

Jack Daniel's Remand, Part I: Why Did the Trial Court Give "Little Weight" to a Consumer Survey Showing 29% Confusion?, Op. 1, No. 45

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Seven years ago today, Jack Daniel's was no doubt riding high. The U.S. District Court for the District of Arizona gave Jack a big shot in the arm with a trademark infringement and dilution victory over Bad Spaniel's mimicry:

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VIP Prods., LLC v. Jack Daniel's Props, 291 F. Supp. 3d 891, 907 (D. Ariz. 2018).

One of the key pieces of evidence relied upon by the trial court was a consumer survey showing 29% of potential purchasers were "likely to be confused" by Bad Spaniels. *Id.* In fact, the court gave that survey evidence "prevailing weight" and found trademark infringement in favor of Old. No. 7. *Id.*

Fast forward to just last week. After two stints at the Ninth Circuit and one big trip at the Supreme Court, Jack Daniel's and Bad Spaniel's were back before the trial court on remand.

This time, though, the trial court gave the survey evidence "little weight" and rejected Jack Daniel's trademark infringement claim (but not its dilution claim). *VIP Prods. LLC v. Jack Daniel's Props. Inc.*, No. CV-14-02057-PHX-SMM, 2025 U.S. Dist. LEXIS 11866, at

*75 (D. Ariz. Jan. 21, 2025).

Exact same judge. Exact same survey. Exact opposite conclusion seven years later. Was this some sort of judicial variant of the seven year itch? Not exactly. The answer for the trial court's change of heart is this: Justice Sotomayor's concurring opinion back when this trademark tussle was before the U.S. Supreme Court two years ago.

As you may recall, Justice Sotomayor wrote a concurring opinion to address Jack Daniel's consumer survey evidence presented at trial. *Jack Daniel's Props. v. VIP Prods. LLC*, 599 U.S. 140, 164 (2023). She opined that, "[s]urvey answers may reflect a mistaken belief among some survey respondents that all parodies require permission from the owner of the parodied mark." *Id.* She observed that some of the answers to the survey in this case apparently illustrated this "potential." *Id.* (citing two survey respondent answers stating, "I'm sure the dog toy company that made this toy had to get [Jack Daniel's] permission" and "[t]he bottle is mimicked after the Jack Daniel BBQ sauce. So they would hold the patent therefore you would have to ask permission to use the image").

She then expressed this concern:

Allowing such survey results to drive the infringement analysis would risk silencing a great many parodies. Well-heeled brands with the resources to commission surveys would be handed an effective veto over mockery.

Id. at 164.

On remand, the trial court acknowledged Justice Sotomayor's concerns, and found them persuasive. *VIP Prods. LLC*, 2025 U.S. Dist. LEXIS 11866, * 74. As a result, the trial court concluded that because this same survey "may not have accounted for the fact that 'Bad Spaniels' is a parody," it received "little weight."

Are the concerns expressed by Justice Sotomayor and the trial court justified? There are some pretty compelling legal and factual arguments that the answer is "no." We will address those in our next issue, *Jack Daniel's Remand, Part II*. Stay tuned!

Here you will find: [the trial court's original decision](#), [Justice Sotomayor's concurrence](#), and the [trial court's decision](#) on remand.