

MLRC Media Law Conference  
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Lansdowne Resort Hotel, Leesburg, VA

PLENARY 1 Oct. 4<sup>th</sup> 2:45 – 3:45pm

**Fair Use, Parody and Transformation: The Impact of the Andy Warhol and Jack Daniel's Decisions of the Supreme Court**

**With**

**Tom Hentoff** is co-chair of Williams & Connolly's First Amendment & Media and Trademark and Copyright practice groups. Tom served as lead appellate counsel for Lynn Goldsmith in the Andy Warhol Foundation case in the Second Circuit and worked with his partners Lisa Blatt and Sarah Harris representing Ms. Goldsmith in the Supreme Court. Tom has represented clients in other leading copyright cases including the Locast case, the DISH Hopper litigation, and the Grokster and Napster cases.

**Rebecca Tushnet** is a professor of law at Harvard Law School. After clerking for Chief Judge Edward R. Becker of the Third Circuit and Associate Justice David H. Souter on the Supreme Court, she practiced intellectual property law at Debevoise & Plimpton before beginning teaching. Her work currently focuses on copyright, trademark and false advertising law. She wrote amicus briefs to the Supreme Court in favor of the Warhol Foundation and VIP Products. Her blog, at [tushnet.blogspot.com](http://tushnet.blogspot.com), has been on the ABA's Blawg 100 list of top legal blogs for the past three years. Professor Tushnet helped found the Organization for Transformative Works, a nonprofit dedicated to supporting and promoting fanworks, and currently volunteers on its legal committee. She is also an expert on the law of engagement rings.

**Roman Martinez** is the Deputy Office Managing Partner of the Washington, D.C., office of Latham & Watkins, and a member of the firm's Supreme Court & Appellate Practice. He represents clients in their highest stakes appeals in the Supreme Court of the United States, as well as in federal and state appellate courts around the country. He has argued 13 cases in the Supreme Court, including representing defendant in Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith. He also argues important cases in the fields of the First Amendment, arbitration, copyright, patent law, criminal law, civil rights, employment, and civil and criminal procedure. In addition, he has argued dozens of appeals in the D.C., Second, Third, Fourth, Sixth, Eighth, Ninth, and Federal Circuits, as well as in New York, California, New Jersey, Ohio, and Tennessee appellate courts, among others.

**Susan Kohlmann** is a partner at Jenner & Block. She has tackled some of the most significant issues the content, media, and entertainment industry has faced. Representing entertainment and media industry giants, including film studios and television networks, new technology companies, and others in media and entertainment, she deftly navigates clients at the convergence of content and technology. Susan litigates cases addressing critical issues threatening her clients' ability to exploit their creative works and key brands and clarifies the reach and application of federal law to new technologies and their content distribution platforms.

**James Rosenfeld** is a partner at Davis Wright Tremaine in New York. He represents a wide range of internet content and service providers, and publishers and broadcasters in every medium. His cases span media, intellectual property, and internet law - including copyright, trademark, defamation, right-of-publicity, invasion of privacy, freedom of information law, reporter's privilege, and commercial matters. He has particular expertise on issues unique to content providers on the internet and other new platforms, including the DMCA and CDA legal immunities for user-generated content; liability arising from linking, sharing, distributing, embedding, moderating, and aggregating content; and issues relating to artificial intelligence, social media, online advertising and piracy.

**Andy Warhol Foundation for the Visual Arts v. Goldsmith**, 143 S. Ct. 1258 (May 18, 2023)

[https://www.supremecourt.gov/opinions/22pdf/21-869\\_87ad.pdf](https://www.supremecourt.gov/opinions/22pdf/21-869_87ad.pdf)

The Supreme Court, in its recent copyright decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258 (May 18, 2023), narrowed the circumstances in which a new creation that copies from an existing work will be deemed “transformative” under the first fair use factor, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” The case involves an orange silkscreen portrait of the musician, Prince, that Andy Warhol based upon a photo by Lynn Goldsmith, and that the Andy Warhol Foundation (“AWF”) licensed after Warhol’s death to Condé Nast for use as a magazine cover in 2016.

