This article was originally published in Law.com/NYLJ Expert Opinion | **Trademarks** on Saturday, December 13, 2025. It can also be viewed at https://www.felicellolaw.com/news-insights/publications/2025-12-13-dilution-without-infringement-the-paradox-of-parody-under-trademark-law

# Dilution Without Infringement? The Paradox of Parody Under Trademark Law

The 2023 Supreme Court ruling clarified that parody can defend against trademark infringement but not against dilution of a famous mark. While parody may avoid confusing consumers, it can still harm a brand's value if used as a source identifier. This creates tension for brand owners, emphasizing that trademark law mainly aims to prevent confusion and protect brand integrity.

December 13, 2025 By **Rosanne Felicello**

Trademark law gives exclusive rights to a brand to use a specific word or design to identify itself to consumers. Brazen producers sometimes attempt to parody more well-known brands when peddling their products. While a clever spoof can make consumers laugh without misleading them, it can also chip away at the value of a well-known brand.

In its 2023 decision in *VIP v Jack Daniels* , the Supreme Court made it clear that even though both infringement and dilution turn on source identification, parody may play a role in infringement analysis but is not a defense to a dilution claim where the mark is used as a source identifier. This article will explain the decision as well as highlight the tension it has created for in-house counsel managing brand assets.

**What is a Trademark For?**

The central purpose of trademark law is to allow brands to distinguish their goods and services from those produced by competitors. This serves the twin goals of allowing producers to control the quality of goods and services produced under their trademark and also avoiding consumer confusion.

Federal trademark law is codified in legislation known as the Lanham Act. The Lanham Act contains various means of protecting the trademark holder's rights. A trademark owner can pursue a claim of infringement against another person or entity that copies its mark. And the owner of a "famous" mark can also assert a separate claim of dilution.

You might think that the analysis would be the same for infringement and dilution. If a mark is confusingly similar, isn't it likely to infringe and dilute? The answer from the Supreme Court is essentially maybe but maybe not where the infringing mark is a parody.

In 2023, the Supreme Court issued a decision in VIP v. Jack Daniel's Properties Inc., 599 U.S. 140(2023), in which it suggested that both types of violations should turn on the same issue: "whether the use of a mark is serving a source-designation function" but also found that a good parody might not be an infringement but would dilute a famous mark.

**Is the Allegedly Infringing Mark Funny?**

It seems to matter for trademark purposes. According to the Supreme Court in Jack Daniels, If an alleged infringing mark is an effective parody with a clear "message of ridicule or pointed humor," then it may convey an "expressive message," is not likely to cause consumer confusion, and will not be deemed trademark infringement, even if it is used as a source identifier.

But even if the mark is not infringing, a mark that is a parody of a famous mark may dilute the value of a famous mark by tarnishment. That is because "no parody, criticism, or commentary will rescue the alleged dilutor" from liability for dilution by garnishment where the use is as a source identifier for the alleged dilutor's own goods or services.

In Jack Daniels, the Supreme Court vacated the Ninth Circuit's decision and remanded for the District Court to apply these standards. On remand, the District Court determined that there was no likelihood of confusion because the mark and trade dress at issue were parodies, but, because they were also used as source identifiers, they were dilutive of Jack Daniels' goods.

This result appears to be mandated by the Supreme Court decision but does not seem to be practical in the marketplace. For one, only "famous" marks receive the benefit of the anti-dilution mandate of the Lanham Act. Under this rubric, marks may parody non-famous existing marks and even use the marks as source identifiers without liability under the Lanham Act. And two, as the District Court notes, the more likely that the new mark is a parody, the more likely it is to be dilutive but less likely it is to be found to be infringing.

**What Does Taste Have To Do With It?**

In the Tommy Hilfiger case in the Second Circuit, referred to favorably by the Jack Daniels court—the court found no dilution largely on the basis that it found no likelihood of confusion, even while acknowledging that "a likelihood of confusion is not necessary to find dilution, and indeed may be inconsistent with such a finding." *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221F.Supp.2d 410, 422 (S.D.N.Y. 2002). The difference in analysis between Jack Daniels and Hilfiger appears to be the taste of the joke.

In Hilfiger, the products at issue were pet fragrances and the court referred to the parody as "light-hearted," whereas the products at issue in Jack Daniel's were pet toys, some which referenced poop. But should whether the parody is in good or bad taste determine whether the purported diluter can avoid liability?

Jack Daniels seems to say no. In that case, the Supreme Court made clear that parody is not a defense to a dilution claim where the mark is used as a source identifier. But why is parody a factor to be considered in a likelihood of confusion analysis when the mark is used as a source identifier? Is it naïve to think that brands would not sometimes spoof themselves? And shouldn't they be able to have exclusive right to do so? What value is served by allowing competitors to use the goodwill built up in a brand to mock it selling a different item?

Allowing parody to be considered in the analysis of "likelihood of confusion" appears to be a callback to the analysis of fair use under copyright law, where there is a constant tension between freedom of speech and right of a copyright holder to exclude others from using certain speech.

But the same free speech concerns do not animate trademark law, where the only speech is necessarily commercial speech and the entire purpose of the trademark is to identify to the consumer the source of the goods or service. A competitor's right to parody, on the back of the trademark holder's goodwill, seems unnecessary and counterproductive to the purpose of trademark law.

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