

Athletic Shoe Logo Trademark Wars—Another Chapter



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Adidas has historically been extremely aggressive about challenging other shoe makers if they ornament their shoes with parallel stripes (sometimes called the “three stripe” design). A jury in federal court in New York just exonerated the luxury fashion brand Thom Browne “four-stripe” designs (examples shown below) from Adidas’s claim of trademark infringement.



Thom Browne designs



Adidas designs



The jury found the Thom Browne designs were not likely to confuse consumers with Adidas trademark rights.

Cases won by Adidas in the Past

In order to function as a trademark, the mark must be presented in a manner that conveys to consumers that it is indicating a source for the product. This can be accomplished in a variety of ways, but the Trademark Office typically considers whether the words are set off from other text in way that makes it appear to be a trademark in terms of placement, size, font, color, and capitalization.

Stripe Type	Adidas		Other Brand
Three vs. Three Stripes		VS.	 <i>Infringer Sketchers</i>
Three vs. Two Stripes		VS.	 <i>Shoe Branding Europe</i>
Three vs. Two & Four Stripes		VS.	 <i>Payless</i>
			 <i>Payless</i>

Obviously, the Adidas three-stripe trademark has reached a level of fame few marks achieve. This has come about not only long and world-wide use for decades, but through massive amounts of advertising and promotion. Like any brand-owner, Adidas argues it is simply protecting its brand from encroachment by users. In light of the above-successes, Adidas undoubtedly had confidence in its claim against Thom Browne.

The Athletic Shoe and Apparel Logo World is Murkier than One Might Think

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However, trademark infringement has a multi-factor legal test. Similarities between competing trademarks, as well as relatedness of the products or services provided under the marks, are typically the primary factors.

But the Adidas cases also bring out another factor that can help decide a case. Called “third party usage”, the scope of protection of even famous



brands can be limited by co-existence in the marketplace of similar but non-identical marks for the same products or services. A hypothetical example is as follows. If you developed fame for the brand name “Mountain Peak Insurance”, you might consider “Mountain Top Insurance” a clear infringer. However, if third parties exist with the names “Mountain Acme Insurance” and “Mountain Summit Insurance”, and are not infringers, there is an argument that “Mountain Top Insurance” can co-exist also.

Adidas is not the only athletic shoe/apparel company with stripes in its logo. K-Swiss has a five-stripe design. Other well-known brands include stripes as a part of their overall design. See table below:

Brand	Logo	Shoe Design
Adidas		 <i>Adidas three-stripe</i>
K-Swiss		 <i>K-Swiss five-stripe</i>
Asics		 <i>Asics incorporates two-stripes into it's design</i>
Reebok		 <i>Reebok incorporates two-stripes into it's design</i>
Mizuno		 <i>Mizuno incorporates three-stripe "M" into it's design</i>

Thus, the “third party usage” factor is available to argue Adidas does not have a monopoly on any number or presentation of stripes in such products.

Although the jury verdict in the Thom Browne case did not require the jury to explain its reasoning, undoubtedly this had to be a factor in the Thom Browne decision. This factor essentially probes the number and nature of any similar trademarks is use on similar products.

The major atheletic shoe/apparel brands have a long history of aggressively enforcing their logos. Such logos are highly valuable, and they have the deep pockets to try to “elbow out” as much brand scape as possible.

The chart above illustrates that even well-known brands like Asics and Reebok share quite similar components of their logos (both have two downward curved stripes with one or two bars crossing them).

As seen by the chart below, this has “third party usage” relevance to the scope of protection of two other major brands, namely Nike and Puma.

Take-Aways

The shoe logo fights highlight an important factor when evaluating either whether your trademark is infringed by a competitor, or whether your trademark infringes another's.

















No one is entitled to unlimited scope of trademark rights (called a "right in gross"). Even if two trademarks appear similar when compared in isolation to one another (in isolation), the analysis must take into account others' competing brands ("third party usage"). Lack of similar third party usage can support broader trademark rights. If Thom Browne entered the marketplace with its four parallel stripe designs, and Adidas was the only shoe/apparel maker with parallel stripes, Adidas would have the upper hand on this factor.