Back in 1984, Vanity Fair commissioned the legendary artist, Andy Warhol, to create an image – that one a purple silkscreen print – for a cover article about Prince. A few years earlier, a professional photographer, Lynn Goldsmith, had taken a photograph of Prince, which had appeared in a Newsweek article about the up-and-coming musician. Subsequently, she licensed the photo to Vanity Fair to be used as an “artist reference for an illustration”; this was the photo that Warhol used for the silkscreen. She was paid \$400 for a “one time” use of the photo and was given credit in the magazine for the “source photograph.” As it turns out, Warhol, without Goldsmith’s knowledge or permission, created a total of 16 prints based upon Goldsmith’s photograph (the “Prince Series”), which were transferred to AWF after Warhol’s death in 1987. Among the images was the “Orange Prince” that was licensed to Condé Nast in 2016 for use in connection with a special magazine tribute to Prince after his death.

Goldsmith was neither credited, nor paid, for the use of the image in the 2016 magazine, and she notified AWF that she believed the image to be infringing. AWF sued Goldsmith for a declaratory judgment of noninfringement. The Southern District of New York granted AWF's motion for summary judgment, finding that the fair use factors favored AWF. But the Second Circuit reversed, holding that all four fair-use factors favored Goldsmith. AWF appealed, and the Supreme Court granted certiorari, only on the question of whether the first fair use factor favors AWF's commercial licensing of the Warhol image.

A 7-2 Supreme Court majority, in an opinion by Justice Sotomayor, held that, in the specific context of AWF's commercial licensing of the Orange Prince, the first factor favored Goldsmith. In its core holding, the Court stated:

In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.

The Court went on to state that in the context of AWF's commercial licensing of the Orange Prince, a "particularly compelling justification" for the use is needed, and that "convey[ing] a new meaning or message . . . alone is not enough for the first factor to favor fair use." In finding that the first fair-use factor favors Goldsmith, the Court took particular note of the fact that Goldsmith's photos of Prince, including the one at issue, had previously been licensed to magazines to illustrate articles about Prince, and had also previously been licensed to serve as artists' references, and that this was how photographers make their living. The Court emphasized that AWF licensed the Orange Prince for a similar purpose, to illustrate an article about Prince. But the Court also stated that it "expresses no opinion as to the creation, display, or sale of any of the original Prince Series works," underscoring that the Court was limiting its analysis to AWF's commercial licensing of the Warhol image in 2016, thus leaving a host of questions about the implications of this ruling.

A sharp dissent by Justice Kagan asserted that the decision "leaves our first-factor inquiry in shambles" by placing so much emphasis on the similarity of the *uses* of the original Goldsmith photo and secondary print created by Warhol, and not enough (or no) emphasis on the *new expression, meaning or message* that Warhol added to his work.

Needless to say, the decision has been controversial and has received mixed reviews within the copyright bar, so we're asking our expert roundtable, to weigh-in with their takeaways on the ruling.



Figure 1. A black and white portrait photograph of Prince taken in 1981 by Lynn Goldsmith.

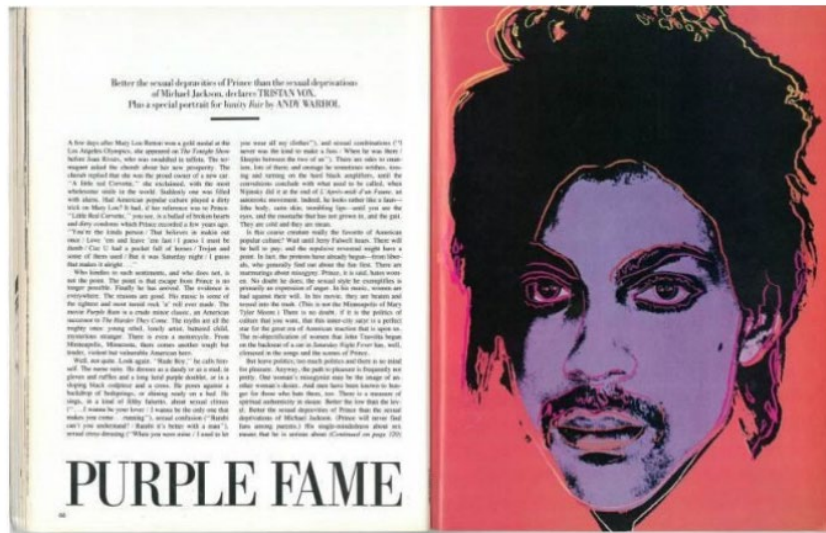


Figure 2. A purple silkscreen portrait of Prince created in 1984 by Andy Warhol to illustrate an article in Vanity Fair.

