

**WILL BAD SPANIELS’ NEW “DISCLAIMER”
KEEP VIP PRODUCTS OUT OF THE
DOGHOUSE? A CONSUMER SURVEY
PROVIDES A CAUTIONARY TALE FOR
WOULD-BE PARODISTS**

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I. INTRODUCTION

During the summer of 2023, the U.S. Supreme Court issued its momentous Lanham Act ruling in *Jack Daniel’s Props. v. VIP Prods. L.L.C.*¹ The Court wiped out First Amendment victories in the *VIP Products’* lower court decision sending this epic trademark tussle back to the lower

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¹ *Jack Daniel’s Props. v. VIP Prods. L.L.C.*, 599 U.S. 140 (2023).

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courts for further consideration.² As of this writing, it appears the sole issue left to decide is whether prospective dog toy purchasers believe there is a connection or association between Bad Spaniels and Jack Daniel's.³ Will the trier of fact view this as a playful canine caper? Or will potential customer confusion win out? This article examines that question by introducing a survey conducted by the author in July 2023 (the "July 2023 Survey"). The July 2023 Survey assessed whether the current iteration of the toy—now using a new and improved "parody" disclaimer—effectively negates consumer confusion. Based on the results of the July 2023 Survey, things may not be looking good for the naughty doggie.⁴

When the trial court first decided the issue of infringement in 2018,⁵ it relied heavily on a consumer survey conducted by the late Dr. Gerald Ford (the "May 2015 Survey").⁶ That survey showed that nearly 30% of the respondents believed there was a connection or affiliation between the famed whiskey maker and the scrappy dog toy manufacturer.⁷ When the May 2015 Survey was conducted, VIP Products had a very small disclaimer at the bottom of the back of the hang tag stating "[t]his product is not affiliated with Jack Daniel Distillery."⁸ Since that time,

² *Id.* at 144–45.

³ *Id.* at 163. It should be noted that the District Court has ordered the parties to submit simultaneous motions for judgment as a matter of law on Friday, February 16, 2024. See Order, dated November 28, 2023 (Dkt. 333).

⁴ J. Michael Keyes, *Bad Spaniels Survey* (July 2023) (unpublished survey) (on file with author).

⁵ *VIP Prods., L.L.C. v. Jack Daniel's Prods.*, 291 F. Supp. 3d 891, 907–08 (D. Ariz. 2018).

⁶ *Jack Daniel's*, 599 U.S. at 151–52.

⁷ *VIP Prods.*, 291 F. Supp. 3d at 907.

⁸ Declaration and Rule 26 Report of Dr. Gerald L. Ford at 8, *VIP Prods., L.L.C. v. Jack Daniel's Prods.*, 291 F. Supp. 3d 891 (D. Ariz. 2018) [hereinafter Ford Report].

though, VIP Products has apparently “upped” its disclaiming efforts. In an attempt to further distance itself from “Old No. 7,” the reverse side of the hang tag now prominently states that this toy is a “parody,” that it has no affiliation with Jack Daniel’s, and that consumers should not be “confused” into believing there is a connection between the two companies.⁹ In fact, the reverse side of the hang tag goes so far as to provide consumers with the “correct” answers to the original survey questions from the May 2015 Survey.¹⁰

The problem for VIP Products is that, according to this author’s survey, the “new and improved” disclaimer appears to have been wholly *ineffective* at dispelling confusion.¹¹ According to the data, even after the new hang tag disclaimer was shown to respondents, approximately 31% of them *still* believed there was a connection or affiliation between the two companies.¹² That’s a problem for Bad Spaniels, but it may signal an even bigger problem *writ large* for other would-be parodists seeking to distance themselves from the subjects of their parodies through the use of point-of-sale disclaimers.