However, similar third party usage can be a game changer, as is likely at least part of the story in Thom Browne's win over Adidas.

Typically you will know the brands of your closest competitors. But sometimes trademark searching is done to identify whether similar third party usage exists. Your trademark counsel can walk you through cost and procedures to identify third party usage and its relevance to a question of infringement.

While courts and commentators warn that care must be taken against giving this factor undue weight, it must be considered in any evaluation of trademark rights.

The foregoing is not legal advice. Each situation is unique. You should engage trademark counsel to obtain legal advice on any specific trademark infringement issue you may have.

Brand	Logo	Shoe Design	Takeaway
Nike			Nike "swoosh stripe" has leading end turned up and trailing body.
Puma			Puma "formstripe" has leading end turned down and trailing body.
Asics			Asics incorporates similar shape as Puma "formstripe" with two-bars across it.
Reebok			Reebok incorporates similar shape to Puma "formstripe" with one bar across it.
Mizuno			Another Mizuno logo seems to incorporate part of the Nike "swoosh stripe" plus a downward turned portion.
Vans			Vans has several versions of a leading end turned up and a trailing body.
Saucony			Saucony has different designs with opposite downward and upward turned ends.
Brooks			Brooks has a to end similar to Nike's front end, and then a widening trailing body.



U.S. Supreme Court Rules on Whether Andy Warhol's Painting of a Prince Photograph Rises to the Level of Being Fair Use



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On May 18th, 2023, the U.S. Supreme Court provided insight into what can be deemed fair use in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (598 [U.S.](#) ___, 2023).

In this case, a photograph of the music star, Prince, was at issue. This photograph was taken by a legendary photographer, Lynn Goldsmith, whose award-winning photography was published in *Life*, *Rolling Stone*, *Time*, and *People* magazine.

In 1984, *Vanity Fair* magazine wanted to license the photograph of Lynn Goldsmith to illustrate a story about Prince. Goldsmith agreed on the condition that it was a one-time use for \$400. The famous artist, Andy Warhol, created a painting and fifteen other works based on the Goldsmith photograph, now called the "Prince Series." After Warhol passed away, the Andy Warhol Foundation for the Visual Arts ("AWF") licensed the images to Condé Nast publications for \$10,000, where Goldsmith received neither compensation nor credit.

AWF sued Goldsmith for a declaratory judgment of noninfringement or, in the alternative, the defense of fair use. The Southern District Court of New York granted summary judgment for AWF that was reversed and remanded by the Court of Appeals for the Second Circuit. Both Courts looked at the four factors of fair use under 17 U.S.C. Section 107, which are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for

nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The District Court felt that the Warhol painting was transformative by providing a distinctively new expression and aesthetics, while the Court of Appeals held that the transformative purpose and character must be something more than just another artist's style to prevent granting rights to celebrity plagiarists.

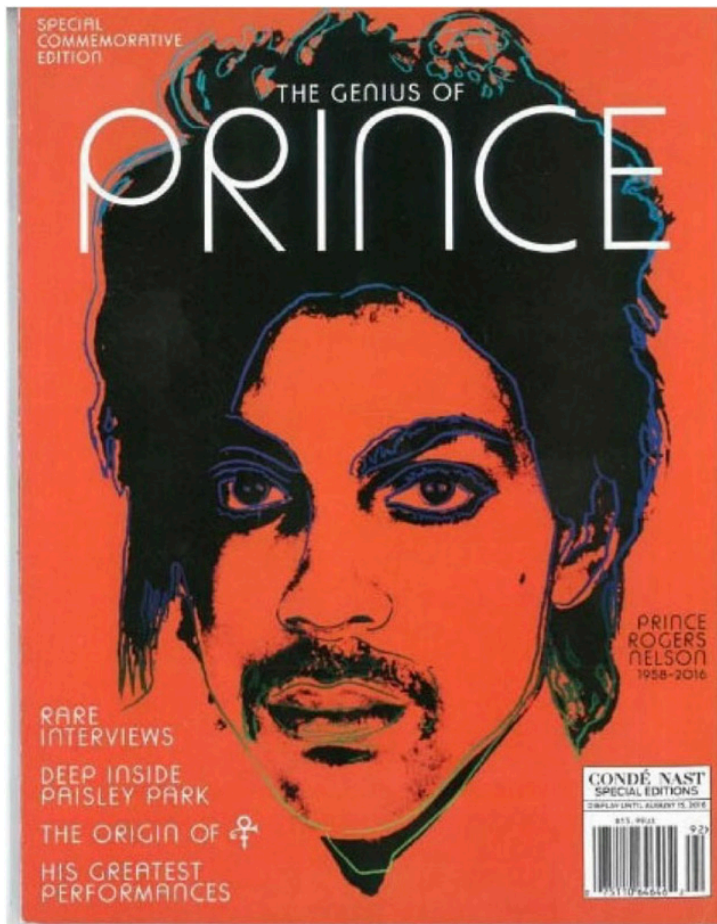
The most challenging aspect of this case is that Andy Warhol was known for painting the most ordinary objects, like a soup can, which evokes consumerism. Therefore, the Court acknowledged that everyday household items could be transformed with a new meaning and message.