- **ISSUES INCLUDE:**
- Does the decision significantly change the law of fair use?

- Does it correct lower courts’ expansive – and unjustified - reliance on the transformative use test?
- How significant is the majority’s focus on the use of a secondary work — as opposed to the meaning and message of the work?
- Is the decision reconcilable with *Campbell v. Acuff-Rose Music*, 510 U. S. 569 (1994)?
- Will the decision have a dramatic impact on artistic creation, as Justice Kagan argued?
- Will the decision create uncertainty and more litigation?

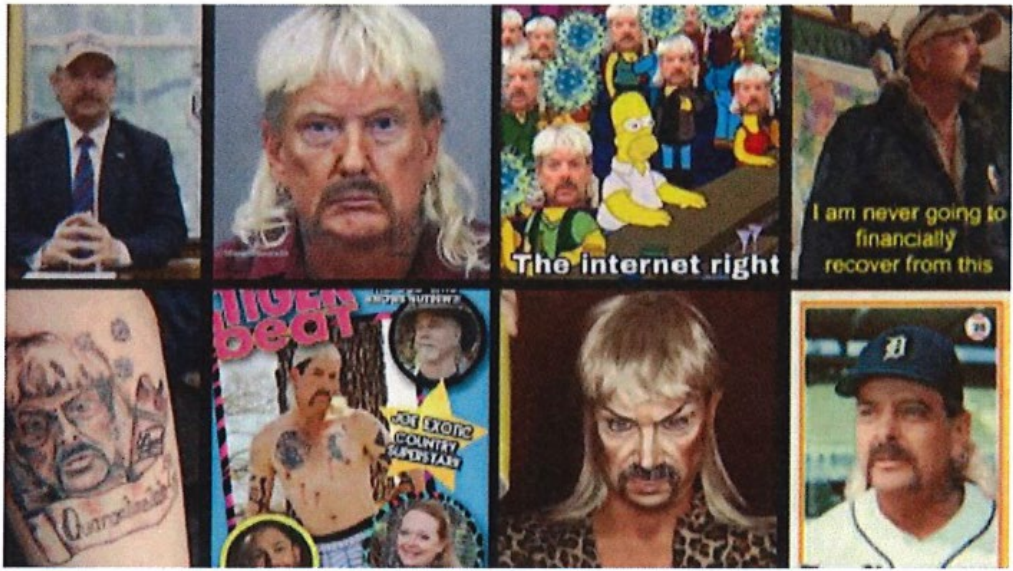
**Post-decision Fair Use developments:**

**Cramer v. Netflix (W.D. Pa. Sept. 18, 2023)**

<https://storage.courtlistener.com/recap/gov.uscourts.pawd.291597/gov.uscourts.pawd.291597.32.0.pdf>

**Netflix Use of Tattoo Image Was Transformative Under *Warhol v. Goldsmith***

Plaintiff sued Netflix for \$10 million alleging a 2.2 second depiction of his tattoo of “Joe Exotic” in an episode of *Tiger King* was infringing. Following supplemental briefing on the impact of *Andy Warhol Foundation v. Goldsmith*, the court held the use was fair and transformative. Netflix used the tattoo in a montage depicting public fascination with Joe Exotic in the early days of the pandemic, and was “criticism, comment, or reporting that is expressly defined as fair use under the Copyright Act.” Unlike in *Warhol*, Netflix’s use of the tattoo was fundamentally different than plaintiff’s purpose of promoting a tattoo business and gift cards.







