

**Free-Ride or Free Speech?:  
Key Trademark Parody Cases**

**NYIPLA Trademark Committee Seminar**

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1. *Am. Express Co. v. Vibra Approved Labs. Corp.*, 10 U.S.P.Q.2d 2006 (S.D.N.Y. 1989).

Type of use	Condom packaging made to appear like an AMERICAN EXPRESS card, also using “Never Leave Home Without It”, a modification of American Express’ slogan “Don’t Leave Home Without It”
Images	 <p>[defendant’s use described above]</p>
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction
Confusion likely?	No. “Of the eight factors to be weighed into the likelihood of confusion equation, only one points distinctly in plaintiff’s favor and that is the indisputable strength of American Express’ marks. With the exception of the junior user’s bad faith in adopting the marks and the quality of defendant’s product, both considerations which do not tip decidedly in favor of either party, the remaining factors weigh against a finding of likelihood of confusion. Taking into account all of the Polaroid components, it cannot be said that plaintiff has demonstrated a likelihood of confusion as to the source or sponsorship of defendant’s condom cards. Likelihood of confusion being an essential element of a claim of trademark infringement, plaintiff has failed to establish probable success on the merits of that claim and is therefore not entitled to a preliminary injunction on the first cause of action.”
Dilution?	Yes, under NY State Dilution Statute.
First Amendment?	Not mentioned. The closest the court came is this passage: “Viewed in the light of [a Callman treatise definition that dilution “threatens two separable but related components of advertising value. Junior uses may blur a mark’s product identification or they may tarnish the affirmative associations a mark has come to convey”], defendants’ condom card cannot be shrugged off as a mere bawdy jest, unreachable by any legal theory. American Express has a legitimate concern that its own products’ reputation may be tarnished by defendants’ conduct; and that damage, impossible to quantify and hence irreparable, will result. To the extent that the ‘Girl Scout Poster’ case... points to a different conclusion, I decline to follow it. <i>Sally Gee</i> , citing and applying more recent appellate authority, has expanded anti-dilution remedies under the New York statute.”
Order of Analysis?	Likely confusion, then dilution.
Surveys?	Not mentioned.
Intent?	On the confusion claim: “Although Hollywood clearly sought financial gain by appropriating plaintiff’s marks for use on its condom cards, there has been no showing that it did so with the intent to confuse consumers as to the source or sponsorship of those cards.”


	On the NY state dilution claim: “It is clear that defendant sought to capitalize on the recognizability of plaintiff’s marks, to its own commercial advantage. While not saying that defendant's use of the marks was in bad faith under the Lanham Act, ... it is fair to say that the marks were adopted with a predatory intent, or an intent to take advantage of plaintiff's marks for defendant's own gain.”
Disclaimer?	Not mentioned.
Comments?	

2. *Anheuser Busch, Inc. v. L&L Wings, Inc.*, 962 F. 2d 316 (4<sup>th</sup> Cir. 1992)

Type of use	T-shirts featuring a beer can with red, white and blue label & “This Beach is for You” slogan
Images	
Who won?	Brand owner loses on appeal (after district court judge had issued judgment notwithstanding verdict in brand owner’s favor following a jury verdict of no likely confusion)
Procedural Posture	Jury trial
Confusion likely?	No. Consumer confusion unlikely. Most important issue: did the t-shirts look alike in minds of ordinary consumer? “The jury examined the T-shirt as a whole and reasonably concluded that consumer confusion was unlikely.”
Dilution?	Not mentioned.
First Amendment?	“Some courts have held that trademark parody is entitled to First Amendment protection. See <i>Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.</i> , 886 F.2d 490, 493 (2d Cir.1989); <i>L.L. Bean</i> , 811 F.2d at 33-34. Given our decision to reinstate the jury verdict under the statutory standard, however, we have no occasion to reach defendants' contention that the First Amendment provides an independent basis for ruling in their favor.”
Order of Analysis?	Confusion test, then assessment of parody.
Surveys?	Not mentioned.
Intent?	Intent to parody is not probative of likely confusion
Disclaimer?	Not mentioned.
Comments?	Effective parody diminishes the risk of consumer confusion & provides further support for jury verdict of no likely confusion. Likelihood of confusion test awkward in context of parody. “ The purpose of the Lanham Act is to eliminate consumer confusion, not to banish all attempts at poking fun or eliciting amusement. <i>Elsmere Music, Inc. v. National Broadcasting Co.</i> , 623 F.2d 252, 253 (2d Cir.1980). The statute is designed to protect consumers from product misinformation, not to deprive the commercial world of all humor and levity. In this case, the ordinary consumers who served as jurors reasonably concluded that the T-shirt eliminated any risk of confusion, and we refuse to interfere with that

	verdict.”
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3. *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F. 3d 769 (8<sup>th</sup> Cir. 1994)

Type of use	Michelob Oily fake ad on back page of humor magazine
Images	
Who won?	Brand owner wins on appeal, with appeals court reversing dismissal of claims after bench trial by district court
Procedural Posture	Bench trial
Confusion likely?	Yes
Dilution?	Yes, State law Dilution Claim Survey shows tarnishment Rejects defendant's First Amendment argument Suggesting plaintiff's products contain oil <u>not necessary</u> to defendant's goals
First Amendment?	First Amendment right is not absolute – no simple, mechanical rule
Order of Analysis?	Begin by analyzing likelihood of confusion; only if likelihood of confusion exists, does court consider First Amendment Balancing test for expressive work – weigh public intent in protecting defendant's expression against interest in avoiding consumer confusion
Surveys?	Anheuser-Busch offered survey evidence which court credited. "Over half of those surveyed thought Balducci needed Anheuser-Busch's approval to publish the ad. Many of these presumably felt that such approval had in fact been obtained. Six percent thought that the parody was an actual Anheuser-Busch advertisement."
Intent?	An intent to parody is not an intent to confuse. However, Defendant had indifference to possibility some consumers might be confused: "For example, no significant steps were taken to remind readers that they were viewing a parody and not an advertisement sponsored or approved by Anheuser-Busch. Balducci carefully designed the fictitious ad to appear as authentic as possible. Several of Anheuser-Busch's marks were used with little or no alteration. The disclaimer is virtually undetectable. Balducci even included a ® symbol after the words Michelob Oily. These facts suggest that Balducci sought to do far more than just 'conjure up' an image of Anheuser-Busch in the minds of its readers."




Disclaimer?	Disclaimer is virtually undetectable
Comments?	

4. *Anheuser-Busch, Inc. v. VIP Products, LLC*, 666 F. Supp. 2d 974 (E.D. Mo. 2008)

Type of use	Buttwiper dog squeeze toy made to look like Budweiser bottle
Images	
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction
Confusion likely?	Yes
Dilution?	Dilution – rejects tarnishment and blurring
First Amendment?	Not mentioned.
Order of Analysis?	Does likelihood of confusion analysis, then looks at parody Finds likelihood of confusion – parody not automatic defense
Surveys?	Relies on survey evidence; Distinguishes other cases because of survey evidence here showing actual confusion. “[O]ne of three people interviewed mistakenly believed that VIP’s ‘Buttwiper’ is manufactured and marketed by, or with the approval of, Plaintiff or that there is some affiliation between ‘Buttwiper’ and Plaintiff.”
Intent?	“Here, Mr. Sacra directed a graphic designer to create a knock-off of the ‘Budweiser’ trade dress for use on his product. Although ‘intent to parody is not an intent to confuse the public,’ <i>Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC</i> , 507 F.3d 252, 263 (4th Cir. 2007), ‘[e]vidence that the alleged infringer chose a mark with the intent to copy, rather than randomly or by accident, typically supports an inference of likelihood of confusion,’ <i>Utah Lighthouse Ministry</i> , 527 F.3d at 1055.”
Disclaimer?	Not mentioned.
Comments?	“Some parodies will constitute an infringement, some will not. But the cry of ‘parody!’ does not magically fend off otherwise legitimate claims of trademark infringement or dilution. There are confusing parodies and non-confusing parodies. All they have in common is an attempt at humor through the use of someone else’s trademark. A non-infringing parody is


	merely amusing, not confusing.’ <i>Dr. Seuss Enters., L.P. v. Penguin Books, USA</i> , 109 F.3d 1394, 1405 (9th Cir.1997) (quoting McCarthy on Trademarks, § 31.38[1] at 31-216 (rev. ed.1995)).”
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5. *Ben & Jerry's Homemade Inc. v. Rodax Distributors Inc., No. 1:12-cv-06734 (S.D.N.Y. 2013)*

Type of use	Pornographic film series using Ben & Jerry's trade dress
Images	
Who won?	Brand owner wins
Procedural Posture	TRO (but without requested recall), followed by consent judgment with recall order and permanent injunction
Confusion likely?	
Dilution?	
First Amendment?	
Order of Analysis?	
Surveys?	
Intent?	
Disclaimer?	
Comments?	<p>Court did not address merits due to quick capitulation by defendant. Court's concerns expressed at argument on TRO motion related only to jurisdiction over defendants and granting a recall order on a TRO basis without hearing from defense first.</p> <p>Plaintiff argued in its papers that the parody defense did not apply:</p> <p>"It is well-recognized in the Second Circuit, as elsewhere, that a 'fair use' defense such as parody applies only where the use of another's mark offers commentary or criticism of the parodied mark, rather than where a defendant's use merely markets a product. See <i>Harley-Davidson, Inc. v. Grottanelli</i>, 164 F.3d 806, 813 (2d Cir. 1999) (rejecting parody defense because defendant's use of the 'mark makes no comment on Harley's mark; it simply uses it somewhat humorously to promote his own products and services ....'). See also <i>Cliff's Notes, Inc. v. Bantam Doubleday Dell Publishing Group</i>, 886 F.2d 490, 495 (2d Cir. 1989) ('trademark protection is not lost simply because the allegedly infringing use is in connection with a work of purported artistic expression'); <i>Deere &amp; Co. v. MTD Products, Inc.</i>, 41 F.3d 39 (2d Cir. 1994) (alleged parody held to violate New York's anti-dilution statute)."</p>


	<p>“Defendants’ use of Plaintiffs’ BEN &amp; JERRY’S® Intellectual Property does not constitute parody. Plaintiffs’ BEN &amp; JERRY’S® Intellectual Property is not the subject of the Infringing ... DVDs. The Infringing ... DVDs offer no commentary or criticism of the BEN &amp; JERRY’S® Intellectual Property. Neither Plaintiffs’ BEN &amp; JERRY’S® Intellectual Property nor their products are included in the content of the Infringing BEN &amp; CHERRY’S DVDs. The BEN &amp; JERRY’S® Intellectual Property is featured solely on the Infringing Labels and Infringing Product Packaging. Thus there is no commentary at all to consider. The parody defense fosters social commentary, criticism, and creative expression for its own sake, but it does not protect a purveyor of pornography who chooses to appropriate the goodwill of a famous brand to boost its sales.”</p>
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6. *Burck v. Mars, Inc.*, 571 F.Supp.2d 446 (SDNY 2008)

Type of use	M&M character dressed as Naked Cowboy
Images	
Who won?	Brand owner wins right to proceed on false endorsement claim (but not on NY right to privacy statute, which protects the name, portrait, or picture of a 'living person,' not a character created or a role performed by a living person).
Procedural Posture	Rule 12 motions to dismiss decided allowing case to proceed; matter settled thereafter
Confusion likely?	Brand owner's confusion claims are plausible: Some consumers, as defendants argue, may view the M & M Cowboy characters as a part of a larger work depicting New York scenes and parodying famous New York characters. But other consumers may mistakenly believe that The Naked Cowboy himself endorsed the copying of his 'trademarked likeness' because the M & M Cowboy characters appear in a commercial setting (i.e., on the video billboard and inside the M & M World store). Moreover, even assuming that the M & M Cowboy characters were parodies, a factfinder may nevertheless conclude that the parodies were too weak to negate the potential for consumer confusion. See <i>Schieffelin &amp; Co. v. Jack Co. of Boca, Inc.</i> , 725 F.Supp. 1314, 1324 (S.D.N.Y.1989) (determining whether parody is sufficiently strong to destroy consumer confusion is an issue for the jury); <i>Geary</i> , 831 F.Supp. at 275 (concluding that 'it is not true that a reasonable viewer would necessarily understand that defendants were satirizing a commercial of independent origin or that [plaintiff] had no association with [the adaptation of the commercial]')."
Dilution?	Not mentioned
First Amendment?	"But even if a parody is not so obvious to negate any likelihood of confusion, it may still be raised as an affirmative defense of fair use. The First Amendment protects parodies because they are valid forms of artistic expression and criticism. Parodies 'provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,' and thus 'has an obvious claim to transformative value.' <i>Campbell</i> , 510 U.S. at 579, 114 S.Ct. 1164. Whether the parody defense is used in the likelihood of confusion analysis or as an affirmative defense, the end result is the

	same if the defendant successfully asserts it: the plaintiff may not recover for the defendant's use of his trademark.”
Order of Analysis?	Assessment of likely confusion first, with consideration of whether or not parody is obvious
Surveys?	Not mentioned
Intent?	Not mentioned
Disclaimer?	Not mentioned
Comments?	