Part II of this article describes the design and results of the May 2015 Survey administered by Dr. Ford and introduced in the case. It also briefly discusses the procedural history of the case, including the Ninth Circuit and U.S. Supreme Court decisions. Part III of this article describes the structure, design, and results of the July 2023 Survey conducted by the author of this article to test the effectiveness of the new Bad Spaniels disclaimer as

⁹ See *infra* Figure 2 and 3. The hangtag was obtained from a Bad Spaniels dog toy purchased from the Silly Squeakers Official Store on Amazon.com on June 11, 2023.

¹⁰ *Id.*

¹¹ See generally Keyes, *supra* note 4.

¹² *Id.* (noting that the calculations and percentages discussed throughout were arrived at by reviewing the raw survey data, “coding” the responses accordingly, and then performing the calculations as explained throughout).

compared to the May 2015 Survey. The July 2023 Survey replicated the May 2015 Survey in all material respects, including use of the same questions, age and gender quotas, and the like. The key difference between the two surveys is that the July 2023 Survey used the new hang tag as the stimulus to test whether it was effective at negating confusion. Part IV discusses the implications of the July 2023 Survey and some of the lessons that parodists—and their counsel—should be mindful of when litigating these sorts of trademark disputes.

II. PROCEDURAL HISTORY AND THE MAY 2015 SURVEY

A. Procedural History

Sometime in the last decade or so, VIP Products launched its Silly Squeakers line of chewy dog toys.¹³ This line of dog toys includes takeoffs and riffs on various liquor and beverage brands such as Jose Perro (after Jose Cuervo tequila), Mountain Drool (after Mountain Dew soda), and, of course, Bad Spaniels (after Jack Daniel's whiskey). Jack Daniel's Properties was none too pleased and demanded VIP Products cease and desist.¹⁴ After VIP Products initiated a declaratory judgment action in the U.S. District Court for the District of Arizona, Jack Daniel's Properties counterclaimed for various trademark transgressions, including unfair competition, infringement, and dilution.¹⁵ The case ultimately proceeded to a four-day bench trial in 2017.¹⁶

¹³ VIP Prods., L.L.C. v. Jack Daniel's Props., 291 F. Supp. 3d 891, 898 (D. Ariz. 2018).

¹⁴ Answer and Counterclaims of Defendant and Counterclaimant at 3, VIP Prods., L.L.C. v. Jack Daniel's Props., 291 F. Supp. 3d 891 (D. Ariz. 2018).

¹⁵ *Id.*

¹⁶ *VIP Prods.*, 291 F. Supp. 3d at 897.

Jack Daniel's Properties cleaned house, prevailing on the infringement and dilution claims.¹⁷ However, that victory was fleeting as the Ninth Circuit reversed the decision saying the trial court failed to analyze the infringement and unfair competition claims under the "artistic expression" test set forth in *Rogers v. Grimaldi*.¹⁸ On remand, the trial court (begrudgingly) found in favor of VIP Products,¹⁹ which the Ninth Circuit summarily affirmed.²⁰ Jack Daniel's Properties petitioned the U.S. Supreme Court to step in.²¹ The U.S. Supreme Court ultimately did step in.²² The Court reversed the Ninth Circuit's decision and held that because VIP Products used Jack Daniel's trademarks and trade dress as "source identifiers," *Rogers v. Grimaldi* did not hold sway.²³ The Court then remanded the case to the lower courts and made it clear that VIP Products can still attempt to establish that there is no likelihood of confusion.²⁴

B. The May 2015 Survey

One central piece of evidence at the initial trial was the consumer survey evidence produced by Jack Daniel's Properties, the May 2015 Survey. On the infringement and unfair competition claims in particular, the trial court gave

¹⁷ *Id.* at 905, 911.

¹⁸ VIP Prods., L.L.C. v. Jack Daniel's Props., 953 F.3d 1170, 1174–76 (9th Cir. 2020).

¹⁹ VIP Prods., L.L.C. v. Jack Daniel's Props., No. CV-14-02057-PHX-SMM, 2021 U.S. Dist. LEXIS 232410, at *20–21 (D. Ariz. Oct. 8, 2021).