## **Jack Daniel's Properties v. VIP Products (June 8, 2023)**

[https://www.supremecourt.gov/opinions/22pdf/22-148\\_3e04.pdf](https://www.supremecourt.gov/opinions/22pdf/22-148_3e04.pdf)

### **Supreme Court Clarifies When Rogers Test Applies in Trademark Cases**

**By James Rosenfeld and Celyra I. Myers**

On June 8, 2023, the Supreme Court issued a highly anticipated decision in *Jack Daniel's Properties, Inc. v. VIP Products LLC*, No. 22-148 (U.S.). The decision left intact existing legal protections for the use of trademarks and trade dress in expressive works, but held that they did not apply where a product used another party's marks to designate the source of its own goods or services.

The case had threatened to limit the *Rogers v. Grimaldi* doctrine, which allows the creators of expressive works to incorporate trademarks if the marks are artistically relevant and not explicitly misleading. Jack Daniel's argued that a squeaky, chewable dog toy designed by VIP Products to resemble a bottle of Jack Daniel's whiskey infringed and diluted its trademarks and trade dress. VIP Products countered that its use was subject to the *Rogers* test and, under that test, was not infringing. It also sought refuge from Jack

Daniel's dilution claim under the Lanham Act's statutory exclusion from liability for non-commercial trademark use.

The Court reversed, in a unanimous decision. It held that when a defendant uses a mark as a designation of source for its own goods or services, the Rogers test does not apply to trademark infringement claims (regardless of whether the use of the mark communicates some message beyond source identification), and similarly the Lanham Act's non-commercial exclusion does not shield parody, criticism or commentary when an alleged diluter uses a mark to designate its own goods. It remanded to the Ninth Circuit for analysis consistent with these rulings.

### **Procedural History**

Jack Daniel's sent a cease and desist letter to VIP Products complaining that VIP's "Bad Spaniels" dog toy, which mimics the shape and label design of a Jack Daniel's Old No. 7 Black Label Tennessee Whiskey bottle, replacing the details about the whiskey with dog-themed bathroom humor, infringed and diluted Jack Daniel's trademarks. VIP brought a lawsuit seeking a declaratory judgment that its toy did neither. Jack Daniel's counterclaimed for trademark infringement and dilution. VIP Products argued that its use of the Jack Daniel's trademarks in its parody dog toy was protected from infringement liability by the Rogers test as an expressive work, and protected from dilution liability by the Lanham Act's non-commercial use exclusion as a parody. In 2017, the District Court for the District of Arizona rejected VIP's arguments and held a bench trial, holding VIP liable on both counts.

VIP Products appealed, arguing that the District Court erred in finding trademark infringement without requiring Jack Daniel's to first satisfy the Rogers test, which requires a plaintiff to show that the defendant's use of a mark either (1) is not artistically relevant to the underlying work or (2) explicitly misleads consumers as to the source or content of the work, before conducting its likelihood of confusion analysis. As to dilution, VIP argued that its use of the Jack Daniel's trade dress was for the purpose of parody, rather than commercial use as required by the Lanham Act for claims of dilution by tarnishment. In 2020, the Ninth Circuit reversed the lower court's findings as to both infringement and dilution, remanding the case for retrial under the Rogers test and ruling in VIP's favor on the dilution claim.

On remand, the District Court applied the Rogers test, granting summary judgment in VIP's favor. Jack Daniel's sought Supreme Court review, arguing that the Circuit Court's rulings harmed mark owners' ability to protect their marks and opened the door to a "flood of misleading rip-offs." The Supreme Court granted certiorari.

### **The Decision**

The Court did not, as many creators of expressive works had feared, take a position on the merits of the Rogers test, and it largely preserved the existing caselaw regarding expressive use. Thus, the Court left intact Rogers and the many cases that have applied its



standard to novels, songs, films and other works which use others' trademarks to perform some expressive function, rather than to designate the source of the work. See, e.g. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) (use of Barbie name in song "Barbie Girl" was not infringing); *Louis Vuitton Mallatier S.A. v. Warner Bros. Entertainment Inc.*, 868 F.Supp.2d 172, 180 (S.D.N.Y. 2012) (depiction of Louis Vuitton trademark on luggage in movie not infringing).

