

The Long Voyage Home: *VIP Products v. Jack Daniel's* and the Ninth Circuit's Final Word on Tarnishment

WRITTEN BY

Michael D. Hobbs, Jr.

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After more than a decade of litigation rivaling *The Odyssey* in its duration and epic nature as it has traversed every level of the federal judiciary — including a landmark Supreme Court decision — the Ninth Circuit has issued what amounts to the final word in one of trademark law's most closely watched parody disputes. In its August 2026 decision in *VIP Products LLC v. Jack Daniel's Properties, Inc.*, the court vacated the district court's permanent injunction and entered judgment for VIP, holding that Jack Daniel's failed to prove a likelihood of dilution by tarnishment under the Trademark Dilution Revision Act (TDRA). The Bad Spaniels squeaky toy — with its “Old No. 2 On Your Tennessee Carpet,” “43% Poo by Vol.,” and “100% Smelly” labels — is here to stay.

BACKGROUND

The dispute began when Jack Daniel's objected to VIP's dog toy, which mimics the bottle shape and label design of its flagship whiskey. After years of litigation, the Ninth Circuit initially sided with VIP under the *Rogers v. Grimaldi* test, treating the toy's parodic character as a basis for limiting trademark liability. The Supreme Court reversed in 2023, holding that *Rogers* does not apply when a parodist uses a mark as a source identifier, and that the TDRA's noncommercial use exception similarly offers no shelter to source-identifying parody marks. The case returned to the Ninth Circuit with the infringement question resolved in VIP's favor on the specific facts, leaving only the tarnishment claim.

THE NINTH CIRCUIT'S ANALYSIS

The court's tarnishment holding rests on three independent grounds, each of which is doctrinally significant in its own right.

Fame Must Be Proven Mark by Mark. The court drew a firm line that a tarnishment plaintiff must establish that each specific asserted mark is independently famous. Jack Daniel's proved the fame of its word mark and registered trade dress. It did not separately prove that “Old No. 7” is famous. As a result, the entire poo-themed play on “Old No. 2” — the conceptual heart of the alleged tarnishment — fell out of the analysis. The court was unambiguous: the TDRA does not permit a plaintiff to borrow fame from one senior mark to establish the fame of another. For brand owners accustomed to litigating their marks as a collective family, this holding imposes a discipline that pre-litigation strategy must now account for.

Product-Specific Expert Evidence Is Required. Jack Daniel's staked its tarnishment case on the testimony of Dr. Itamar Simonson, who applied the Associative Network Model to opine that any association between feces and a food or beverage product produces consumer disgust. The court rejected this testimony as legally insufficient on two grounds: the expert conducted no study directed at Bad Spaniels specifically, and his analysis entirely ignored the toy's obvious parodic character. Generic consumer psychology, however credentialed the expert, does not substitute for evidence of likely harm arising from the specific product and marks at issue. Where the junior product is an obvious parody, courts will require something more than a theoretical model of disgust response.

Parody Raises the Plaintiff's Burden in the Tarnishment Analysis. This is the decision's most significant doctrinal contribution. The Supreme Court's 2023 opinion resolved that parody provides no categorical defense on infringement or under the TDRA's noncommercial use exception. What remained open was whether parody plays any role in the tarnishment analysis itself. The Ninth Circuit now answers that question clearly: it does. Aligning with the Second, Fourth, and Tenth Circuits, the court held that an obvious, successful parody raises the plaintiff's burden to demonstrate actual likelihood of reputational harm, because consumers confronted with an evident joke are more likely to recognize it as such than to associate the humor with the senior mark. Parody is not a complete defense, but it is a meaningful factor — and the more successful the parody, the harder the plaintiff's case becomes.

TAKEAWAYS FOR PRACTITIONERS

The decision carries several practical implications for both brand owners and companies operating in the parody products space.

For tarnishment plaintiffs, the evidentiary threshold is now materially higher. Fame must be documented mark by mark, not assumed from brand-level recognition. Expert testimony must be tailored to the specific products and marks at issue, not imported from general consumer research. And when the junior product is obviously humorous, consumer surveys or other direct evidence of likely reputational harm are no longer optional.

For parody product developers, the decision is encouraging but not a license. The infringement risk remains real and fact-intensive — VIP prevailed on confusion only on the specific record before the court. A clear, unambiguous parody will receive more favorable treatment in the tarnishment analysis than an ambiguous one, and the line between parody and brand impersonation remains legally consequential.

THE ROAD NOT TAKEN

One element of the decision deserves particular attention from practitioners: the constitutional question the court deliberately left open. VIP argued that the TDRA's tarnishment provision is facially unconstitutional as applied to expressive works. Because VIP prevailed on the merits, the Ninth Circuit declined to reach the argument. That restraint was appropriate — but it means the constitutional challenge remains available for a future litigant who does not have VIP's evidentiary record. Given the current judicial climate around the First Amendment and commercial speech, that argument may find a more receptive audience than it would have a decade ago.

CONCLUSION

VIP Products closes a twelve-year saga with a result that meaningfully reshapes tarnishment doctrine. Famous

marks are not blank checks. Tarnishment plaintiffs must prove fame specifically, litigate with product-specific evidence, and overcome the inherent consumer sophistication that obvious parody creates. For brand owners, the case is a reminder that tarnishment was designed as a remedy for genuine reputational injury — not a tool for suppressing unflattering jokes. The law, as the Ninth Circuit has now confirmed, does have a sense of humor — and it protects parody accordingly. Plaintiffs seeking tarnishment relief must prove not just that their brand was mocked, but that the mockery caused the kind of genuine reputational injury the statute was designed to redress.

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