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What's in Store for IP in 2023? Here's What IPWatchdog Readers are Keeping on Their Radar

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[Howard J. Shire](#)

Howard Shire, a partner in Troutman Pepper's Intellectual Property Practice Group, was quoted in the December 29, 2022 *IPWatchdog* article, "[What's in Store for IP in 2023? Here's What IPWatchdog Readers are Keeping on Their Radar](#)."

In a trademark case with significant First Amendment overtones, the Supreme Court Justices will decide whether there is a First Amendment interest in making poop-themed dog jokes at the expense of Jack Daniel's whiskey. The High Court will decide the fate of a dog's chew toy that is shaped like a liquor bottle and resembles in color and labeling the well-known Jack Daniel's whiskey bottle, but with what one 9th Circuit judge said has "lighthearted, dog related alterations". These include replacing "Old No. 7 Brand Tennessee Sour Mash Whiskey" with "Old No. 2 on your Tennessee carpet", and replacing 40% alcohol by volume with "43 percent poo". While the top of the Jack Daniel's bottle contains "Old No. 7", the top of defendant's dog toy features "The Old No. 2". Jack Daniel's was not amused and sued for trademark infringement. It won at the district court, as the court found a likelihood of confusion, but the decision was unanimously reversed by a three judge panel of the Ninth Circuit, which held that the dog toy, while not exactly the Mona Lisa, is an expressive work that uses irreverent humor to poke fun at Jack Daniel's. As an expressive work, it is protected by the First Amendment. The Ninth Circuit frequently does not fare well at the Supreme Court, so we shall see. The case is *Jack Daniel's Properties v. VIP Products*, No. 22-148.

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