

Dog Toy Maker Has Its Day with Ninth Circuit Trademark Decision—Again

by Elizabeth Brannen

“Let Hercules himself do what he may,
The cat will mew, and dog will have his day”

— *Hamlet* (Act 5, Scene 1)

Some jokes are off-color, and in the case of the Bad Spaniels Silly Squeaker dog toy, the color is brown. Six years after an initial victory subsequently vacated by the Supreme Court, the Ninth Circuit has once again ruled in favor of dog toy maker VIP Products, LLC (“VIP”). *VIP Products LLC v. United States of America*, No. 25-2027 (9th Cir. Aug. 4, 2026). The Court of Appeals has now held that the toy, which resembles a bottle of Jack Daniel’s Old No. 7 Black Label Tennessee Whiskey with dog-related alterations, is unlikely to tarnish the Jack Daniel’s brand “‘by associating the famed whiskey with,’ as the Supreme Court put it, ‘dog excrement.’” *Id.* at 7 (quoting *Jack Daniel’s Props., Inc. v. VIP Prods., LLC (Jack Daniel’s II)*, 599 U.S. 140, 144 (2023)).

This decision is another Ninth Circuit win for VIP Products, but on narrower grounds than in 2020. The Silly Squeaker mimics the Jack Daniel’s bottle and label, substituting “Bad Spaniels” for “Jack Daniel’s,” “the Old No. 2, on your Tennessee Carpet” for “Old No. 7 Brand Tennessee Sour Mash Whiskey,” and “43% POO BY VOL.” and “100% SMELLY” for alcohol content descriptions. In 2020, the Ninth Circuit treated the toy as an expressive parody entitled to heightened First Amendment protection. The Supreme Court rejected that approach insofar as VIP uses the challenged indicia as trademarks of its own; however, it expressly left the ordinary infringement and dilution merits to be addressed below.

On remand, the district court heard cross-motions for judgment and found no trademark infringement (Jack Daniel’s, it held, had not shown a likelihood of consumer confusion), but held VIP Products liable for dilution by tarnishment. Based on its tarnishment finding, the district court entered a permanent injunction and final judgment in Jack Daniel’s favor. On appeal, a Ninth Circuit panel held that Jack Daniel’s had not met its burden to show dilution by tarnishment. The panel vacated the permanent injunction and remanded to the district court for entry of judgment in favor of VIP on the dilution claim.

Several aspects of the Ninth Circuit’s 2026 decision are noteworthy:

First, dilution requires a plaintiff to prove that its mark is famous, and that must be done mark by mark. The panel rejected Jack Daniel’s attempt to “borrow” fame from one element of its branding and use that fame to protect every related element. The Jack Daniel’s word mark and registered trade dress were famous, yes, but the court found no such proof as to “Old No. 7.” That finding was of consequence because the most arguably off-color part of the joke (“Old No. 2”), dropped out of the equation.

Elizabeth Brannen is the Managing Partner of Stris & Maher LLP. Recognized by Chambers USA for her “impressive track record of success in complex IP litigation, including at trial,” she also chairs the firm’s high-profile Intellectual Property Litigation Practice.

Second, when it comes to likely damage to the reputation of the famous mark, specific proof is important. Proof of a mere unpleasant conceptual association was not enough to show reputational harm. The Ninth Circuit found that Jack Daniel's evidence established, at most, a negative association between the broad concept of defecation and consumption of food and drink. It did not show that the Bad Spaniels dog toy itself created any harmful associations, and the court found no evidence to support a reasonable inference that scatological dog toy references have the same likelihood of generating disgust as the same references on consumable products meant for humans might.

Finally, parody still matters. The Supreme Court held that parody is not an escape hatch when the parodic mark is itself used as a source identifier, and the Ninth Circuit joined other circuits in recognizing that parody certainly is not an automatic complete defense to a dilution claim. But the Ninth Circuit said that does not mean courts must ignore its existence. Where a parody is clear, consumers are more likely to see it as the joke it was intended to be and less likely to attribute the joke's unpleasant qualities to the famous mark.

Will this win for VIP and parody withstand the test of time? Or is this just another chapter in this long-running dispute? Only time will tell. In the meantime, the Silly Squeaker barks on and the dog has had its second day.