will emerge from the course of decisions”⁴⁵ also describes the body of trademark litigation.

As part of this rule-development process, courts discussing the application of the confusion factors cite previous court cases as authorities, not external factual sources as evidence. The very existence of multiple treatises working through variations of the multifactor test, such as McCarthy, *supra*, and Callman,⁴⁶ and one treatise just on likely confusion, Richard L. Kirkpatrick & Vijay K. Toke, *Likelihood of Confusion in Trademark Law* (2d ed. 2026), further indicates the systemic need to “clarify legal principles” and “provide guidance to other courts resolving other disputes,” *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 583 U.S. 387, 398 (2018).

Another reason that appellate review may go beyond clear error is that trademark law has constitutional dimensions: it can be used to suppress free speech. If the likely confusion inquiry provides sufficient First Amendment protection when the defendant’s accused use is a trademark use, then it follows that review of a trial court’s decision on likely confusion has constitutional significance. Searching appellate review, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984),⁴⁷ is required to make sure the likely confusion

45. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 596 (1994) (Kennedy, J., concurring) (citation omitted).

46. Malla Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies* (4th ed. 2026).

47. Yoshino, *supra*, at 278 (“While the constitutional facts doctrine has largely been applied to adjudicative facts,

test has done its job. A district court’s error can allow a trademark owner to use the courts to suppress a competitor’s or critic’s speech, justifying greater appellate oversight. *Cf. Bufkin*, 604 U.S. at 384 (noting constitutional significance of probable cause inquiries). Notably, upon remand in *Jack Daniel’s*, the district court took this Court’s well-justified skepticism about the role of survey evidence in parody cases to heart and reversed its initial finding.⁴⁸

CONCLUSION

Confusion factors are court-developed. They involve normative judgments and include general, predictive propositions as sub-rules. These are not subject to fact-finding at the trial stage. Instead, they are the framework by which the finder of fact interprets the historical facts specific to the parties’ dispute. Historical facts are necessary but not sufficient inputs to the resolution of each factor (including mark strength), and thus to the overall likelihood of confusion inquiry.

its logic holds—perhaps even more strongly—with regard to legislative facts. As the Seventh Circuit has observed, ‘an issue of “constitutional fact” is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.’ By their nature, case-spanning facts (that is, legislative facts) will be more likely to have such far-reaching effects than case-specific ones (that is, adjudicative facts).”) (citation modified).

48. *VIP Prods. LLC v. Jack Daniel’s Props. Inc.*, No. CV-14-02057, 2025 WL 275909, at *24 (D. Ariz. Jan. 23, 2025), *vacated and remanded sub nom. VIP Prods., LLC v. United States*, 185 F.4th 919 (9th Cir. 2026).

Meaningful appellate review therefore requires something more than clear error review as to the application of these general rules, even when review of individually relevant factual findings (such as how many similarly named products exist in the market) is appropriately only for clear error. Otherwise, the Court will freeze in place a random snapshot of the common-law evolution of the confusion inquiry over time, preventing courts from reaching consensus on new recurring issues.

This Court has long recognized that fact and law sometimes cannot be cleanly separated. Whether one version of a mark offers the same commercial impression as a later version is heavily factual because it is a single comparison from an ordinary consumer's perspective. *Hana Bank*, 574 U.S. at 420; *see also id.* at 424-25. Whether a challenged copyright infringement is a fair use is often a legal question because the multifactor fair use test has a number of legal inputs as well as some factual questions (e.g., how much of the work was taken, what was the market effect?). *Google*, 593 U.S. at 24. Likelihood of confusion is closer to the latter than the former, not just because it is multifactor, but because many of its subfactors, like the fair use subfactors, require legal judgments.

The Court was asked only to rule on one subfactor of a multifactor test. Whatever its conclusions about the status of the *Abercrombie* spectrum, it should recognize that the overall multifactor inquiry is a mixed question of law and fact in which adjudicative facts only sometimes predominate and in which appellate review regularly needs to go beyond clear error. Additionally, it should not decide here that the non-statutory multifactor test

is always to be used in confusion cases, and it should not preclude evidence-based challenges to the use or application of the *Abercrombie* spectrum.

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APPENDIX

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