7. *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F. 2d 433 (5th Cir. 1962)

Type of use	Insecticide TV ad using slogan “Where there’s life, there’s bugs”
Images	 <p>[defendant’s use described above]</p>
Who won?	Brand owner wins
Procedural Posture	Trial, affirmed on appeal
Confusion likely?	Yes. “The court finds from listening to the tapes, and from watching the film strips, that defendant's use of the slogan was confusingly similar to plaintiff's. This is not to say that the tunes or the words in the advertising were exactly the same, but from the rhythm, meter and the pictures which appeared at the time that the slogan was used, when taken as a whole, created the impression that defendant's advertising had some connection with the plaintiff or plaintiff's product. Some of defendant's film strips show drinking glasses being filled, people dancing, and a simultaneous use of the slogan ‘Where there's life . . . there's Bugs’ . These films follow a format which plaintiff had employed for some four years. The court finds that the advertising of defendant is deceptively similar, so as to confuse the advertising of plaintiff and defendant.”
Dilution?	Mentioned only in passing in rejecting the following contention of the appellant: “Appellant's basic contention is that since it is clear that plaintiff and defendant are not in actual competition in the sale of their products — the one selling beer and the other selling a combined insecticide and floor wax — it has every right to appropriate and make use in any way it sees fit of the slogan which the appellee has popularized by the expenditures of effort and money over the years, regardless of any resulting injury or damage to the appellee caused by any confusion as to the source of the insecticide or by any dilution of or depreciation of the value of the slogan.”
First Amendment?	Not mentioned.
Order of Analysis?	Generally just addressed the issue of unfair competition/likely confusion
Surveys?	Yes, but apparently only on the issue of the fame of the brand owner’s




	slogans: “In an effort to determine the effectiveness of the advertising program, plaintiff employed advertising surveys to determine whether the public was acquainted with the plaintiff’s slogans, and whether the public associated the slogans with plaintiff’s product. The results of the surveys showed that a substantial portion of the public was not only acquainted and familiar with the slogans but also associated the slogans with Budweiser beer.”
Intent?	Not mentioned
Disclaimer?	Not mentioned
Comments?	

8. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F. 2d 490 (2d Cir. 1989)

Type of use	Spy Notes – one time parody
Images	
Who won?	Brand owner loses
Procedural Posture	Preliminary injunction reversed on appeal
Confusion likely?	Confusion only “slight risk.” Relies on <i>Rogers</i> balancing: “[T]he parody cover of Spy Notes, although it surely conjures up the original and goes to great lengths to use some of the identical colors and aspects of the cover design of Cliffs Notes, raises only a slight risk of consumer confusion that is outweighed by the public interest in free expression, especially in a form of expression that must to some extent resemble the original.”
Dilution?	Not mentioned
First Amendment?	<p>“The Polaroid test has its origin in cases of purely commercial exploitation, which do not raise First Amendment concerns. Thus, the Polaroid test is at best awkward in the context of parody, which must evoke the original and constitutes artistic expression. In such a situation, the Polaroid factors should be applied with proper weight given to First Amendment considerations, something the district court did not do here.”</p> <p>“We have stated the “general proposition” that “parody and satire are deserving of substantial freedom – both as entertainment and as a form of social and literary criticism. <i>Berlin v. E.C. Publications, Inc.</i>, 329 F.2d 541, 545 (2d Cir.) (emphasis in original), cert. denied, 379 U.S. 822, 85 S. Ct. 46, 13 L.Ed.2d 33 (1964). ...At the same time, “[t]rademark protection is not lost simply because the allegedly infringing use is in connection with a work of artistic expression.” <i>Silverman v. CBS Inc.</i>, 870 F.2d 40, 49 (2d Cir.), cert. denied, U.S., 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). Books are “sold in the commercial marketplace like other more utilitarian products, making the danger of consumer deception a legitimate concern that warrants some government regulation.” <i>Rogers v. Grimaldi</i>, 875 F.2d 994, 997 (2d Cir. 1989).</p>


	<p>Conflict between these two policies is inevitable in the context of parody, because the keystone of parody is imitation. It is hard to imagine, for example, a successful parody of Time magazine that did not reproduce Time’s trademarked red border. A parody must convey two simultaneous – and contradictory messages: that it is the original, but also that it is <i>not</i> the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused.</p> <p>Thus, the principal issue before the district court was how to strike the balance between the two competing considerations of allowing artistic expression and preventing consumer confusion. We believe that the correct approach in this case was foreshadowed by our decision in <i>Rogers v. Grimaldi</i>, upon which appellant relies heavily.”</p>
Order of Analysis?	Court leads with parody/First Amendment issue: “We start with the proposition that parody is a form of artistic expression, protected by the First Amendment.”
Surveys?	Not mentioned
Intent?	“[A] balancing approach allows greater latitude for works such as parodies, in which expression, and not commercial exploitation of another's trademark, is the primary intent, and in which there is a need to evoke the original work being parodied.”
Disclaimer?	“There is no requirement that the cover of a parody carry a disclaimer that it is not produced by the subject of the parody, and we ought not to find such a requirement in the Lanham Act.”
Comments?	

9. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (EDNY 1972)

Type of use	Poster using Coca-Cola script and ribbon with wording “Enjoy Cocaine”
Images	
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction
Confusion likely?	Yes. “[P]laintiff has received ‘numerous communications from all over the country’ concerning defendant’s poster[fn omitted]—a clear indication of public identification of the poster with plaintiff and strong confirmation of the public confusion which defendant contends does not exist.”
Dilution?	Decision unclear, but suggests that NY State Statute would apply: “Even though in this case there is no confusion of goods or passing off in the strict trademark sense, there is a sufficiently clear showing of the impairment of plaintiff’s mark as a selling device because of defendant’s use. See Callman, supra, § 84.2. The effect of that use as a dilution of plaintiff’s trademark rights is certainly a serious question calling for more deliberate investigation.”
First Amendment?	Rejecting application of First Amendment as follows: “[D]efendant contends that its poster is but an instance of free expression secured by the First Amendment, which constitutes fair comment and cannot be defamatory without a claim of malice. Defendant again relies on <i>Girl Scouts</i> , supra, in which it was stated that in the absence of special circumstances “a court of equity will not enjoin or restrain literary or spoken material,” 304 F.Supp. at 1234, quoting a passage from <i>Konigsberg v. Time, Inc.</i> , 288 F.Supp. 989 (S.D.N.Y.1968). While plaintiff does assert a claim that the association of cocaine with its trademark is defamatory, the thrust of its claim is against defendant’s imitative use of that trademark in a manner injurious to the mark and to plaintiff’s business reputation and good will. The special circumstances mentioned in <i>Girl Scouts</i> , supra, are here present, for if they were not then any unauthorized reproduction of a trade name or mark would be without remedy. The Lanham Act itself, 15 U.S.C. § 1114(2) (a) and (b), recognizes that even newspapers, magazines and periodicals, as well as printers, may be enjoined from innocent infringement of another’s mark as to future publication. Nothing in <i>Paulsen v. Personality Posters, Inc.</i> , 59 Misc.2d 444, 299 N.Y.S.2d 501 (Sup.Ct.1968), cited by defendant, would bar such an injunction under New York law.”
Order of Analysis?	Confusion first, then defenses
Surveys?	Not mentioned.
Intent?	Refers to “defendant’s predatory intent”

Disclaimer?	Not mentioned
Comments?	

10. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F. 2d 200 (2d Cir. 1979)

Type of use	Pornographic movie using uniform of Dallas Cowboy cheerleaders
Images	
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction affirmed on appeal
Confusion likely?	Yes. “The public’s belief that the mark’s owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement. In the instant case, the uniform depicted in ‘Debbie Does Dallas’ unquestionably brings to mind the Dallas Cowboys Cheerleaders. Indeed, it is hard to believe that anyone who had seen defendants’ sexually depraved film could ever thereafter disassociate it from plaintiff’s cheerleaders. This association results in confusion which has ‘a tendency to impugn [plaintiff’s services] and injure plaintiff’s business reputation . . .’ See <i>Coca-Cola Co. v. Gemini Rising, Inc.</i> , 346 F.Supp. 1183, 1189 (E.D.N.Y.1972).”
Dilution?	Yes, on New York state statute, “plaintiff had a right to preliminary relief on its claims of unfair competition and dilution,” without analysis.
First Amendment?	Discussed as follows: “Nor does any other first amendment doctrine protect defendants’ infringement of plaintiff’s trademark. That defendants’ movie may convey a barely discernible message[10] does not entitle them to appropriate plaintiff’s trademark in the process of conveying that message. See <i>Interbank Card Association v. Simms</i> , 431 F.Supp. 131 (M.D.N.C.1977); <i>Edgar Rice Burroughs, Inc. v. Manns Theatres</i> , 195 U.S. P.Q. 159 (C.D.Cal.1976); <i>Coca-Cola Co. v. Gemini Rising, Inc.</i> , supra, 346 F.Supp. at 1191. Plaintiff’s trademark is in the nature of a property right, see <i>Hanover Milling Co. v. Metcalf</i> , 240 U.S. 403, 413, 36 S.Ct. 357, 60 L.Ed. 713 (1915); <i>Alfred Dunhill of London, Inc. v. Dunhill Tailored Clothes, Inc.</i> , 293 F.2d 685, 692, 49 C.C.P.A. 730 (1961), cert. denied, 369 U.S. 864, 82 S.Ct. 1030, 8 L.Ed.2d 84 (1962), and as such it need not ‘yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.’ <i>Lloyd Corp. v. Tanner</i> , 407 U.S. 551, 567, 92 S.Ct. 2219, 2228, 33 L.Ed.2d 31 (1972). Because there are numerous ways in which defendants may comment on ‘sexuality in athletics’ without infringing plaintiff’s trademark, the district court did not encroach upon


	their first amendment rights in granting a preliminary injunction. See <i>Walt Disney Productions v. Air Pirates</i> , 581 F.2d 751, 758-59 (9th Cir. 1978); <i>Reddy Communications, Inc. v. Environmental Action Foundation</i> , 199 U.S.P.Q. 630, 634 (D.D. C.1977).”
Order of Analysis?	Assess whether there are trademark rights in uniform, then likely confusion, then defenses
Surveys?	Not mentioned
Intent?	Not mentioned
Disclaimer?	Not mentioned
Comments?	