The U.S. Supreme Court issued a 7-2 decision, with the majority opinion provided by Justice Sotomayor with Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett, and Jackson joining. It was held that both the painting and photograph were for the same commercial purpose and that the differences were more due to Warhol's characteristic creative style than any artistic transformation. It was also held the right of an author to own derivative works should not be overshadowed by fair use, so the ruling was in favor of Goldsmith.

There was a concurring opinion by Justice Gorsuch and Justice Jackson that highlights that the decision pivoted on the commercial nature and that if the Prince series was shown "in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use." Justice Kagan's dissent (joined by Chief Justice Roberts) focused on the fact that Andy Warhol's work requires an artistic transformation with a meaning that goes way beyond a simple photograph and was this artist's signature contribution to art. It was felt that the inability to build on the work of others would hamstring future artists by undermining creative freedom. Warhol's painting was asserted to be a transformation with significant details on the implications of the treatment of Prince's disembodied head and what that communicates about celebrity.

In my opinion, in an age of sequels, forcing artists to be more creative and develop original work or truly transform the prior work will be a benefit to society. If Andy Warhol had met with Prince and painted his

portrait, this would be an original work capable of copyright protection. This ruling expresses the dissent's strong feelings that this decision "...will thwart the expression of new ideas and the attainment of knowledge. It will make the world poorer." Hopefully, commercial paintings based on photographs or comparable types of duplication created for the same purpose as the original will not bring about such a calamitous result.



Control the Marketing or Risk Denial of a Federal Trademark Registration



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Last month, the federal Trademark Trial and Appeal Board (the “TTAB”)—the administrative body responsible for handling disputes over the issuance of trademark registrations on a nationwide level—issued a precedential opinion in a cannabis case, *In re National Concessions Group, Inc.*, that has significant implications not only for cannabis companies seeking federal trademark protection, but also for federal trademark registration applicants as a whole.

In the *National Concessions Group* case, the trademark applicant had sought registration of the name “BAKKED” in the United States Patent and Trademark Office (the “USPTO”) in connection with the following goods identification: “essential oil dispenser, sold empty, for domestic use.” Notably this identification made no explicit reference to cannabis, marijuana, bongs or other marijuana dispensers. However, relying on evidence it found outside of the application, including both the applicant’s own webpage and promotional materials and product listings on third-party websites, which all promoted the product with reference to “dabbing” (meaning the inhalation of vapors derived from marijuana-based oils, concentrates, and extracts), the USPTO rejected this application as unlawful drug paraphernalia under the federal Controlled Substance Act (the “CSA”), and the TTAB affirmed this rejection.

This case not only confirms that the USPTO will continue to reject trademarks for what it decides are cannabis-related goods and services under the CSA and FCDA unless and until the U.S. Congress legalizes marijuana—which remains a disappointment to many in the industry whose products are currently legal for medical use under 38 state laws and recreational use under 23 state laws—but also serves as an important reminder to any trademark applicant that the USPTO can and likely will look outside the “four corners” of the trademark application. The USPTO can rely not only on the Applicant’s own marketing/promotional materials, but third-party websites and materials as well, in evaluating the federal registrability of a trademark.