²⁰ VIP Prods., L.L.C. v. Jack Daniel's Props., No. 21-16969, 2022 U.S. App. LEXIS 14657, at *1 (9th Cir. Mar. 18, 2022).

²¹ Petition for Writ of Certiorari, Jack Daniel's Prop. v. VIP Prods., L.L.C., 143 S. Ct. 486 (2022) (No. 22-248).

²² *See generally* Jack Daniel's Props. v. VIP Prods., L.L.C., 599 U.S. 140 (2023).

²³ *Id.* at 162.

²⁴ *Id.* at 162–63.

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considerable weight to the May 2015 Survey conducted by Dr. Gerald Ford of Ford Bubala:

The Court credits that Dr. Ford's survey establishes likelihood of confusion in this case. The survey followed the Ever-Ready format, considered the prevailing standard for trademark survey research in cases involving strong marks. . . . Dr. Ford's survey results that 29% of potential purchasers were likely confused is nearly double the threshold to show infringement.²⁵

The population for Dr. Ford's survey consisted of males and females twenty-one (21) years of age or older who were likely, within the next six months, to purchase a dog toy.²⁶ Dr. Ford used "quota sampling," and arrived at age and gender quotas of purchasers "as follows: approximately 44% male and 56% female; among males, approximately 33% 21 to 34, 40% 35 to 54, and 27% 55 or over; and among females, approximately 35% 21 to 34, 36% 35 to 54, and 29% 55 or over."²⁷

Dr. Ford's internet survey used an experimental design where respondents were randomly assigned to either one of two conditions, a "test" cell or a "control" cell.²⁸ 211 respondents were assigned to the test cell.²⁹ The test cell respondents were shown the allegedly infringing dog toy and the hang tag as follows:³⁰

²⁵ VIP Prods., L.L.C. v. Jack Daniel's Prods., 291 F. Supp. 3d 891, 908 (D. Ariz. 2018) (citation omitted).

²⁶ Ford Report, *supra* note 8, at 6.

²⁷ *Id.* at 6 n.4.

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ *Id.* at 8.



Figure 1³¹

Once the test cell survey respondents were shown these images (and confirmed that they could clearly see them), they were asked a series of questions as follows:

- “Who or what company do you believe makes or puts out this product?” (Question No. 7.0)³²
- “What other product or products, if any, do you believe are made or put out by whoever makes or puts out this product?” (Question No. 8.0)³³
- Then, respondents were asked if they believed that the product was “made or put out with the

³¹ The survey stimulus pictured in Figure 1 is a nearly identical version of the actual survey stimulus shown to respondents who participated in the May 2015. The picture of the stimulus in the Ford Report is pixelated so an updated photo of the stimulus is provided for clarity.

³² Ford Report, *supra* note 8, at 13.

³³ *Id.* at 14.

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authorization or approval of any other company.”
(Question No. 9.0)³⁴

- If a respondent answered “yes,” they were then asked, “What company or companies . . . ?” (Question No. 9.1)³⁵
- Finally, respondents were asked if they believed that the company that puts out the product “has a business affiliation or connection with any other . . . companies.” (Question No. 10)³⁶
- If a respondent answered “yes,” they were then asked “What company or companies . . . ?” (Question 10.1)³⁷

Dr. Ford's Results. 62 out of 211 respondents (or 29.38%) answered “Jack Daniel's” in response to one or more of the above-referenced questions.³⁸ Once these test cell results were adjusted for “noise” contained in Dr. Ford's control cell, the net confusion rate was 28.90%.³⁹ As the trial court noted, such a confusion rate is “nearly double” the threshold that other courts have observed would support a finding of likely confusion.⁴⁰

³⁴ *Id.* at 15.

³⁵ *Id.*

³⁶ *Id.* at 16.