11. *Dardenne v. Moveon.org*, Civ. Action No. 14-00150-SDD-SCR (MD La. April 7, 2014)

Type of use	Billboard critical of Louisiana state policy on healthcare
Images	
Who won?	Brand owner loses
Procedural Posture	Preliminary injunction denied
Confusion likely?	No, the State has not demonstrated a substantial likelihood of prevailing on its burden of proving confusion by viewers of the billboard. “[I]t is inconceivable to this Court that a reasonable person reading the subject billboard would likely be confused into believing that the State or the Lieutenant Governor are sponsoring a billboard critical of the elected Governor of the State.”
Dilution?	Not mentioned
First Amendment?	“This case ‘involves the tension between the protection afforded by the Lanham Act to trademark owners and the protection afforded by the First Amendment to expressive activity.’[16] ‘When the unauthorized use of another’s mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark.’[17] ‘[T]rade rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.’[18] While the ‘First Amendment may offer little protection for a competitor who labels its commercial good with a confusingly similar mark,’[19] the First Amendment is implicated when a trademark is used by someone other than the mark owner for the purposes of ‘communicating ideas or expressing points of view’.[20]
Order of Analysis?	“The question before this Court is: Does the enforcement of trademark laws[7] burden MoveOn.org’s constitutional right to free political speech. If so, the state must demonstrate that its interest in protecting its service mark from unauthorized use by MoveOn.org is compelling and that the injunctive relief sought is narrowly tailored to achieve that interest.”
Surveys?	Not mentioned
Intent?	“According to MoveOn.org, its ‘intent was to communicate . . . the message that, whereas the Louisiana tourism campaign is promoting the State as a desirable place to visit, the State might be considered an undesirable place to visit because of its [health care policies]’.”
Disclaimer?	Not mentioned
Comments?	



12. *Deere & Co. v. MTD Products, Inc.*, 41 F. 3d 39 (2d Cir. 1994)

Type of use	Competitor's TV ad showing the deer in the John Deere logo jumping off tractor and running away scared by competitor's machine
Images	 <p><b>JOHN DEERE</b> [defendant's use described above]</p>
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction affirmed on appeal (but limited to NY state)
Confusion likely?	No. The commercial does not appear to be misleading or confusing as to sponsorship, and is in any event not so misleading or confusing as to warrant preliminary injunctive relief as a matter of law. Accordingly, we confine our analysis to the question of dilution under the New York statute.
Dilution?	<p>Yes, under New York state statute, although the use was not considered either blurring or tarnishment.</p> <p>“Whether the use of the mark is to identify a competing product in an informative comparative ad, to make a comment, or to spoof the mark to enliven the advertisement for a noncompeting or a competing product, the scope of protection under a dilution statute must take into account the degree to which the mark is altered and the nature of the alteration. Not every alteration will constitute dilution, and more leeway for alterations is appropriate in the context of satiric expression and humorous ads for noncompeting products. But some alterations have the potential to so lessen the selling power of a distinctive mark that they are appropriately proscribed by a dilution statute. Dilution of this sort is more likely to be found when the alterations are made by a competitor with both an incentive to diminish the favorable attributes of the mark and an ample opportunity to promote its products in ways that make no significant alteration.</p> <p>“We need not attempt to predict how New York will delineate the scope of its dilution statute in all of the various contexts in which an accurate depiction of a distinctive mark might be used, nor need we decide how variations of such a mark should be treated in different contexts. Some variations might well be de minimis, and the context in which even substantial variations occur may well have such meritorious purposes that any diminution in the identifying and selling power of the mark need not be condemned as dilution.</p> <p>“Wherever New York will ultimately draw the line, we can be reasonably</p>

	<p>confident that the MTD commercial challenged in this case crosses it. The commercial takes a static image of a graceful, full-size deer—symbolizing Deere's substance and strength—and portrays, in an animated version, a deer that appears smaller than a small dog and scampers away from the dog and a lawn tractor, looking over its shoulder in apparent fear. Alterations of that sort, accomplished for the sole purpose of promoting a competing product, are properly found to be within New York's concept of dilution because they risk the possibility that consumers will come to attribute unfavorable characteristics to a mark and ultimately associate the mark with inferior goods and services.”</p>
First Amendment?	<p>Not mentioned but reference made to cases supporting commentary:</p> <p>“[W]e must be careful not to broaden section 368-d to prohibit all uses of a distinctive mark that the owner prefers not be made. Several different contexts may conveniently be identified. Sellers of commercial products may wish to use a competitor's mark to identify the competitor's product in comparative advertisements. See, e.g., <i>R.G. Smith v. Chanel, Inc.</i>, 402 F.2d 562, 567 (9th Cir.1968) (perfume manufacturer used competitor's mark in comparative advertisements; injunction denied). As long as the mark is not altered, such use serves the beneficial purpose of imparting factual information about the relative merits of competing products and poses no risk of diluting the selling power of the competitor's mark. Satirists, selling no product other than the publication that contains their expression, may wish to parody a mark to make a point of social commentary, see, e.g., <i>Stop the Olympic Prison v. United States Olympic Committee</i>, 489 F.Supp. 1112, 1123 (S.D.N.Y.1980) (poster used defendant's trademark to criticize trademark owner's involvement with proposed prison; injunction denied), to entertain, see, e.g., <i>L.L. Bean v. Drake Publishers, Inc.</i>, 811 F.2d 26 (1st Cir.) (satiric magazine parodying L.L. Bean catalogue; injunction denied), cert. denied, 483 U.S. 1013, 107 S.Ct. 3254, 97 L.Ed.2d 753 (1987), or perhaps both to comment and entertain, see, e.g., <i>Girl Scouts of USA v. Personality Posters Manufacturing Co.</i>, 304 F.Supp. 1228, 1233 (S.D.N.Y.1969) (poster depicting pregnant Girl Scout to suggest humorously that trademark owner's traditional image of chastity and wholesomeness was somewhat illusory; injunction denied). Such uses risk some dilution of the identifying or selling power of the mark, but that risk is generally tolerated in the interest of maintaining broad opportunities for expression. Cf. <i>Rogers v. Grimaldi</i>, 875 F.2d 994, 1000 (2d Cir.1989) (risk that film title might mislead and violate Lanham Act outweighed by danger of restricting artistic expression).</p>
Order of Analysis?	Dilution
Surveys?	Deere conducted a consumer survey to show the degree of confusion among viewers as to, among other things, the source of the MTD commercial, but the District Court was not sufficiently persuaded by the results to issue an injunction on this claim.

Intent?	Ad agency's "inter-office documents reflect that the animated deer in the commercial was intended to appear 'more playful and/or confused than distressed.'"
Disclaimer?	Not mentioned
Comments?	

13. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997)

Type of use	OJ Simpson – “Cat Not in the Hat” book
Images	
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction affirmed on appeal
Confusion likely?	<p>There are confusing and non-confusing parodies. True parody will be so obvious that clear distinction between source of parody and source of target.</p> <p>“We agree with the district court's findings that under <i>Sleekcraft</i> many of the factors for analysis of trademark infringement were indeterminate and posed serious questions for litigation.”</p> <p>“There are at least three types of proof of likelihood of confusion: (1) survey evidence; (2) evidence of actual confusion; and (3) an argument based on an inference arising from a judicial comparison of the conflicting marks themselves and the context of their use in the marketplace. In a close case amounting to a tie, doubts are resolved in favor of the senior user — Seuss.”</p>
Dilution?	District court found minimal likelihood of success on federal dilution claim; not addressed on appeal
First Amendment?	<p>Addressed on trademark claims in footnote:</p> <p>“We reject outright Penguin and Dove's claim that the injunction in this case constitutes a prior restraint in violation of free speech guaranteed by the United States Constitution. See, e.g., <i>Anheuser-Busch, Inc. v. Balducci Publications</i>, 28 F.3d 769 (8th Cir.1994) (First Amendment did not protect parodist from liability for likelihood of confusion that existed between ad parody in humor magazine and trademarks.); <i>Silverman v. CBS, Inc.</i>, 870 F.2d 40, 49 (2d. Cir.), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989) (“Trademark protection is not lost simply because the allegedly infringing use is in connection with a work of</p>


	<p>artistic expression."); <i>Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.</i>, 604 F.2d 200, 206 (2d Cir.1979) ("The prohibition of the Lanham Act is content neutral, and therefore does not arouse the fears that trigger the application of constitutional 'prior restraint' principles.") (citations omitted)."</p> <p>Addressed on copyright claim as follows: Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment. This court has adopted the 'conjure up' test where the parodist is permitted a fair use of a copyrighted work if it takes no more than is necessary to 'recall' or 'conjure up' the object of his parody.</p>
Order of Analysis?	Defendant argues parody defense applies even if there is likelihood of confusion, but court says parody is not a defense; just another way of saying no likelihood of confusion
Surveys?	Not mentioned (other than as a possible form of proof of likelihood of confusion)
Intent?	"Penguin and Dove's likely intent in selecting the Seuss marks was to draw consumer attention to what would otherwise be just one more book on the O.J. Simpson murder trial."
Disclaimer?	"A Parody" on face of the book
Comments?	Attempt at humor using someone else's trademark

14. *Dr. Seuss Entcs., L.P. v. Comic Mix LLC, Civ. Action No. 16cv2779-JLS (BGS) (S.D. Cal. June 9, 2017)*

Type of use	Two literary works, mashup of Dr. Seuss and Star Trek – “Oh the Places You’ll Boldly Go”
Images	
Who won?	Brand owner loses on trademark claims (with leave to amend as to confusingly similar titles); copyright claims proceed
Procedural Posture	Motion to dismiss
Confusion likely?	Nothing explicitly misleading; <i>Rogers</i> does not require likelihood of confusion analysis – <i>E.S.S.</i>
Dilution?	Not mentioned
First Amendment?	“[T]rademark rights, even when validly granted, are not absolute; they at times must yield to the First Amendment.”
Order of Analysis?	<i>Rogers</i> balancing test
Surveys?	Not mentioned
Intent?	“Plaintiff asserts that because it alleges that Defendants' conduct was ‘intentional and willful and is calculated specifically to trade off the goodwill that DSE has developed in its Dr. Seuss Marks[,]’ it therefore must be taken as true that Defendants intended to explicitly mislead the public. (Opp'n 22.) But a defendant may intend to or willfully use a mark without any desire to explicitly mislead consumers. And the only other section of the Complaint with relevant allegations states that ‘Defendants deliberately wrote and illustrated [Boldly] with the intention of imitating the Seuss Marks, and in creating confusion in the minds of the relevant public as to the origin of [Boldly] and/or deceiving the public as to Dr. Seuss's approval or licensing of [Boldly].’ (Compl. ¶ 31.) However, this statement is ‘no more than [a] conclusion[ ] . . . not entitled to the assumption of truth.’ <i>Iqbal</i> , 556 U.S. at 679.”
Disclaimer?	“Boldly's copyright page both states that ‘[t]his is a work of parody, and is not associated with or endorsed by CBS Studios or Dr. Seuss Enterprises, L.P.[.]’ and includes the following text: ‘Copyright Disclaimer under section 107 of the Copyright Act 1976, allowance is made for “fair use” for purposes such as criticism, comment, news reporting, teaching, scholarship, education, research, and parody.’”
Comments?	Nominative fair use – does not implicate source identifying function;

	<p>satisfies factors</p> <p>Conclusion:</p> <p>“Given the foregoing, the Court cannot say as a matter of law that Defendants' use of Plaintiff's copyrighted material was fair. The Court therefore DENIES Defendants' Motion to Dismiss Plaintiff's claim of copyright infringement. But Plaintiff's trademark and unfair competition claims stand on different footing. Plaintiff does not oppose the substance of Defendants' trademark-based argument regarding nominative fair use, and the Court therefore GRANTS Defendants' Motion to Dismiss Plaintiff's claims of trademark infringement and unfair competition. However, given Plaintiff's lack of nominative-fair-use opposition and Defendants' failure to respond to Plaintiff's confusingly-similar-titles argument under <i>Rogers v. Grimaldi</i>, the Court grants Plaintiff LEAVE TO AMEND its Complaint regarding the second and third causes of action. <i>DeSoto v. Yellow Freight Sys., Inc.</i>, 957 F.2d 655, 658 (9th Cir. 1992) (holding that a Court should freely grant leave to amend "unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency" (quoting <i>Schriber Distrib. Co. v. Serv-Well Furniture Co.</i>, 806 F.2d 1393, 1401 (9th Cir. 1986))). Any such amendment must be within fourteen days of the date on which this Order is electronically docketed.</p>
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15. *Federal Exp. Corp. v. Federal Espresso, Inc.*, 201 F. 3d 168 (2d Cir. 2000)