The USPTO has always done this to some extent when evaluating whether an applied-for trademark itself is “merely descriptive,” “geographically descriptive,” “primarily a surname,” or a “varietal/cultivar” name—it relies on dictionary definitions, third-party uses, telephone directories, the International Union for the Protection of New Varieties of Plants (UPOV) database, and the like. However, this TTAB ruling serves as a



reminder that the USPTO can also look beyond your application and rely on language used in your own and third-party websites and promotional materials to deny registration on other grounds.

By way of example, in the *In re National Concessions Group, Inc.* case, the TTAB considered both the applicant's use of the phrase "The Dabaratus" (clearly a reference to "dabbing") on its BAKKED products and its promotion of the product as "the all-in-one tool for dabbing" on its website, as well as third-party websites describing what dabbing means as the basis for its rejection. All of this information was outside of (extrinsic) to the information in the trademark application itself.

The USPTO is similarly permitted to look at how an applied-for trademark is used on an agricultural/horticultural company's own webpages, and of their retailers', to reject a trademark if the USPTO decides from such extrinsic information that it is a varietal/cultivar name (a specific plant species). Under USPTO rules, it is impermissible to register a plant's varietal/cultivar name as a trademark because it is considered to be the generic name of a plant. Consequently, if you or your retailers inadvertently use the brand name (e.g., SNOWGLOBE) when describing the varietal as opposed to varietal designation (e.g., 123XYZ), this could lead to a rejection from the USPTO that your proposed trademark brand is unregistrable as a varietal name. Thus, it is imperative that a trademark owner monitor its own advertising as well as that of its retailers.

Still further, if you have a trademark that could be conceived as descriptive or highly suggestive (as in the brand "ALL-BRAN"), it is important that you ensure both you and your retailers use this mark in a trademark manner (e.g., "ALL-BRAN™ cereal" or "ALL-BRAN cereal") not descriptively (e.g., "Kellogg's all-bran cereal is on sale").

In the end, a key-takeaway from this case is the strong reminder that companies should take an active role in the messaging/promotion of their products for themselves and their retailers if they intend to seek federal trademark protection.



IP Protection in US Territories



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Did you know that Intellectual Property (IP) rights obtained under federal law automatically extend to United States territories? Federal IP rights include patents, copyrights, and trademarks (although state rights are separately available). This means that a U.S. granted patent, a registered copyright, and a registered trademark provide protections in all U.S. territories. Although territories are distinct from the 50 United States (and the District of Columbia), since they benefit from certain federal governance, these federal IP rights are extended to the territories. As a result, there is no requirement to separately obtain protection in Puerto Rico or any other U.S. territory via local territorial laws.

As a refresher, territories have jurisdiction under the U.S. federal government, yet they do not have the same status as a state. The inhabited territories include:

- Puerto Rico
- United States Virgin Islands (St. Thomas, St. Croix and St. John)
- American Samoa
- Guam
- Commonwealth of the Northern Mariana Islands

Federal IP protections stem from the U.S. Constitution. Article I, Section 8, Clause 8 states that Congress has the power “*To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*” (emphasis added). Federal patent and copyright laws were enacted in 1790. Thereafter federal trademark laws were derived from the Constitution’s Commerce Clause with the Lanham Act as the primary trademark law. The U.S. Supreme Court has confirmed the U.S. Constitution and its protections apply to all incorporated territories. As a result, the federal protection for each of type of IP - patents, copyrights, and trademarks – result in the federal rights naturally extend to the U.S. territories. Certain trade secret protections may also be available within the territories under recent federal statute changes.

Perhaps equally as important as the source of IP protections for U.S. territories is the practical consideration that most of the territories do not have any separate mechanism available for obtaining patent, copyright and/or trademark rights. Puerto Rico is the exception to this general rule. Other than Puerto Rico, which has a Trademark Office, the territories do not have separate Patent Offices, Copyright Offices and/or Trademark Offices to examine, register and grant IP rights.