³⁷ *Id.* at 17.

³⁸ *Id.* at 18.

³⁹ Ford Report, *supra* note 8, at 31 n.20 (explaining that only 1 respondent (.48%) in the control cell (n = 207) believed the control product was made or put out by Jack Daniel's, and thus, the test cell results of 29.38% needs to be adjusted by .48% to arrive at “net” confusion of 28.90%).

⁴⁰ VIP Prods., L.L.C. v. Jack Daniel's Prods., 291 F. Supp. 3d 891, 908 (D. Ariz. 2018).

III. THE JULY 2023 SURVEY WITH BAD SPANIELS’ NEW “DISCLAIMER”

Sometime after Dr. Ford conducted the May 2015 Survey, VIP Products apparently “pivoted” with how it marketed its parody of Jack Daniel’s whiskey. In its current formulation, the reverse side of the hang tag now (once it is removed from the toy) attempts to expressly put consumers on notice that it has “no affiliation” or “connection” with Jack Daniel’s Properties.⁴¹ The reverse side of the hang tag appears as follows:



Figure 2

⁴¹ See *infra* Figure 2 and 3; *supra* note 9.

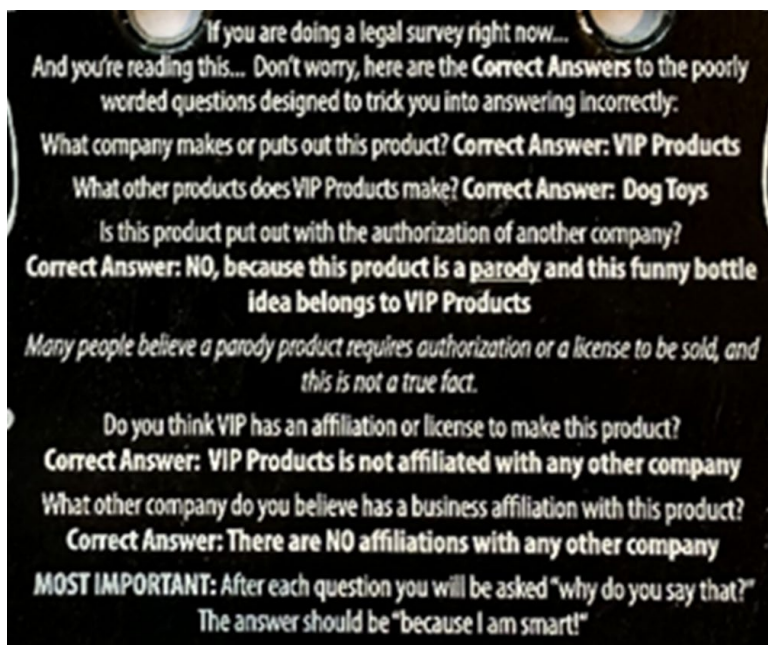


Figure 3

In fact, the reverse side of the hang tag now gives consumers the “correct” answers to Dr. Ford’s survey questions from the May 2015 Survey.⁴²

To assess whether VIP Products’ modification of the reverse side of the hang tag would be effective in “disclaiming” any connection with Jack Daniel’s Properties, the author of this article conducted a consumer survey in July 2023 (the “July 2023 Survey”).⁴³ The purpose of the survey was to compare whether there was any statistically significant difference between Dr. Ford’s “test” cell results from the May 2015 Survey (showing a confusion rate of 29.38%)⁴⁴ and the July 2023 Survey results where

⁴² See *infra* Figure 2 and 3; *supra* note 9.

⁴³ The July 2023 Survey was conducted by the author. See Keyes, *supra* note 4.

⁴⁴ Ford Report, *supra* note 8, at 18.

consumers were shown the identical bottle with the modified reverse hang tag.