Type of use	Small Coffee Shop using name “Federal Espresso” then “Ex Federal Espresso” (ultimately changed name to Freedom of Espresso”)
Images	
Who won?	Brand owner loses
Procedural Posture	Denial of preliminary injunction affirmed on appeal
Confusion likely?	No, only strength of FEDERAL EXPRESS mark factor favored plaintiff; on the similarity of the marks issue, the Court found: “The marks appear in different typefaces and colors, and as part of distinctly different logos. In addition, defendants' use of their mark is always accompanied by other indicia of origin, such as a logo, pictures of coffee cups, or words like "coffee," that prevent any confusion as to the source of their products. Because the marks are not sufficiently similar to cause confusion, this factor favors defendants.”
Dilution?	Maybe, but not enough to merit reversing district court’s decision denying a preliminary injunction. “[W]e are less inclined than the district court toward the view that Federal Express is not likely to succeed on the merits of its dilution claims—although our view does not lead us to conclude that it was an abuse of discretion to deny a preliminary injunction. Several of the above factors seem to suggest that Federal Express may win on the merits. To begin with, the fame and distinctiveness of its mark is not in dispute. Defendants concede that the mark is entitled to protection. The district court found that it is ‘strong,’ that it had ‘acquired secondary meaning,’ and that it ‘is entitled to broad protection.’ 1998 WL 690903, at *10.”
First Amendment?	Not mentioned
Order of Analysis?	Trademark infringement and then dilution claims; parody not mentioned/assessed (logos differed)
Surveys?	Not mentioned
Intent?	“Plaintiff produced no evidence that defendants adopted their mark with the intent of benefitting commercially from the fame of the mark "FEDERAL EXPRESS." Ms. Dobbs testified that she adopted the FEDERAL ESPRESSO mark after viewing a site near the Federal



	<p>Building and because she wanted her business to "sound big." The fact that defendants did not seek the assistance of counsel prior to choosing their mark raises the possibility that they were aware of a potential infringement but continued to use the name. Ms. Dobbs testified that she was familiar with the FEDERAL EXPRESS mark. However, she stated that the partners did not think their name was a problem because they did not ship packages.</p> <p>No information was submitted at the preliminary injunction hearing that would support a finding of predatory intent. Thus, this factor favors defendants.”</p>
Disclaimer?	Not mentioned
Comments?	

16. *Girl Scouts v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228 (SDNY 1969)


Type of use	Poster showing pregnant girl scout with “Be Prepared” slogan
Images	 <p>The image block contains three distinct photographs. On the left, a young girl in a tan uniform stands against a pink background, labeled 'BROWNIE GIRL SCOUT'. In the middle, another young girl in a green uniform stands against a pink background, labeled 'JUNIOR GIRL SCOUT'. On the right, a black and white photograph shows a pregnant woman in a Girl Scout uniform, with the words 'BE PREPARED' printed in large white letters across her chest.</p>
Who won?	Brand owner loses
Procedural Posture	Preliminary injunction denied
Confusion likely?	<p>No.</p> <p>“Plaintiff has failed utterly to establish the requisite element of customer confusion.”</p> <p>“Plaintiff’s affidavit goes no further than to state that ‘Plaintiff has received telephone calls from members of the public expressing their indignation concerning defendant’s said poster’; but indignation is not confusion. To the contrary, the indignation of those who have called would appear to make it clear that they feel that the Girl Scouts are being unfairly put upon, not that the Girl Scouts are the manufacturers or distributors of the object of indignation.”</p>
Dilution?	<p>No. However, the court relies on authority to the effect that, despite the express language in the New York state dilution statute that confusion is not required, relief is denied when confusion is absent:</p> <p>“In the light of these decisions construing § 368-d and of the lack of any evidence before the court establishing confusion, no injunction can be granted on the basis of the fourth cause of action.”</p>
First Amendment?	Mentioned in connection with dismissing the defamation claim.
Order of Analysis?	Each cause of action assessed (and dismissed) in order.
Surveys?	Not mentioned
Intent?	“[N]o evidence of fraudulent intent to deceive on the part of defendant has even been offered, much less shown likely to be proven.”
Disclaimer?	Not mentioned
Comments?	

17. *Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc.*, 776 F. Supp. 1454 (WD Wa. 1991)

Type of use	t-shirt with “Hard Rain Cafe” instead of “Hard Rock Cafe”
Images	
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction, but defendant stipulated that if the preliminary injunction was granted, a permanent injunction could be entered
Confusion likely?	Yes.
Dilution?	“Because the Court has ruled that there is a violation of the Lanham Act, there is no need to decide the claim of dilution and accordingly the Court makes no Findings of Fact or Conclusions of Law regarding dilution.”
First Amendment?	<p>“Courts have also found no likelihood of confusion on the basis of parody where the subject matter concerns social commentary.[2] That is not the case here.”</p> <p>FN 2: “See, e.g., <i>Cliffs Notes v. Bantam Doubleday Dell Pub. Group</i>, 886 F.2d 490 (2d Cir.1989) (parody deserves freedom as a form of social and literary criticism; risk of confusion between “Cliffs Notes” study guides and “Spy Notes,” which follow format similar to Cliff Notes but poke fun at modern literature, is outweighed by First Amendment rights); <i>L.L. Bean, Inc. v. Drake Publishers, Inc.</i>, 811 F.2d 26 (1st Cir.) (trademark owner's rights extend to commercial uses of mark but cannot be used to suppress points of view; thus, defendant's “L.L. Bean's Back-To-School-Sex-Catalog” was not an infringement of the “L.L. Bean” mark), cert. denied, 483 U.S. 1013, 107 S.Ct. 3254, 97 L.Ed.2d 753 (1987); <i>Girl Scouts of U.S.A. v. Personality Posters Mfg.</i>, 304 F.Supp. 1228 (S.D.N.Y.1969) (makers of poster featuring pregnant Girl Scout with phrase “Be Prepared” were not in any way competing with Girl Scouts).”</p>
Order of Analysis?	<p>Trademark claims, followed by parody defense analysis.</p> <p>“Parody is not a defense to trademark infringement, but rather is another factor to be considered in the likelihood of confusion equation. <i>Schieffelin &amp; Co. v. Jack Co. of Boca</i>, 725 F.Supp. 1314, 1323 (S.D.N.Y.1989); <i>Mutual of Omaha Ins. Co. v. Novak</i>, 648 F.Supp. 905, 910 (D.Neb.1986), aff'd, 836 F.2d 397 (8th Cir. 1987), cert. denied, 488 U.S. 933, 109 S.Ct. 326, 102 L.Ed.2d 344 (1988). A “true” parody will be “so obvious and heavy handed that a clear distinction [is] preserved in the viewer's mind between the source of the actual product and the source of the parody.” <i>Mutual of Omaha</i>, 648 F.Supp. at 910. A defendant's claim of parody will</p>

	be disregarded where the purpose of the similarity is to capitalize on a famous mark's popularity for the defendant's own commercial use. <i>Grey v. Campbell Soup Co.</i> , 650 F.Supp. 1166, 1175 (C.D.Cal.1986), aff'd, 830 F.2d 197 (9th Cir.1987).”
Surveys?	Not mentioned
Intent?	“[Defendant’s owner] testified that she was not certain whether she had heard of HARD ROCK CAFE restaurants when one of her customers requested that she make a HARD RAIN CAFE design. Stipulation, Par. 26. She testified that she had not seen any HARD ROCK CAFE T-shirts prior to that request. Id. She testified that when she requested that Venture Graphics make a HARD RAIN CAFE design transfer, she had no idea what the HARD RAIN CAFE design would look like. Stipulation, Par. 24. Regardless of actual intent, the defendant has knowingly adopted a mark substantially similar to plaintiff's mark. The Court should therefore presume that the defendant will accomplish its purpose and that the public will be deceived. <i>Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc.</i> , supra.”
Disclaimer?	Not mentioned
Comments?	


18. *Harley-Davidson, Inc. v. Grottanelli*, 164 F. 3d 806 (2d Cir. 1999)

Type of use	Hand Drawn rendering of Harley Davidson bar & shield logo with “American Made” instead of HARLEY-DAVIDSON mark & “Unauthorized Dealer” appearing below, for “The Hog Farm” motorcycle repair shop
Images	 <p>[Defendant’s logo described above]</p>
Who won?	Brand owner wins on claim of infringement of Harley-Davidson's bar-and-shield design mark but loses as to the word “hog”
Procedural Posture	Judgment after trial, affirmed in part, reversed in part
Confusion likely?	Yes
Dilution?	Discussed only in the context of the rulings relating to the word HOG
First Amendment?	Not mentioned
Order of Analysis?	Trademark claims, then parody defense
Surveys?	Not mentioned
Intent?	“Grottanelli's defense of laches with respect to the bar-and-shield logo was also properly rejected. His intention to confuse undermines any claim of good faith....”
Disclaimer?	“Grottanelli gains no protection by coyly adding to his version of the bar-and-shield logo the wording "UNAUTHORIZED DEALER." We have alluded to commentary questioning the capacity of brief negating words like "not" or "no" in disclaimers adequately to avoid confusion.”
Comments?	“Grottanelli admits that his use of his bar-and-shield logo "purposefully suggests an association with Harley," ... but argues that his use is a protectable parody. We have accorded considerable leeway to parodists whose expressive works aim their parodic commentary at a trademark or a trademarked product, see, e.g., <i>Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.</i> , 886 F.2d 490, 493-95 (2d Cir.1989), cf. <i>Rogers v. Grimaldi</i> , 875 F.2d 994, 998 (2d Cir.1989), but have not hesitated to prevent a manufacturer from using an alleged parody of a competitor's mark to sell a competing product, see <i>Deere &amp; Co. v. MTD Products, Inc.</i> , 41 F.3d 39 (2d Cir.1994) (applying New York's anti-dilution statute). Grottanelli uses his bar-and-shield logo on the signage of his business, in his newsletter, and on T-shirts. The signage on his business is, in effect, trademark use for a competing service, since Harley-Davidson offers motorcycle repair services through its authorized dealers, and Grottanelli's placement of his bar-and-shield logo on his newsletter and T-shirts promotes his repair and parts business. In this context, parodic use is sharply limited. See <i>Deere</i> , 41 F.3d at 45 (citing <i>Wendy's</i>

International, Inc. v. Big Bite, Inc., 576 F.Supp. 816 (S.D.Ohio 1983)).[14]

Grottanelli's claimed parodic use of Harley-Davidson's logo is vulnerable not only because he uses it to market competing services but also because whatever protection is to be afforded a trademark parody must be informed by the Supreme Court's recent elucidation in the copyright context of parodies allegedly protected by the defense of fair use. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). "[T]he heart of any parodist's claim to quote from existing material[] is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works." *Id.* at 580, 114 S.Ct. 1164 (emphasis added). The comment must have some "critical bearing on the substance or style of the original composition." *Id.* The Supreme Court's parody explication as to copyrights, set forth in the context of an expressive work, is relevant to trademarks, see Robert S. Shaughnessy, Note, *Trademark Parody*, 72 Va. L.Rev. 1079 (1986), especially a trademark parody that endeavors to promote primarily non-expressive products such as a competing motorcycle repair service. Grottanelli's mark makes no comment on Harley's mark; it simply uses it somewhat humorously to promote his own products and services, which is not a permitted trademark parody use. See *Deere*, 41 F.3d at 44-45; *Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc.*, 776 F.Supp. 1454, 1462 (W.D.Wash.1991); *Grey v. Campbell Soup Co.*, 650 F.Supp. 1166, 1175 (C.D.Cal.1986), *aff'd*, 830 F.2d 197 (9th Cir. 1987).