Taking a closer look at the Puerto Rico Trademark Office (PRTO), there are benefits to filing a trademark locally in Puerto Rico, even though a U.S. Registration protects a mark in the territory of Puerto Rico. For example, injunctive relief for infringement is unlikely to be granted for a U.S. Registration absent a presence and use of the mark in the territory. A registration with the PRTO provides ex parte temporary restraining orders as well as statutory damages and attorneys' fees for trademark infringement that are only available under local laws. These benefits have resulted in an increased number of trademark filings with the PRTO.

Interestingly, Puerto Rico also has its own IP rights and protections with respect to a Moral Rights Act, Right of Publicity Act, and a Trade Secrets Act. Each of these, along with its independent Trademark Office show that Puerto Rico has established the most robust independent IP protections of the US territories.

The USPTO has also been tracking the IP filings made by U.S. residents living in Puerto Rico with recent years seeing a significant increase in the number of patent and trademark filings made by residents in Puerto Rico. According to the USPTO's Performance and Accountability Report for the 2021 Fiscal Year, there was an 83% increase in trademark applications filed

by US residents in Puerto Rico between fiscal years 2017 and 2021. According to the same report there was a 71% increase in patents issued to U.S. residents in Puerto Rico between fiscal years 2017 and 2020.

Next, we turn to patents to review the scope of IP protections provided by a granted U.S. patent. A U.S. patent will permit a patent owner to prevent unauthorized third parties from making, using, selling or importing patented products in the U.S. (and its territories). Any activity taking place in a territory is treated as if it took place in the United States and a patent owner can seek to stop such activity through patent infringement lawsuits.

With respect to copyrights, U.S. copyright law applies to the U.S. territories except for American Samoa. This is an example of a distinction between an incorporated and unincorporated territory of the United States.

This information is meant to provide an overview of the scope of IP rights through granted U.S. patents, U.S. trademark registrations, and registered copyrights. The decision whether to file for U.S. IP rights, along with the enforcement of any such IP rights should be done in consultation with legal representation. MVS, along with its network of foreign counsel counterparts, are a great resource to assess rights and enforcement.



Protect Your PBR Rights! International Licensing and Novelty Limitations



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Plant Breeder's Rights (PBR) are a form of intellectual property rights granted to the breeder of a new variety of plant. These rights give the breeder exclusive control over the use, propagation, and commercialization of the variety for a set number of years. Central to the establishment and international harmonization of PBR is the International Union for the Protection of New Varieties of Plants (UPOV). Founded in 1961, and subsequently revised in 1972, 1978, and 1991, UPOV has been instrumental in formulating a balanced and effective system of intellectual property rights for plant breeders worldwide. The UPOV system sets out the minimum standards and guidelines for granting and enforcing PBR across member countries. It establishes the criteria for eligibility, duration, and scope of rights, ensuring a level playing field for breeders seeking protection. Currently, UPOV comprises more than 70 member countries, each adopting legislation consistent with the requirements of the convention, although details and implementation varies between countries.

To qualify for protection under the UPOV system, plant varieties must meet certain criteria, including novelty, distinctiveness, uniformity, and stability. A variety is considered novel if it has not been "sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety" in the territory of the country in which protection is sought earlier than one year before filing, or in any other territory earlier than four years before filing (six years in the case of trees or vines). As many breeders first seek licensees for the variety prior to actual sales of plant material, this begs the question: Does licensing the variety count as a "sale or disposal" that triggers the one- or four-year time limitation for filing? As with many legal questions, the short answer is "it depends."

Licensing is not explicitly addressed by UPOV guidance, leaving room for interpretation and application by member countries. The determination of whether licensing qualifies as a sale depends on the specific terms and conditions outlined in the licensing agreement, as well as the legal interpretation within the jurisdiction where the protection is sought. Generally speaking, the determination of whether licensing constitutes a sale hinges on the nature of the agreement and the transfer of rights involved. If the licensing agreement includes the transfer of the rights



to commercially exploit the plant variety, such as the authorization to produce, sell, or distribute the variety, it is likely to be considered a sale. In this case, the licensing arrangement would trigger the start of the time limits for determining novelty under the UPOV system. However, if the licensing agreement does not involve the transfer of the commercial rights to the variety, but instead grants limited permissions or access for research purposes, for example, it may not be considered a sale. In such cases, the licensing agreement would not impact the novelty status of the plant variety.