Instead, the Court ruled that Rogers does not apply when an alleged infringer uses a mark as a designation of source for its own goods, i.e., "when trademarks are used as trademarks." Indeed, the Court observed that the doctrine had always been a "cabined doctrine," applying exclusively to non-trademark uses.

Moreover, whether a mark has some expressive content in addition to being a source identifier, i.e., whether it "conveys some message on top of source," is of no import; when the use is "at least in part" for source identification, the Court stated, "Rogers has no proper role."

In the case at bar, VIP was concededly using the Jack Daniel's marks and dress as source identifiers of its dog toy, rendering Rogers inapplicable, and the traditional likelihood of confusion test applied. That VIP also used the mark for some expressive purpose—parody or commentary—did not change this outcome. While the expressive aspects "may properly figure in assessing the likelihood of confusion," they did not warrant applying Rogers. The Court remanded for application of the likelihood of confusion factors.

The Court found dilution to be an easier call. The Ninth Circuit had held that VIP's use fell under the Lanham Act's exclusion from dilution liability for the "noncommercial use of a mark," under §1125(c)(3)(C), because it was parodic. The Supreme Court found that this expansive interpretation of that exclusion "puts the noncommercial exclusion in conflict with the statute's fair-use exclusion." The fair-use exclusion expressly applied to parody, but carved out situations when the use is "as a designation of source for the person's own goods or services." §1125(c)(3)(A). The Ninth Circuit's approach negated that carve-out.

The Court stressed that its opinion was narrow. "We do not decide whether the Rogers test is ever appropriate, or how far the 'noncommercial use' exclusion goes"—only that neither applies when the alleged infringer's use is source-identifying. It vacated and remanded for proceedings consistent with its holdings.

Justice Sotomayor, with Justice Alito joining, endorsed the Court's opinion but wrote separately to emphasize that, in the context of parodies and potentially other uses protected by the First Amendment, courts should treat survey results skeptically. Since surveys may reflect a mistaken belief among respondents that parodies require permission from the owner of the underlying mark, and could therefore be manipulable,

"[w]ell-heeled brands with the resources to commission surveys would be handed an effective veto over mockery."

In another short concurrence, Justices Gorsuch, Thomas, and Barrett indicated some skepticism regarding the origin and applicability of the Rogers test, and cautioned lower courts to be "attuned" to the fact that "it is not obvious that Rogers is correct in all its particulars," without indicating what portions of the test left them unconvinced of its validity.

### **KEY BRIEFS:**

Jack Daniel's Brief:

[https://www.supremecourt.gov/DocketPDF/22/22-148/252030/20230111151701242\\_Jack%20Daniels%20petitioners%20brief\\_1.11.23.pdf](https://www.supremecourt.gov/DocketPDF/22/22-148/252030/20230111151701242_Jack%20Daniels%20petitioners%20brief_1.11.23.pdf)

"Jack Daniel's loves dogs and appreciates a good joke as much as anyone. But Jack Daniel's likes its customers even more, and doesn't want them confused or associating its fine whiskey with dog poop. Jack Daniel's also welcomes jokes at its expense. But VIP does not just make jokes about Jack Daniel's. VIP sells products mimicking Jack Daniel's iconic marks and trade dress that mislead consumers, profit from Jack Daniel's hard-earned good-will, and associate Jack Daniel's whiskey with excrement. In other words, poop humor has its time and place, particularly for toddlers and young children. But Jack Daniel's does not want its customers looking at their whiskey bottles and wondering why in the world Jack Daniel's is talking about dogs defecating on Tennessee carpets...."

The Lanham Act establishes only one standard for infringement: likelihood of confusion as to origin, sponsorship, or approval. The Act does not impose a heightened standard for "humorous" or "expressive" works. Rogers (on which the Ninth Circuit relied) did not interpret the Act but invented a balancing test to assuage the Second Circuit's fears about applying the Act to "artistic" or "expressive" works. But Rogers' two-prong test does not align with the Act's likelihood-of-confusion standard. Both artistically relevant and implicitly misleading uses of trademarks may confuse customers. Courts appropriately account for any "artistic" or "humorous" uses of trademarks using the Act's likelihood-of-confusion standard, treating the nature of the use as a factor in determining whether customers will likely be confused. Because Jack Daniel's proved likely confusion at trial, the matter should have ended there."