19. *Heisman Trophy Trust v. Smack Apparel Co.*, 637 F.Supp.2d 146 (SDNY 2009)

Type of use	t-shirt with HE15MAN instead of HEISMAN
Images	
Who won?	Brand owner wins
Procedural Posture	Summary judgment
Confusion likely?	Yes
Dilution?	Not discussed in detail
First Amendment?	Not mentioned
Order of Analysis?	<p>This was also a breach of contract case, with the contract providing that defendant will "cease and permanently refrain from manufacturing, displaying, selling or offering for sale any clothing or other merchandise bearing the [Heisman] Marks, or confusingly similar marks, and from displaying or otherwise using the [Heisman] Marks, or confusingly similar marks, on or in connection with any website." The court addressed likely confusion under standard test, followed by "other factors" affecting confusion, including a "parody" claim:</p> <p>Smack Apparel also raises what amounts to a parody defense, asserting that its "He15man" shirt "depends on a lack of confusion to make sense," and that the shirt was "intended to be humorous or clever." (Smack Br. 17). But even if the T-shirts were intended as parodies, they do not warrant protection as such because they create a substantial likelihood of confusion. See, e.g., <i>Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.</i>, 886 F.2d 490, 494 (2d Cir.1989) ("A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused."). Smack Apparel's T-shirts fail to convey that they are not "the original" because they give the strong impression of being officially licensed or approved Heisman T-shirts; any parody intended is unclear at best. Smack's parody defense thus fails to create an issue of material fact.</p>
Surveys?	Not mentioned
Intent?	<p>The Court next examines whether Smack Apparel "adopted its mark with the intention of capitalizing on [The Heisman Trust's] reputation and goodwill and any confusion between his and the senior user's product." <i>Edison Bros. Stores, Inc. v. Cosmair, Inc.</i>, 651 F.Supp. 1547, 1560 (S.D.N.Y.1987). Smack Apparel has denied any such intention, and its denials are plausible. The existence of bad faith is therefore a disputed</p>

	<p>issue of fact. However, although a finding of bad faith could weigh significantly in The Heisman Trust's favor, a finding of good faith would carry little weight in Smack Apparel's favor. See <i>Beacon Mut. Ins. Co. v. OneBeacon Ins. Group</i>, 376 F.3d 8, 19 (1st Cir.2004) (the good faith factor "usually matters only where an alleged infringer copied a mark in bad faith; a converse finding of good faith carries little weight."); <i>Fuji Photo Film Co., Inc. v. Shinohara Shoji Kabushiki Kaisha</i>, 754 F.2d 591, 596 (5th Cir.1985) (finding that good faith was not a defense to trademark infringement because "if potential purchasers are confused, no amount of good faith can make them less so. Bad faith, however, may, without more, prove infringement."). Therefore, even viewing all facts regarding good faith in Smack Apparel's favor and assuming good faith, the sixth Polaroid factor is neutral.</p>
Disclaimer?	<p>Smack Apparel argues that it places disclaimers on its T-shirts that should help to dispel consumer confusion. The Court first notes that there are unresolved questions of fact as to when Smack Apparel began using the disclaimers, when it switched from a more generic disclaimer ("This shirt is NOT LICENSED or ENDORSED by any institution or organization....") to a Heisman-specific disclaimer (adding the words "including the HEISMAN TROPHY TRUST"), and whether the disclaimers were present on the Smack Apparel T-shirts at issue here. These questions notwithstanding, disclaimers have been found to be of limited value in alleviating an otherwise substantial likelihood of confusion, especially where, as here, the disclaimers are not particularly prominent (measuring 3.5 to 4.5 inches wide and .5 to .75 inches high) and use vague, general language.</p>
Comments?	




20. *Hershey Co. v. Friends of Steve Hershey*, 33 F. Supp. 3d 588 (D. Md 2014) (PI granted); see also 2015 Motion to dismiss denied at [https://scholar.google.com/scholar\\_case?case=12528384295625394544&hl=en&as\\_sdt=6,33](https://scholar.google.com/scholar_case?case=12528384295625394544&hl=en&as_sdt=6,33)


Type of use	Promotional signs for Steve Hershey for senate, using HERSHEY candy bar trade dress
Images	
Who won?	Brand owner wins
Procedural Posture	PI granted; defense motion to dismiss denied
Confusion likely?	Yes. "Although the Court agrees that the public is not likely to confuse the Senator with a candy bar, the confusion requirement also encompasses confusion with respect to sponsorship or affiliation. "The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement." <i>Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.</i> , 604 F.2d 200, 205 (2d Cir. 1979)."
Dilution?	Because the Plaintiffs' have demonstrated a likelihood of success on the merits of their trademark infringement claim, the Court need not address the merits of the Plaintiffs' claims of trademark dilution, breach of contract, false designation of origin, or common law trademark infringement.

First Amendment?	To the extent that the Defendants argue that their use of the Hershey Trade Dress is protected by the First Amendment, that argument fails. When a defendant uses another entity's mark as part of a communicative message, it is entitled to First Amendment protection. See <i>Am. Family Life Ins. Co.</i> , 266 F.Supp.2d at 699. However, that protection does not apply when the trademark is used to associate a political candidate with a popular consumer brand. See <i>id.</i> Here, the Defendants are not using the Hershey Trade Dress for parody, political commentary, or other communicative purposes. See <i>United We Stand America</i> , 128 F.3d at 93 (use of the plaintiff's mark as a means of association is not protected by the First Amendment). Accordingly, their use is not entitled to First Amendment protection
Order of Analysis?	Trademark claims, then First Amendment
Surveys?	No, but anecdotal evidence of actual confusion
Intent?	Not mentioned
Disclaimer?	The Defendants offered to add a last minute disclaimer above the campaign's existing signage stating "Our Senator, not Big Chocolate... we're not confused." See ECF No. 20. The proposed design is still substantially similar to Hershey Trade Dress and the proposed disclaimer is vague, unclear, and would do little, if anything, to reduce public confusion with respect to Hershey's affiliation with Senator Hershey.
Comments?	

21. *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, 73 F. 3d 497 (2d Cir. 1996)


Type of use	Spa'am character from Muppet movie
Images	
Who won?	Brand owner loses
Procedural Posture	Bench trial, judgment for defendant affirmed on appeal
Confusion likely?	<p>Likelihood of confusion analysis with heavy emphasis on parody:</p> <p>Henson's use of the name "Spa'am" is simply another in a long line of Muppet lampoons. Moreover, this Muppet brand of humor is widely recognized and enjoyed. Thus, consumers of Henson's merchandise, all of which will display the words "Muppet Treasure Island," are likely to see the name "Spa'am" as the joke it was intended to be. Unlike the parody of a Michelob beer advertisement at issue in <i>Anheuser-Busch, Inc. v. Balducci Publications</i>, 28 F.3d 769 (8th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 903, 130 L.Ed.2d 787 (1995), where the defendant "carefully designed the fictitious ad to appear as authentic as possible" and "sought to do far more than `conjure up' [the original]," id. at 774, Henson's parody is not particularly subtle.</p> <p>We find, therefore, that the clarity of Henson's parodic intent, the widespread familiarity with Henson's Muppet parodies, and the strength of Hormel's mark, all weigh strongly against the likelihood of confusion as to source or sponsorship between Hormel's mark and the name "Spa'am." Moreover, this reasoning applies to both use of the Spa'am character likeness alone and use of the likeness and name together on Henson's movie merchandise.</p>
Dilution?	No dilution: Very little likelihood Henson's parody will weaken association; more likely to increase public identification
First Amendment?	Not mentioned.
Order of Analysis?	Infringement, then dilution
Surveys?	Not mentioned.
Intent?	Court refers to "Henson's transparent parodic intent"
Disclaimer?	Not mentioned
Comments?	Claim is about merchandise only; plaintiff did not sue on use of Spa'am as character in film (Muppet Treasure Island)

22. *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10<sup>th</sup> Cir. 1987)

Type of use	Lardashe Jeans – smiling pig and Lardashe on seat of pants
Images	
Who won?	Brand owner loses
Procedural Posture	Bench trial, with judgment for defendant, affirmed on appeal
Confusion likely?	No likelihood of confusion; Parody can cause confusion
Dilution?	State Law Dilution Claim: Upholds finding that parody is likely to increase public identification of Jordache mark Not tarnishing: not unwholesome, unsavory or degrading
First Amendment?	A growing number of judges and commentators have sought to extend first amendment protection to the noncommercial use of trademarks. See, e.g., <i>San Francisco Arts &amp; Athletics, Inc.</i> , 107 S.Ct. at 2993-3000 (Brennan, J., dissenting); <i>L.L. Bean</i> , 811 F.2d at 28-34; <i>International Olympic Comm. v. San Francisco Arts &amp; Athletics</i> , 789 F.2d 1319, 1320-26 (1986) (Kozinski, J., dissenting from denial of rehearing en banc), aff'd sub nom. <i>San Francisco Arts &amp; Athletics</i> , ___ U.S. ___, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987); Note, Trademark Parody, 72 Va.L.Rev. at 1107-17; Dorsen, Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs, 65 B.U.L.Rev. 923, 949-52 (1985); Denicola, Trademarks as Speech, 1982 Wis.L.Rev. at 190-206; but see, e.g., <i>Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.</i> , 604 F.2d 200, 206 (2d Cir.1979). The tension between the first amendment and trademark rights is most acute when a noncommercial parody is alleged to have caused tarnishment, a situation in which first amendment protection is greatest. This concern is not as great here because Lardashe is being used as a trademark to identify a commercial product. See <i>L.L. Bean</i> , 811 F.2d at 32; Note, Trademark Parody, 72 Va.L.Rev. at 1081 n. 10.
Order of Analysis?	Trademark claims first
Surveys?	Rejects plaintiff's survey evidence – side-by-side comparison
Intent?	Focuses on intent; with parody, intent is not necessarily to confuse but rather to amuse



	Rejects idea that intent to parody creates a presumption of likelihood of confusion
Disclaimer?	Not mentioned
Comments?	

23. *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942 (N.D. Ill. 2002)

Type of use	Velveeta / King VelVeeda graphic artist name/character and merchandise at CheesyGraphics.com (sexually explicit / drug paraphernalia)
Images	
Who won?	Brand owner wins
Procedural Posture	Preliminary injunction granted
Confusion likely?	Court addressed dilution claim only
Dilution?	Likelihood of dilution analysis – use dilutes Velveeta mark
First Amendment?	<p>First Amendment defense fails:</p> <p>Mr. Helm uses the name "King VelVeeda" as a nickname and to identify his artwork and services as belonging to him. Mr. Helm admits that he does not need the name "King VelVeeda" to write political or social commentary, because "VelVeeda" is the source and not the object of his commentary. (Tr. at 168). Further, Mr. Helm concedes that his website is not about free speech, and he has never used the name "VelVeeda" in any parody or commentary. (Tr. at 120, 127). Mr. Helm did not reveal any examples of his commentary—political or social, that he allegedly posts on his website, save for the drawing of a giant noodle, which he has posted on his website since the filing of the instant lawsuit.</p> <p>Also, Mr. Helm uses the name for commercial purposes:</p> <p>Mr. Helm argues that he also provides commentary and free displays of artwork on his website, and therefore, his use of the name "King VelVeeda" can hardly be categorized as "propos[ing] a commercial transaction." [9] (Def.'s Suppl. Resp. at 9). Mr. Helm understates the predominance of his activities that propose a commercial transaction. While it is true that Mr. Helm has noncommercial content on his website, three of the six links that display prominently at the top of his homepage offer his merchandise or services for sale. The Court is unconvinced that commerce does not encompass a significant portion of Mr. Helm's website. Further, given the broad scope set forth by the Supreme Court in construing the term "in commerce" in association with the Lanham Act, Mr. Helm's arguments must fail.</p> <p>However, when First Amendment at stake, injunction must be no more</p>

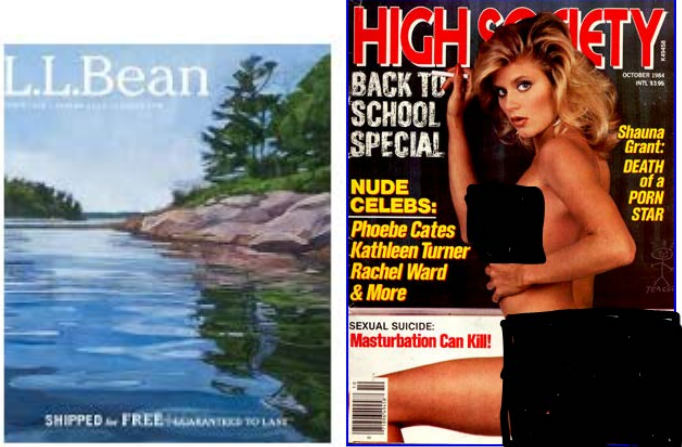
	burdensome than necessary.
Order of Analysis?	First Amendment analysis in context of preliminary injunction
Surveys?	Not mentioned
Intent?	Not mentioned
Disclaimer?	Not mentioned
Comments?	Court rejects parody defense on facts – commercial speech, not commenting about brand: Mr. Helm admitted that his use of the name "VelVeeda" is unnecessary to sell or display his art or to post commentary.