For example, in the United States, the sale of harvested material produced as a result of experimentation or testing of a variety to ascertain the characteristics of the variety, or as a by-product of increasing a variety, are not considered sales or dispositions “for purposes of exploitation of the variety”. Plant Variety Protection Act, 7 U.S.C. §§ 2321-2583. Similarly excluded are sales for reproductive purposes so long as the sale is done as an integral part of a testing program to ascertain characteristics of the variety or to increase the variety

on behalf of the breeder. Thus, licensing agreements limiting third party access to the variety for purposes of research or propagation without commercial distribution would likely not impact the novelty status.

Although many member countries have similar explicitly defined exceptions to the definition of a “sale or disposal”, others do not. Thus, consulting with legal counsel in each country where PBR protection is sought is crucial. The interpretation of licensing agreements can vary across jurisdictions and foreign counsel can provide country-specific advice regarding compliance with applicable time limitations. Absent specific guidance, the most prudent strategy is to assume all licensing agreements count as a sale for the purposes of novelty determinations. Accordingly, to err on the side of caution, PBR filings should be made within one year from the date of the licensing agreement in the country where the agreement is executed, and within four years (six years for trees or vines) in all other countries.



The Supreme Court Issues Narrow Decision on Jack Daniel's Dog Toy Case



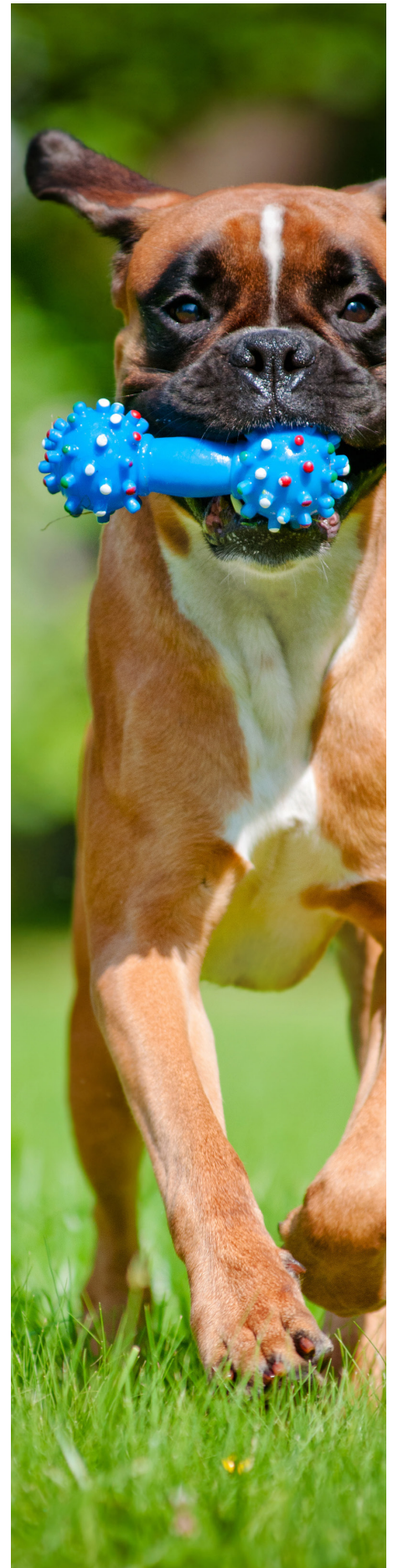
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As a follow up to my [blog post](#) in November, the Supreme Court reviewed and issued a decision for the trademark dispute between Jack Daniel's and the dog toy company VIP Products.