**VIP Product's Brief:**

[https://www.supremecourt.gov/DocketPDF/22/22-148/255017/20230216181340185\\_22-148\\_Brief.pdf](https://www.supremecourt.gov/DocketPDF/22/22-148/255017/20230216181340185_22-148_Brief.pdf)

"This is a case about speech, and a popular brand's attempts to control that speech by weaponizing the Lanham Act. JDPI asks the Court to abolish the Rogers test, scrapping decades of judicial efforts to marry the public's interests in avoiding confusion and

protecting free speech. The Lanham Act, which specifies no particular test for likelihood of confusion, requires no rejection of Rogers.

1. The Bad Spaniels Silly Squeaker® toy is indisputably a good-faith (and successful) parody. It

involves a pretend trademark and pretend trade dress on a pretend label on a pretend bottle with pretend contents, when the real product is a parody embodied in a solid-vinyl dog toy with a squeaker. The parody comments on both iconic alcohol brands' self-serious bombardment of consumers with advertising and dog owners' joyful humanization of their pets. The evidence and surrounding social context of "Jack" demonstrate that VIP's parody was well aimed. That VIP used a dog toy to communicate its message is irrelevant, as medium and profit motive do not matter to the First Amendment."

### **Solicitor General's Brief in Support of Jack Daniel's**

[https://www.supremecourt.gov/DocketPDF/22/22-148/252545/20230118173036134\\_22-148%20Jack%20Daniels%20Props%20v%20VIP%20Prods.pdf](https://www.supremecourt.gov/DocketPDF/22/22-148/252545/20230118173036134_22-148%20Jack%20Daniels%20Props%20v%20VIP%20Prods.pdf)

The court of appeals erred in requiring petitioner to satisfy a special threshold test before invoking the statutory likelihood-of-confusion standard for proving trademark infringement under the Lanham Act. ... The Act does not prescribe a special test that a plaintiff must satisfy when the plaintiff asserts that a parodic use of its mark in commerce infringes the mark. As other courts of appeals have recognized, however, the parodic nature of the allegedly infringing use is properly taken into account under the flexible standards that the lower courts have developed for assessing likelihood of confusion.... The parodic nature of an allegedly infringing use of a mark in commerce should be taken into account when applying the Lanham Act's likelihood-of-confusion standard, but it does not justify adding to or displacing the statutory standard. In many cases, using a parody of a mark in commerce is unlikely to cause confusion and therefore is unlikely to infringe the mark. Parody depends on drawing an allusion to something familiar in order to make a joke, and the humorous contrast between a successful parody and the original will itself usually serve to distinguish the two."

### **Amicus Brief Motion Picture Association (in support of neither party)**

[https://www.supremecourt.gov/DocketPDF/22/22-148/252464/20230118141316975\\_22-148%20ac%20Motion%20Picture%20Association%20Inc.pdf](https://www.supremecourt.gov/DocketPDF/22/22-148/252464/20230118141316975_22-148%20ac%20Motion%20Picture%20Association%20Inc.pdf)

Rogers functions well as a test precisely because it is confined to artistic works, not to any consumer product that could arguably be said to incorporate some expressive element. Petitioner argues that because Rogers was misapplied to protect Respondent's product, Rogers is wrong. But Rogers simply does not cover this dog toy. The MPA therefore urges this Court both to affirm the validity of Rogers in appropriate cases and to clarify that Rogers does not apply when the item accused of infringement is a consumer

product rather than an artistic work. This is not to suggest that all references to others' trademarks on consumer products are necessarily infringing; all it means is that the traditional likelihood-of-confusion analysis applies, which courts have demonstrated time and again they can easily apply to consumer products alleged to be parodies in a way that avoids First Amendment concerns.