24. *Lions Gate Entertainment Inc. v. TD Ameritrade Services Company, Inc.*, 170 F. Supp. 3d 1249 (CD Ca. 2016) (motion to dismiss trademark claims granted via March 14, 2016 decision); (Civ. Action No. 2:15-cv-05024 Aug. 1, 2016) (dilution claim reinstated on plaintiff's motion for reconsideration)

Type of use	Banking ad spoofing <i>Dirty Dancing</i> movie	
Images		
Who won?	Brand owner wins right to bring dilution claim; common law trademark infringement claim preempted by copyright act	
Procedural Posture	Motion to dismiss granted & then denied as to dilution claim	
Confusion likely?	Court focused on preemption claim	
Dilution?	Case addressed sufficiency of the pleadings; Lion's Gate sufficiently plead a claim: Given that the parties do not dispute a slogan can be used as a trademark and given Lions Gate's allegations that Defendants intended to use this phrase as part of branding campaign, the cause of action survives the Motion to Dismiss.	
First Amendment?	Not mentioned	
Order of Analysis?	Merits not yet addressed	
Surveys?	Not mentioned	
Intent?	Not mentioned	
Disclaimer?	Not mentioned	
Comments?		




25. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F. 2d 26 (1st Cir. 1987)

Type of use	Pornographic spoof of LL Bean catalog appearing in “back to school” edition of High Society magazine
Images	
Who won?	Brand owner lost
Procedural Posture	Cross motions for summary judgment denied on many claims but granted with judgment for plaintiff and injunction issued as to Maine state dilution claim only; reversed and remanded on appeal
Confusion likely?	Not addressed - - the district court had denied summary judgment as to leave the factual question of "likelihood of confusion" for resolution at trial
Dilution?	<p>Dilution statute unconstitutional if applied to address non-commercial speech:</p> <p>We think the Constitution tolerates an incidental impact on rights of expression of commercial actors in order to prevent a defendant from unauthorizably merchandising his products with another's trademark.[4] In such circumstances, application of the anti-dilution statute constitutes a legitimate regulation of commercial speech, which the Supreme Court has defined as "expression related solely to the economic interests of the speaker and its audience." <i>Central Hudson Gas &amp; Elec. v. Public Serv. Comm'n</i>, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980). It offends the Constitution, however, to invoke the anti-dilution statute as a basis for enjoining the noncommercial use of a trademark by a defendant engaged in a protected form of expression:</p> <p>[T]he failure to distinguish between commercial and non-commercial speech "could invite dilution, simply by a leveling process, of the force of the" First "Amendment's guarantee with respect to the latter kind of speech." <i>Id.</i> at 563 n. 5, 100 S.Ct. at 2350 n. 5 (quoting <i>Ohralik v. Ohio State Bar Ass'n</i>, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978)).</p> <p>If the anti-dilution statute were construed as permitting a trademark owner</p>


	to enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct. The legitimate aim of the anti-dilution statute is to prohibit the unauthorized use of another's trademark in order to market incompatible products or services. The Constitution does not, however, permit the range of the anti-dilution statute to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context.
First Amendment?	There are serious first amendment implications involved in applying anti-dilution statutes to cover noncommercial uses of a trademark.
Order of Analysis?	First amendment / constitutional issues first
Surveys?	not mentioned
Intent?	Drake did not use Bean's mark to identify or promote goods or services to consumers; it never intended to market the "products" displayed in the parody.
Disclaimer?	The article was labelled as "humor" and "parody" in the magazine's table of contents section; it took up two pages in a one-hundred-page issue; neither the article nor appellant's trademark was featured on the front or back cover of the magazine.
Comments?	We recognize that the plaintiffs in <i>Pillsbury Co. v. Milky Way Productions, Inc.</i> , 215 U.S.P.Q. (BNA) 124 (N.D.Ga.1981), obtained injunctive relief against Screw magazine, which had published pictures of facsimiles of Pillsbury's trade characters, "Poppin Fresh" and "Poppie Fresh," engaged in sexual intercourse and fellatio. The pictorial also featured plaintiff's trademark and the refrain of its jingle, "The Pillsbury Baking Song." While the district court granted relief under Georgia's anti-dilution statute, 215 U.S.P.Q. at 135, it did so only after specifically declining to consider whether defendants' presentation constituted a parody. <i>Id.</i> at 129-30. The defendants in Pillsbury had tried to proffer parody as a defense to plaintiff's copyright infringement claim; they did not assert it as a defense to the dilution claim. Pillsbury, therefore, does not stand for the proposition that the publication of a parody properly may be enjoined under an anti-dilution statute, since the court never considered whether defendants had presented a parody, and defendants never asserted parody as a defense to the dilution claim.

26. *Lombardo v. Dr. Seuss Enterprises, L.P., Civ. Action No. 16cv9974 (SDNY Sept. 15, 2017)*


Type of use	Who's Holiday? play featuring characters from How the Grinch Stole Christmas
Images	
Who won?	Brand owner loses
Procedural Posture	Motion for judgment on the pleadings decided with DJ granted permitting the play to proceed; case now on appeal
Confusion likely?	<p>Applies Rogers test – risk of confusion outweighed by public interest in parodic expression:</p> <p>Use of Dr. Seuss-style hand-lettering and the drawn images of Cindy-Lou Who presents a closer question, for these trademarks do not appear in the Play, but are instead alleged to have been used in connection with advertising for the Play and other promotional materials. Counterclaims ¶ 29. Nevertheless, they serve plaintiffs' parodic purpose, for as the Second Circuit recognized in <i>Cliffs Notes</i>, a parodic work must necessarily evoke elements of the original work, including trademarked elements, in order to communicate the object of the parody. "It is hard to imagine, for example, a successful parody of <i>Time</i> magazine that did not reproduce <i>Time</i>'s trademarked red border." <i>Cliffs Notes</i>, 886 F.2d at 494. So too here, it is hard to imagine a parody of a Dr. Seuss book that did not deploy the characteristic typeface associated with Dr. Seuss' most well-known books, or a parody of Cindy-Lou Who that omitted images of that character. The public's interest in free speech outweighs defendant's interest in protecting these trademarks.</p>
Dilution?	Same analysis as infringement analysis
First Amendment?	Conflict between the First Amendment and the law of trademark "is inevitable in the context of parody, because the keystone of parody is imitation." <i>Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.</i> , 886 F.2d 490, 494 (2d Cir. 1989). In this Circuit, courts are to apply a balancing test to resolve the conflict between these interests: the Lanham Act "should be construed to apply to artistic works only where the public

	interest in avoiding consumer confusion outweighs the public interest in free expression." <i>Rogers v. Grimaldi</i> , 875 F.2d 994, 999 (2d Cir. 1989).
Order of Analysis?	First Amendment first
Surveys?	Not mentioned
Intent?	Thus, although discovery might yield additional information about plaintiffs' intent, such information is unnecessary to resolve the fair use issue; all that is needed is the parties' pleadings, copies of <i>Grinch and the Play</i> , and the relevant case law. Defendant objects that plaintiffs have cherry-picked documents (such as promotional materials) that refer to the <i>Play</i> as a parody, and attached those documents to their complaint. I have not relied on such documents. The "threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived," not whether the author of the secondary work labels it as such. <i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569, 582 (1994).
Disclaimer?	not mentioned, but advertisements refer to "see the play Dr. Seuss did not want you to see"
Comments?	

27. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F. 3d 252 (4<sup>th</sup> Cir. 2007)

Type of use	Chewy Vuiton dog toys
Images	
Who won?	Brand owner loses
Procedural Posture	Cross motions for summary judgment, resulting in defense judgment, affirmed on appeal
Confusion likely?	Traditional likelihood of confusion analysis Analysis depends on effectiveness of parody Effective parody diminishes likelihood of confusion
Dilution?	Dilution – rejects idea that parody automatically gives rise to actionable dilution Defendant argues spoof tends to increase public identification of LVMH’s marks Parody not a complete defense where defendant uses parody as its own designation of source Does likelihood of dilution analysis Consider parody in overall circumstances Court rejects tarnishment claim
First Amendment?	Not mentioned
Order of Analysis?	
Surveys?	Not mentioned
Intent?	An intent to parody is not an intent to confuse
Disclaimer?	Not mentioned
Comments?	LVMH has increased burden to show dilution

28. *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am., No. 10-CV-1611 (PKC), 2012 WL 1022247 (S.D.N.Y. Mar. 22, 2012)*

Type of use	Hyundai’s 2010 Super Bowl ad on the theme of “luxury” consisting of brief vignettes that show “policemen eating caviar in a patrol car; large yachts parked beside modest homes; blue-collar workers eating lobster during their lunch break; a four-second scene of an inner-city basketball game played on a lavish marble court with a gold hoop (featuring a basketball with a simulation of the LV toile monogram trademark); and a ten-second scene of the Sonata driving down a street lined with chandeliers and red-carpet crosswalks.”
Images	 <p>The image block contains two photographs. On the left is a classic Louis Vuitton handbag with the brown and gold monogram pattern and a red interior. On the right is a close-up of a basketball with the LV monogram pattern, being held by a person's hand in a dark setting.</p>
Who won?	Brand owner wins
Procedural Posture	Cross motions for summary judgment, resulting in judgment for plaintiff on its dilution by blurring claim; defense motion for summary judgment denied on plaintiff’s other claims
Confusion likely?	Facts in dispute prevent decision on summary judgment
Dilution?	Yes. Summary judgment on dilution by blurring claim based on evidence presented by LV and not rebutted by Hyundai regarding the fame / distinctiveness / exclusivity / wide recognition of the LV mark, similarities in the marks, Hyundai’s intent, and survey evidence of actual association.
First Amendment?	<p>The court addressed Hyundai’s First Amendment arguments in the context of whether the “intended expression” in the Hyundai advertisement affected various factors in the confusion analysis:</p> <p>[Hyundai] contends that the ad’s expressive value weighs in Hyundai’s favor on points of the marks’ strength, similarity of the marks and bad faith. As previously noted, however, any comment in the “Luxury” ad is far more subtle than, for example, the parody that inheres in a Muppet depicting an unkempt boar, <i>Hormel Foods</i>, 73 F.3d at 503, or a pet perfume that directly pokes fun at a high-end fashion label, <i>Tommy Hilfiger</i>, 221 F.Supp.2d at 415, 422. Moreover, Hyundai has acknowledged that it intended to make no comment on the Louis Vuitton mark, but instead offered a broader social critique. The Second Circuit has deemed such motivations unworthy of protection. <i>Rogers</i>, 960 F.2d at 310.</p>


	Therefore, based on the record and the law of this Circuit, I conclude that any intended expression in the "Luxury" ad does not weigh in Hyundai's favor.
Order of Analysis?	Dilution, then infringement, then first amendment
Surveys?	Yes, both parties conducted a survey. In the Louis Vuitton survey, among those who recognized the design as Louis Vuitton's, sixty-two percent believed that Louis Vuitton authorized Hyundai's use of the mark. In the Hyundai survey, 19% of survey respondents, without prompting, identified Louis Vuitton as a brand shown in the ad, and 30% of participants who, when asked in Hyundai's survey to focus their attention on the basketball, said that it reminded them of Louis Vuitton.
Intent?	The intent to associate with a famous mark weighs in favor of dilution. <i>Starbucks</i> , 58 F.3d at 109. Evidence of an intent to associate with the mark does not require evidence of bad faith. <i>Id.</i>  [T]he record is replete with statements that Hyundai intentionally used the Louis Vuitton marks for purposes of promoting the Sonata.  [T]he record reflects awareness on the part of Hyundai that it believed it needed permission to use other companies' luxury brands as part of the commercial.
Disclaimer?	No
Comments?	