The July 2023 Survey replicated Dr. Ford's survey structure in all material respects.⁴⁵ Just as with Dr. Ford's survey, the population for the July 2023 Survey consisted of males and females twenty-one (21) years of age or older who were likely, within the next six months, to purchase a dog toy.⁴⁶ Dr. Ford's same quota sampling method was used in the July 2023 Survey, and it replicated the same age and gender distributions.⁴⁷

The identical number of survey respondents (211)⁴⁸ participated in the July 2023 Survey. Respondents were surveyed using an internet survey overseen by the author of this article and administered by Qualtrics.com, a market research firm specializing in conducting online surveys.⁴⁹ Just as with Dr. Ford's survey, the sample selection, questions, questionnaire design, and interviewing procedures employed in the July 2023 Survey were designed in accordance with the generally accepted standards and procedures in the field of survey research.⁵⁰ Just as with the May 2015 Survey, the July 2023 Survey was also designed to meet the criteria for survey trustworthiness detailed in the *Reference Guide for Survey Research* authored by Dr. Shari Diamond.⁵¹

⁴⁵ See generally Keyes, *supra* note 4. There were some minor differences between the screening criteria. For example, in Dr. Ford's 2015 survey, he excluded respondents from taking surveys on their mobile phones. Ford Report, *supra* note 8, at 6 n.3.

⁴⁶ See Keyes, *supra* note 4; Ford Report, *supra* note 8, at 6.

⁴⁷ See Keyes, *supra* note 4; Ford Report, *supra* note 8, at 6 n.4.

⁴⁸ See Keyes, *supra* note 4; Ford Report, *supra* note 8, at 2.

⁴⁹ See generally Keyes, *supra* note 4.

⁵⁰ *Id.*

⁵¹ *Id.*; see generally Shari Seidman Diamond, *Reference Guide for Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359 (Nat'l Acad. Press ed., 3d ed. 2011).

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The July 2023 Survey respondents were shown the allegedly infringing dog toy and the modified reverse side of the hang tag as follows:



Figure 4

Once the July 2023 Survey respondents were shown these images (and confirmed that they could clearly see them), they were asked the identical series of questions posed by the May 2015 Survey:

- “Who or what company do you believe makes or puts out this product?” (Question No. 7.0)⁵²

⁵² Keyes, *supra* note 4 (referring to information at column AA); Ford Report, *supra* note 8, at 13.

- “What other product or products, if any, do you believe are made or put out by whoever makes or puts out this product?” (Question No. 8.0)⁵³
- Then, respondents were asked if they believed that the product was “made or put out with the authorization or approval of any other company.” (Question No. 9.0)⁵⁴
- If a respondent answered “yes,” they were then asked, “What company or companies . . . ?” (Question No. 9.1)⁵⁵
- Finally, respondents were asked if they believed that the company that puts out the product “has a business affiliation or connection with any other . . . companies . . .” (Question No. 10)⁵⁶
- If a respondent answered “yes,” they were then asked “What company or companies . . . ?” (Question 10.1)⁵⁷

The July 2023 Survey Results. 67 out of 211 respondents (or 31.7%) answered “Jack Daniel’s” in response to one or more of the above-referenced questions.⁵⁸ This is directionally higher than the 62 out of 211 respondents (or 29.38%)⁵⁹ who answered “Jack Daniel’s” in the May 2015 Survey.

⁵³ Keyes, *supra* note 4 (referring to information at column AG); Ford Report, *supra* note 8, at 14.

⁵⁴ Keyes, *supra* note 4 (referring to information at column AM); Ford Report, *supra* note 8, at 15.

⁵⁵ Keyes, *supra* note 4 (referring to information at column AN); Ford Report, *supra* note 8, at 15.

⁵⁶ Keyes, *supra* note 4 (referring to information at column AT); Ford Report, *supra* note 8, at 16.

⁵⁷ Keyes, *supra* note 4 (referring to information at column AU); Ford Report, *supra* note 8, at 17.

⁵⁸ Keyes, *supra* note 4 (the survey responses were coded by the author).