As a review, VIP Products creates a dog toy line called "Silly Squeakers" which are squeaking toys that look like the Jack Daniel's square-shaped bottle of Old No. 7 Whiskey but replace the Jack Daniel's wording. VIP contends that these products are a parody and fair use of Jack Daniel's whiskey product, but Jack Daniel's believes that the use of their trademark design and trade dress of the whiskey product infringes and dilutes the mark. In 2018, a District Court heard the case and ruled in favor of Jack Daniel's stating the "Silly Squeakers" could result in consumer confusion and dilute the Jack Daniel's trademarked design. In 2020, the Ninth Circuit disagreed with the lower court's decision believing that VIP's product was an expressive work protected by the First Amendment and would not dilute the trademark.

The Supreme Court disagreed with the Ninth Circuit and found that the lower court was too expansive in believing that parody is always exempt. Two main issues were whether VIP products infringed Jack Daniel's trademark and whether VIP products diluted the trademark.

The Lanham Act defines and protects trademarks. In trademark infringement cases, the question is whether the defendant's use of a mark is "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. §§1114(1)(A), 1125(a)(1)(A). The Ninth Circuit applied the Rogers test, which covers titles of "artistic works" that such titles carry an "expressive element" and would only carry a slight risk in confusing consumers as to the "source or content" of the underlying work. See 875 F. 2d. at 998-1000. The Supreme Court disagreed that Rogers applied in this case as "consumer confusion about source—trademark law's cardinal sin—is most likely to arise when someone uses another's trademark as a trademark." VIP noted that they used their trademark and trade dress as source identifiers, which only poses the question whether the trademarks are likely to cause consumer confusion. The Supreme Court remanded that question to the lower courts.



In trademark dilution cases, the question is whether the defendant “harmed the reputation” of a famous trademark. 15 U.S.C. §§ 1125(c)(2)(A), (C). The Lanham Act excludes dilution liability for “any non-commercial use of a mark”, which does not shield parody, criticism, or commentary when an alleged diluter uses a mark as a designation of source for its own goods. 15 U.S.C. §1125(c)(3)(C); see also 599 U.S. 3. The Supreme Court disagreed with the Ninth Circuit’s holding that dilution liability covered parody, since it “puts the noncommercial exclusion in conflict with the statute’s fair-use exclusion” which covers “parodying, criticizing, or commenting upon” a famous mark owner, but does not apply when the use is “as a designation of source for the person’s own goods or services.” 15 U.S.C. §§1125(c)(3)(A), (A)(ii); see also 599 U.S. 3. Thus, the Supreme Court held, the Ninth Circuit’s use of the noncommercial use exclusion was

overbroad in stating the parody was always exempt regardless of whether it designates the source, and additionally remanded this question to the lower courts as well.

In holding, the Supreme Court noted that the opinion for this case was quite narrow. The Court stated that regarding infringement “we hold only that Rogers does not apply when the challenged use of a mark is as a mark” and for dilution “that the noncommercial exclusion does not shield parody or other commentary when its use of a mark is similarly source-identifying.” 599 U.S. 20. Thus, the Supreme Court vacated and remanded both questions regarding trademark infringement and dilution to the lower courts to decide whether the “Silly Squeakers” infringed or diluted Jack Daniel’s trademark.



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Heidi Sease Nebel, Chair, MVS Biotechnology and Chemical Practice Group

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Melissa Mitchell, Intellectual Property Attorney in the MVS Biotechnology and Chemical Practice Group

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Heidi Sease Nebel, Chair, MVS Biotechnology and Chemical Practice Group

Sarah M.D. Luth, Intellectual Property Attorney in the MVS Biotechnology and Chemical Practice Group and Co-Chair, MVS Data Privacy and Cybersecurity Practice Group

Gregory Lars Gunnerson, Intellectual Property Attorney in the MVS Mechanical-Electrical Practice Group

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Sarah M.D. Luth, Intellectual Property Attorney in the MVS Biotechnology and Chemical Practice Group and Co-Chair, MVS Data Privacy and Cybersecurity Practice Group

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Public Relations Society of America (PRSA) 2023 Midwest District Conference

September 21-22, 2023 - West Des Moines, Iowa

Richard Marsolais, Business Development Director

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