29. *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., Appeal No. 16-241-cv.* (2d Cir. Dec. 22, 2016) (summary affirmance of 156 F. Supp. 3d 425 S.D.N.Y. 2016)

Type of use	“My Other Bag” Canvas bags featuring image of Louis Vuitton handbags on one side
Images	
Who won?	Brand owner loses
Procedural Posture	Cross Motions for summary judgment, ruled in favor of defendant and affirmed on appeal
Confusion likely?	No likelihood of confusion under <i>Polaroid</i> factors
Dilution?	No likelihood of dilution whether parody considered before or after applying statutory factors
First Amendment?	Not mentioned by appeals court
Order of Analysis?	
Surveys?	Not mentioned by appeals court
Intent?	Not mentioned by appeals court
Disclaimer?	Not mentioned by appeals court
Comments?	<p>Mark not being used as a designation of source</p> <p>District Court decision:</p> <p>LVMH cannot take a joke</p> <p>Fair use as a matter of law under §1125(c)(3)</p> <p>Successful parody – even if not, no blurring</p> <p>Rejects infringement claim for same reasons</p> <p>Goes through likelihood of confusion factors</p>




30. *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894 (9<sup>th</sup> Cir. 2002)

Type of use	Barbie Girl song
Images	 <p>The image shows two items side-by-side. On the left is a Barbie doll in a purple dress, packaged in a clear plastic box with pink and white accents. The box features the text 'Barbie D.I.Y. CRIMP &amp; CURL' and 'WATER-ACTIVATED CURLS!'. On the right is the CD cover for 'Barbie Girl' by Aqua. The cover features the band members and the text 'AQUA PRESENTED BY ANI MUSIC BARBIE GIRL'. Below the images is the lyrics of the song.</p> <p>Hiya Barbie Hi Ken!  Do you want to go for a ride?  Sure Ken Jump in  I'm a Barbie girl, in a Barbie world  Life in plastic, it's fantastic  You can brush my hair,  undress me everywhere  Imagination, life is your creation  Come on Barbie, let's go party!</p>
Who won?	Brand owner loses
Procedural Posture	Summary judgment, affirmed on appeal
Confusion likely?	<p>No, applying Rogers test:  Applying Rogers to our case, we conclude that MCA's use of Barbie is not an infringement of Mattel's trademark. Under the first prong of Rogers, the use of Barbie in the song title clearly is relevant to the underlying work, namely, the song itself. As noted, the song is about Barbie and the values Aqua claims she represents. The song title does not explicitly mislead as to the source of the work; it does not, explicitly or otherwise, suggest that it was produced by Mattel. The only indication that Mattel might be associated with the song is the use of Barbie in the title; if this were enough to satisfy this prong of the Rogers test, it would render Rogers a nullity.</p>
Dilution?	<p>Dilution – definitely blurs because consumers think of both of the doll and of the song  Noncommercial use exception to FTDA applies</p>


First Amendment?	<p>Limited to this core purpose — avoiding confusion in the marketplace — a trademark owner's property rights play well with the First Amendment. "Whatever first amendment rights you may have in calling the brew you make in your bathtub 'Pepsi' are easily outweighed by the buyer's interest in not being fooled into buying it." Trademarks Unplugged, 68 N.Y.U. L.Rev. 960, 973 (1993).</p> <p>The problem arises when trademarks transcend their identifying purpose. Some trademarks enter our public discourse and become an integral part of our vocabulary. How else do you say that something's "the Rolls Royce of its class"? What else is a quick fix, but a Band-Aid? Does the average consumer know to ask for aspirin as "acetyl salicylic acid"? See Bayer Co. v. United Drug Co., 272 F. 505, 510 (S.D.N.Y. 1921). Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law.</p>
Order of Analysis?	First amendment analysis first
Surveys?	Not mentioned
Intent?	Not mentioned
Disclaimer?	Each album included a disclaimer saying that Barbie Girl was a “social commentary [that was] not created or approved by the makers of the doll.”
Comments?	<p>“Our likelihood-of-confusion test, see AMF v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979), generally strikes a comfortable balance between the trademark owner’s property rights and the public’s expressive interests. But when a trademark owner asserts a right to control how we express ourselves – when we would find it difficult to describe the product any other way (as in the case of aspirin), or when the mark (like Rolls Royce) has taken on an expressive meaning apart from its source-identifying function – applying the traditional test fails to account for the full weight of the public’s interest in free expression.</p> <p>The First Amendment may offer little protection for a competitor who labels its commercial good with a confusingly similar mark, but “[t]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.” L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st Cir. 1987). Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment. See Yankee Publ’g, Inc. v. News Am. Publ’g, Inc., 809 F.Supp. 267, 276 (S.D.N.Y. 1992) (“[W]hen unauthorized use of another’s mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right.”). Simply put, the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function. See Anti-Monopoly,</p>

	<p>Inc. v. General Mills Fun Group, 611 F.2d 296, 301 (9th Cir. 1979) (“It is the source-denoting function which trademark laws protect, and nothing more.”)....</p> <p>The song does not rely on the Barbie mark to poke fun at another subject but targets Barbie herself. See <i>Campbell v. Acuff-Rose Music, Inc.</i>, 510 U.S. 569, 580, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994); see also <i>Dr. Seuss Ents., L.P. v. Penguin Books USA, Inc.</i>, 109 F.3d 1394, 1400 (9th Cir. 1997). This case is therefore distinguishable from <i>Dr. Seuss</i>, where we held that the book <i>The Cat NOT in the Hat!</i> borrowed Dr. Seuss’s trademarks and lyrics to get attention rather than to mock <i>The Cat in the Hat!</i> The defendant’s use of the Dr. Seuss trademarks and copyrighted works had “no critical bearing on the substance or style of” <i>The Cat in the Hat!</i>, and therefore could not claim First Amendment protection. <i>Id.</i> at 1401. Dr. Seuss recognized that, where an artistic work targets the original and does not merely borrow another’s property to get attention, First Amendment interests weigh more heavily in the balance. See <i>id.</i> at 1400-02; see also <i>Harley-Davidson, Inc. v. Grottanelli</i>, 164 F.3d 806, 812-13 (2d Cir. 1999) (a parodist whose expressive work aims its parodic commentary at a trademark is given considerable leeway, but a claimed parodic use that makes no comment on the mark is not a permitted trademark parody use).”</p> <p>Applies Rogers – expressive value of ideas notwithstanding commercial nature</p> <p>Song pokes fun at Barbie herself – distinguishes <i>Cat Not in the Hat</i></p>
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31. *Mutual of Omaha Insurance Co. v. Novak*, 836 F.2d 397 (8<sup>th</sup> Cir. 1985)

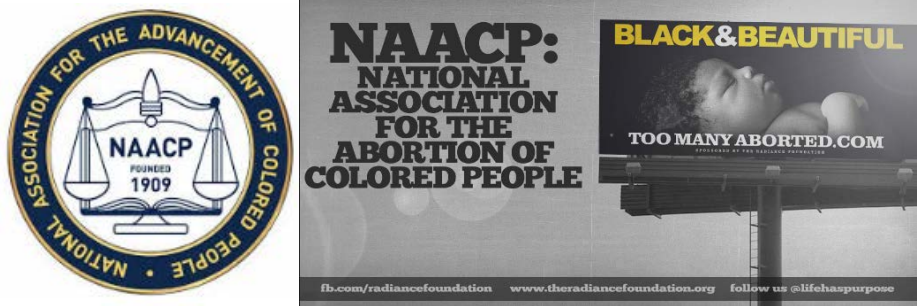
Type of use	Mutant of Omaha on T-shirts
Images	
Who won?	Brand owner wins
Procedural Posture	trial on the merits, affirmed on appeal
Confusion likely?	Yes, Straight likelihood of confusion analysis: It is possible that we would reach a conclusion different from that of the District Court if the likelihood of confusion issue were before us de novo. But our role here is limited to determining whether there is sufficient support in the record for the District Court's finding. We believe there is such support and therefore do not view the finding of a likelihood of confusion as clearly erroneous.
Dilution?	Not mentioned
First Amendment?	Defendant argued First Amendment – court says protection of First Amendment does not give defendant license to infringe Adequate alternative avenues of communication
Order of Analysis?	trademark issues first
Surveys?	Court relied on survey
Intent?	Dissent refers to defendant's lack of intent to pass off his shirts as plaintiff's
Disclaimer?	Not mentioned
Comments?	

32. *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. (BNA) 124 (N.D.Ga.1981)

Type of use	Pornographic images & text using Pillsbury doughboy appearing in Screw magazine
Images	 <p>[ defendant's use described above]</p>
Who won?	Brand owner wins
Procedural Posture	Bench trial on the merits resulting in right to injunctive relief under state dilution statute
Confusion likely?	No.
Dilution?	Yes, under Georgia Anti-Dilution Statute. The court concludes that, despite the lack of actual damages, there is a likelihood that the defendants' presentation could injure the business reputation of the plaintiff or dilute the distinctive quality of its trademarks. Consequently, the court concludes that the plaintiff has prevailed on this claim and is entitled to injunctive relief provided in section 106-115 of the Georgia Code.
First Amendment?	Not addressed in connection with dilution claim & not addressed on fair use claim because fair use was found (on the copyright claim) -- On page 48 of its post-trial brief, Milky Way states that, in light of recent Fifth Circuit decisions, it decided to place primary emphasis on its fair use defense and chose not to press the first amendment aspects of the case further at that time. Pillsbury construes this statement as an abandonment of Milky Way's first amendment defense. While the court disagrees with Pillsbury's conclusion that Milky Way has dropped its first amendment defense, it need not reach this issue in light of its ruling that Milky Way's unauthorized use of the plaintiff's copyrights is protected by the fair use doctrine.
Order of Analysis?	Each claim addressed in order
Surveys?	Not mentioned
Intent?	[T]he plaintiff accuses the defendants of intentionally besmirching the commercial reputation of its doughboy. The basis for this accusation is a statement made by Mr. Goldstein during his deposition that he intended to "have a good time and make fun of" the plaintiff's doughboy. Conceding that he intended to make light of the doughboy, however, is not tantamount to admitting that he used the plaintiff's marks for the purpose of intentionally deceiving the public or deriving some monetary benefit at the plaintiff's expense. Milky Way admits that the similarity between its portrayal and the plaintiff's marks is no mistake, but there is no evidence

	that in borrowing these marks the defendants intended "to confuse, mislead, or deceive the public." <i>Amstar Corp.</i> , 615 F.2d at 263 , 205 USPQ at 978 .
Disclaimer?	Not mentioned.
Comments?	<p>Distinguished by the LL Bean v. Drake case as follows:</p> <p>We recognize that the plaintiffs in <i>Pillsbury Co. v. Milky Way Productions, Inc.</i>, 215 U.S.P.Q. (BNA) 124 (N.D.Ga.1981), obtained injunctive relief against <i>Screw</i> magazine, which had published pictures of facsimiles of Pillsbury's trade characters, "Poppin Fresh" and "Poppie Fresh," engaged in sexual intercourse and fellatio. The pictorial also featured plaintiff's trademark and the refrain of its jingle, "The Pillsbury Baking Song." While the district court granted relief under Georgia's anti-dilution statute, 215 U.S.P.Q. at 135, it did so only after specifically declining to consider whether defendants' presentation constituted a parody. <i>Id.</i> at 129-30. The defendants in <i>Pillsbury</i> had tried to proffer parody as a defense to plaintiff's copyright infringement claim; they did not assert it as a defense to the dilution claim. <i>Pillsbury</i>, therefore, does not stand for the proposition that the publication of a parody properly may be enjoined under an anti-dilution statute, since the court never considered whether defendants had presented a parody, and defendants never asserted parody as a defense to the dilution claim.</p>