**Amicus Brief of First Amendment Professors (in support of VIP Products)  
written by Prof. Tushnet**

[https://www.supremecourt.gov/DocketPDF/22/22-148/255392/20230223130058120\\_43246%20pdf%20Tushnet%20br.pdf](https://www.supremecourt.gov/DocketPDF/22/22-148/255392/20230223130058120_43246%20pdf%20Tushnet%20br.pdf)

“A test like that set forth in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), offers a way to manage the commercial/noncommercial divide. When trademark owners assert that noncommercial speech causes confusion, a stringent test protects against the suppression and chilling of nonmisleading speech. This test is grounded in the recognition that, when noncommercial speech is at issue, reasonable persons do not make purchasing decisions about speech based on a belief that the trademark owner controls references, even prominent references, to its trademarks, especially when other parts of the content identify the actual speaker. Liability for explicit, material falsehoods can be constitutionally justified; liability for tarnishment or for immaterial confusion, especially immaterial confusion of a small percentage of the audience, cannot.

[Jack Daniel’s] position is that constitutional concerns cannot justify “rewriting” the Lanham Act. Yet it has long been settled that Congress cannot pass laws that override the Constitution and the Lanham Act is no exception.”

**Amicus Brief 30 Trademark Law Professors (in support of VIP Products)**

[https://www.supremecourt.gov/DocketPDF/22/22-148/255429/20230223152033068\\_22-148%20Trademark%20Law%20Professors%20Amicus%20Brief%20TO%20FILE.pdf](https://www.supremecourt.gov/DocketPDF/22/22-148/255429/20230223152033068_22-148%20Trademark%20Law%20Professors%20Amicus%20Brief%20TO%20FILE.pdf)

“The Government’s Position that *Rogers* Should Not Be Applied Beyond Titles of Artistic Works Is Wrong: The government reasons that because the *Rogers* court “narrowly” construed the Lanham Act to avoid conflict with the First Amendment in the particular “area of titles,” U.S. Br. 27, courts should not similarly construe the act to avoid First Amendment conflicts for other expressive works. That argument gets *Rogers* exactly backwards.”

**Post-Decision Developments**

**JTH Tax LLC v AMC Networks** (S.D.N.Y. Sept. 2023) (dismissing trademark claims against television drama ‘Better Call Saul’ over use of plaintiff’s Liberty Tax mark).

<https://storage.courtlistener.com/recap/gov.uscourts.nysd.584042/gov.uscourts.nysd.584042.44.0.pdf>

“In *Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, the Supreme Court held that Rogers ‘does not [apply] when an alleged infringer uses a trademark in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods’ or ‘in other words, a trademark as a trademark.’ While the Supreme Court declined to decide ‘whether Rogers has merit in other contexts,’ this Court remains bound by Rogers where an expressive work does not use a mark ‘as a designation of source for the infringer's own goods.’”

**US Supreme Court revives toy inventor's lawsuit over Disney 'Toy Story 3' bear**  
Reuters (June 2023)

The U.S. Supreme Court ruled on Tuesday that Disney (DIS.N) must face a New Jersey toy creator's lawsuit that claimed the company violated her trademark rights with its character Lots-o'-Huggin' Bear from the blockbuster 2010 film "Toy Story 3." The justices threw out a lower court's ruling that Disney was protected against the lawsuit from Randice-Lisa Altschul's Diece-Lisa Industries by the U.S. Constitution's First Amendment protections for freedom of speech.

<https://www.reuters.com/legal/us-supreme-court-revives-toy-inventors-lawsuit-over-disney-toy-story-3-bear-2023-06-20/>

**Petitions and Briefs: Diece-Lisa Industries Inc v. Disney Store USA LLC**

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-347.html>

## ISSUES INCLUDE

- Should the First Amendment independently protect the use of another’s trademarks on a commercial product – particularly in a parody context?
- Do existing trademark doctrines adequately allow for such use in titles and merchandise?
- Does it matter if the use is an obvious exploitation of a well-known brand?
- Does it matter if there is no likelihood of confusion?

- In what circumstances will the Rogers v. Grimaldi test still apply?