⁵⁹ Ford Report, *supra* note 8, at 18.

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On just the “authorization or approval” question (Q. 9.0), significant differences were observed between the two studies. With respect to the May 2015 Survey, 23 out of the 62 respondents (37%) believed that Bad Spaniels needed Jack Daniel’s “approval” or “authorization.” With respect to the July 2023 Survey, only 5 respondents out of the 67 respondents (7%) believed that Bad Spaniels needed Jack Daniel’s “approval” or “authorization.” On the “business affiliation or connection” question (Q. 10), significant differences were observed, but in the *other* direction. With respect to the May 2015 Survey, only 4 out of the 62 respondents (6%) believed there was a business “affiliation or connection” between the two companies. Whereas with respect to the July 2023 Survey, 21 respondents out of the 67 respondents (31%) believed there was such an “affiliation or connection” between the two.

It should be noted that the coding of responses and subsequent calculations may actually be underreporting respondents who expressed a connection with Jack Daniel’s whiskey. For example, 12 respondents (none of whom mentioned Jack Daniel’s whiskey by name) responded “liquor” to one or more of the survey questions.⁶⁰ An additional 5 respondents answered “Tennessee Whiskey” to one or more of the above questions without mentioning Jack Daniel’s whiskey by name.⁶¹

IV. THE TALE OF THE TAPE

What lessons can be drawn from the July 2023 Survey data and the effect of the modified hang tag in this dog fight? There are a couple of important ones.

First, the modified hang tag was obviously not effective at reducing the overall confusion rate compared to the prior hang tag. The surveys show that about a third of

⁶⁰ Keyes, *supra* note 4 (based on coded information).

⁶¹ *Id.*

the respondents in both can be characterized as “confused.” The bigger and more intriguing question is “why?” Why did the modified hang tag fail to reduce the overall level of confusion? That is more challenging to answer based on the survey data and the varied symphony of responses.

It appears, though, that the more explicit, overt, and direct VIP Products became in explaining that “this is a VIP product,” that technique was effective in communicating that VIP Products did not need “authorization or approval.” But that only got VIP Products so far. That same explicit, overt, and direct approach on the modified hang tag left a significantly higher percentage of respondents with the impression that there must *still* be an “affiliation or connection” between these two companies regardless.

It might be a natural inclination to assume that survey responses would move in tandem on the “authorization or approval” and the “affiliation or connection” questions. But that clearly is not what happened here because what the right hand giveth, the left hand taketh.

Second, the results of this author’s experimental survey may be of use to future parodists—and their counsel. These results suggest that it might be wise to explore and test the effectiveness of different disclaimers, to the extent those are being used in order to disclaim any affiliation or connection between two companies. Even prominent disclaimers that say overtly and explicitly “this is a parody” presented to consumers as part of a marketing plan might not be effective at dispelling overall confusion rates, especially if the disclaimer still uses lots of text and tries to convey several points in one sitting.⁶² This may mean that when it

⁶² Some courts have expressed a healthy amount of skepticism over the efficacy of disclaimers in Lanham Act cases. See *Profitess Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (noting a “growing body of academic literature has concluded that disclaimers, especially those . . . which employ brief negator words such as ‘no’ or ‘not,’ are

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comes to disclaimers, “less is more” for grabbing the attention of consumers. Or, to put it another way, a lengthy disclaimer may mean a would-be parodist will simply be barking up the wrong tree.

generally ineffective”) (citation omitted); *see also* Ford Motor Co. v. Lloyd Design Corp., 184 F. Supp. 2d 665, 673–74 (E.D. Mich. 2002) (“The principle that disclaimers are often ineffective is especially applicable when the infringer uses an exact replica of the relevant trademark.”). Other courts appear more open to the effectiveness of such disclaimers in certain circumstances. *See* TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 824 (9th Cir. 2011) (upholding the splash screen disclaimer).