33. *Radiance Foundation, Inc. v. NAACP*, 786 F. 3d 316 (4th Cir. 2015)

Type of use	billboard from organization critical of NAACP’s pro-choice position referring to NAACP as “National Association for the Abortion of Colored People”
Images	
Who won?	Brand owner loses
Procedural Posture	Bench trial resulting in injunction reversed on appeal
Confusion likely?	<p>No, applies Rogers test.</p> <p>Provided the title is connected to and not misleading about the contents and does not use the mark in a way that clearly suggests authorship, see Rogers, 875 F.2d at 999, use of a mark in a title will generally not result in the type of consumer confusion necessary to support infringement claims. In this case, the title related to and conveyed the subject of the article: the NAACP and Radiance's views of its alleged stance on abortion. The use of the satirical modification of the true NAACP name was designed, as many titles are, to be eye-catching and provocative in a manner that induces the reader to continue on. We cannot find that use of the NAACP marks in the title of the Radiance article created a likelihood of confusion as to the piece's authorship or affiliation.</p>
Dilution?	<p>No, exceptions apply.</p> <p>Trademark law in general and dilution in particular are not proper vehicles for combatting speech with which one does not agree. Trademarks do not give their holders under the rubric of dilution the rights to stymie criticism. Criticism of large and powerful entities in particular is vital to the democratic function.</p>
First Amendment?	To find Lanham Act violations under these facts risks a different form of infringement—that of Radiance's expressive right to comment on social issues under the First Amendment. Courts have taken care to avoid Lanham Act interpretations that gratuitously court grave constitutional concerns, and we shall do so here. We hold that Radiance is not liable for trademark infringement or dilution of defendant's marks by tarnishment.
Order of Analysis?	First amendment first
Surveys?	District Court relied on survey evidence showing that people thought NAACP in fact stood for ‘National Association for the Abortion of Colored People.’
Intent?	Intent to parody is not intent to confuse
Disclaimer?	Not mentioned


Comments?	
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34. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 736 F. 3d 198 (2d Cir. 2013)


Type of use	Coffee offered at small coffee shop called “Charbucks Blend”
Images	
Who won?	Brand owner loses
Procedural Posture	Bench trial with judgment for defendant, affirmed on appeal.
Confusion likely?	Infringement claim not addressed
Dilution?	<p>No:</p> <p>The ultimate question is whether the Charbucks Marks are likely to cause an association arising from their similarity to the Starbucks Marks, which impairs the Starbucks Marks’ tendency to identify the source of Starbucks products in a unique way.</p> <p>Starbucks did not demonstrate a likelihood of dilution by blurring. Ultimately what tips the balance in this case is that Starbucks bore the burden of showing that it was entitled to injunctive relief on this record. Because Starbucks' principal evidence of association, the Mitofsky survey, was fundamentally flawed, and because there was minimal similarity between the marks at issue, we agree with the District Court that Starbucks failed to show that Black Bear’s use of its Charbucks Marks in commerce is likely to dilute the Starbucks Marks.</p>
First Amendment?	Not mentioned.
Order of Analysis?	focus was dilution claim
Surveys?	Yes, but survey was found to be fatally flawed for failing to show respondents the use as it appeared in the marketplace.
Intent?	Black Bear's intent to associate the Charbucks Marks with the Starbucks Marks was a factor found in Starbuck’s favor.
Disclaimer?	Not mentioned.
Comments?	

35. *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302 ( ND Ga. 2008)

Type of use	T-shirts, mugs, and website with message critical of Wal-Mart using WALQUEDA and WALOCAUST logos
Images	
Who won?	Brand owner loses
Procedural Posture	Summary judgment for Smith
Confusion likely?	No fair-minded jury could find that a reasonable consumer is likely to be confused by the challenged marks.
Dilution?	Smith's parodic work is considered noncommercial speech and therefore not subject to Wal-Mart's trademark dilution claims, despite the fact that Smith sold the designs to the public on t-shirts and other novelty merchandise.
First Amendment?	<p>Wal-Mart contends that Smith is a merchant who misappropriated its trademarks and business reputation in pursuit of illegal profit and who disingenuously seeks to cloak those activities under the First Amendment. Smith alleges that Wal-Mart is attempting to misuse trademark laws to censor his criticism of the company. According to Smith, at stake in this case is a person's right to publicly criticize the world's largest retailer — or any other business.</p> <p>At least one court of appeals has specifically addressed whether a social advocate selling t-shirts that carried the group's social message was engaging in noncommercial speech, despite the fact that the group sold the t-shirts to the public for profit. See <i>Ayres v. City of Chicago</i>, 125 F.3d 1010 (7th Cir.1997). In <i>Ayres</i>, the court distinguished limitations on "the sale of goods that are not themselves forms of protected speech," noting that precedent allows more restriction on sales of nonexpressive goods than it does on goods that are forms of protected speech. <i>Id.</i> at 1015. The court likened t-shirts carrying messages of social advocacy to "the sandwich boards that union pickets sometimes wear." <i>Id.</i> at 1014. As such, the t-shirts were "a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away." <i>Id.</i> (citing <i>Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.</i>, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)).</p> <p>The Court is convinced that a reasonable juror could only find that Smith primarily intended to express himself with his Walocaust and Wal-Qaeda concepts and that commercial success was a secondary motive at most.</p>


	Smith has strongly adverse opinions about Wal-Mart; he believes that it has a destructive effect on communities, treats workers badly and has a damaging influence on the United States as a whole. He invented the term "Walocaust" to encapsulate his feelings about Wal-Mart, and he created his Walocaust designs with the intent of calling attention to his beliefs and his cause. He never expected to have any exclusive rights to the word. He created the term "Wal-Qaeda" and designs incorporating it with similar expressive intent. The Court has found those designs to be successful parodies.
Order of Analysis?	Because Smith's arguments with regard to the Safeway factors depend heavily on whether his designs are successful parodies, the Court must first consider whether the contested designs are in fact parodies of Wal-Mart's registered marks.
Surveys?	Yes, but survey was found to be fatally flawed.
Intent?	An intent to parody is not an intent to confuse
Disclaimer?	Smith placed direct criticism of Wal-Mart on his CafePress pages before he received Wal-Mart's cease and desist demand.[30] Similarly, on the CafePress Wal-Qaeda homepage, created after the filing of this lawsuit, the viewer first sees a disclaimer of affiliation with Wal-Mart and a hyperlink to Wal-Mart's own website. Words denouncing Wal-Mart are placed next to some of the designs. Smith's Walocaust and Wal-Qaeda homepages also disclaim affiliation with Wal-Mart and criticize the company in the page's first view, before the hyperlinks to Smith's CafePress stores appear. The criticism and disclaimers show Smith's intent to avoid consumer confusion.
Comments?	

36. *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F.Supp.2d 410 (S.D.N.Y. 2002)

Type of use	Pet perfumes -- Timmy Holedigger
Images	
Who won?	Brand owner loses
Procedural Posture	Defense motion for summary judgment granted
Confusion likely?	Parody so Lanham Act must be construed narrowly Then court goes through likelihood of confusion analysis Joke is clear enough to result in no confusion
Dilution?	<p>No</p> <p>No blurring -- Given the nature of the challenged use, then, and the utter lack of evidence that the selling power of Hilfiger's marks has been diminished, no rational trier of fact could conclude that Nature Labs' pet perfume is likely to impair the identification of Hilfiger's marks with its products.</p> <p>No tarnishment -- There is nothing to suggest that a designer label has anything to lose from mere association with pets, particularly where the entire association is a light-hearted if somewhat heavy-handed parody. I agree with the conclusion of the district court in <i>Jordache</i>: "When the association is essentially a harmless, clean pun, which merely parodies or pokes fun at the plaintiff's mark, tarnishment is not likely."</p>
First Amendment?	<p>First Amendment interests – balancing test – greater latitude for parodies However:</p> <p>“[W]hen another's mark is used for source identification in a way likely to cause consumer confusion .... [t]he First Amendment affords no protection because trademark law permissibly regulates misleading commercial speech.”</p> <p>“When a parodist makes trademark use of another's mark, it should be entitled to less indulgence, even if this results in some residual effect on the free speech rights of commercial actors.”</p>
Order of Analysis?	First Amendment, then trademark issues
Surveys?	Lack of surveys by plaintiff noted by the court

Intent?	intent to amuse, not confuse
Disclaimer?	Yes. Although “a disclaimer alone is insufficient to dispel confusion, when the context ensures that consumer confusion is diminished, the use of a disclaimer can be of added benefit in obviating confusion.”
Comments?	Defendant had dual purpose – expressive comment and selling commercial product Actionable if used as source identification

37. *VIP Products LLC v. Jack Daniel's Properties, Inc.*, Civ. Action No. CV-14-2057-PHX-SMM (D. Ariz. 2016)

Type of use	Bad Spaniel doggie toys
Images	
Who won?	Brand owner wins right to try the case
Procedural Posture	Defense motion for summary judgment denied; Bench trial held October 2017
Confusion likely?	Facts in dispute – a reasonable trier of fact could find for Jack Daniel's
Dilution?	Facts in dispute – a reasonable trier of fact could find for Jack Daniel's
First Amendment?	The Bad Spaniels dog toy is not an expressive work for purposes of the application of the Rogers test because VIP makes trademark use of its adaptations of JDPI's trademarks and the Jack Daniel's trade dress to sell a commercial product, its novelty dog toy. The novelty dog toy is not an expressive work like those to which the Rogers test has been applied in the Ninth Circuit. In this case, where the adaptation of the Jack Daniel's trademark and trade dress were engaged for the dual purpose of making an alleged expressive comment as well as the commercial selling of a non-competing product, the First Amendment does not establish protection.
Order of Analysis?	Defenses reviewed first because it was a defense motion for summary judgment
Surveys?	Jack Daniel's offered an expert on consumer behavior, but it does not appear he did a survey
Intent?	Addressed on the issue of determining whether Jack Daniel's trade dress had secondary meaning:  VIP admits that it intentionally copied the JDTW bottle dress, and that it did so precisely to enable consumers to instantly recognize Jack Daniel's whiskey as the "target" of the Bad Spaniels alleged parody. (See Doc. 110 at 2 (VIP stating that it designed the Bad Spaniels dog toy to be a comical parody of a Jack Daniel's whiskey bottle).) VIP's copying of the

	identifiable parts of the JDTW bottle dress was indisputably an attempt to capitalize and free ride upon the success of Jack Daniel's existing secondary meaning. In this case, intentional copying by VIP supports an inference of secondary meaning.
Disclaimer?	Not mentioned.
Comments?	

38. *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F.Supp. 267, 276 (SDNY 1992)

Type of use	New York Magazine cover made to look like the Farmer's Almanac
Images	
Who won?	Brand owner loses
Procedural Posture	Stipulated written record submitted to judge for final decision
Confusion likely?	<p>A close call, but no:</p> <p>On first impression, New York's cover is unquestionably similar to plaintiffs' Cover Design and is clearly suggestive of the Almanac. I find, however, that New York made it sufficiently clear that the obvious reference to the Almanac was a joke and that New York made clear its own identity by bold prominent display of its title, so as to dispel any substantial likelihood of real consumer confusion. Furthermore, even if there was some confusion as to source or origin, it was relatively minor and was far outweighed by First Amendment considerations protecting the right of commentary and artistic expression.</p>
Dilution?	No, for reasons similar to the trademark infringement claim
First Amendment?	Even if there was some likelihood of confusion, I would still conclude that New York's cover did not violate Yankee's trademark rights. This is because the First Amendment confers a measure of protection for the unauthorized use of trademarks when that use is a part of the expression of a communicative message.
Order of Analysis?	Infringement claim followed by First Amendment analysis
Surveys?	Not mentioned
Intent?	The takeoff was neither intended to mislead nor, in the court's view, did it mislead.
Disclaimer?	Not mentioned.
Comments?	