

**MAKING JUDGES THINK FUNNY: THE
BENEFITS OF APPLYING COMEDIC THEORY TO
ISSUES OF PARODY AND SATIRE IN
TRADEMARK LAW**

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Dedicated in loving memory of my mother, Dr. Robin Molella, who encouraged me to write this Note, and to Bernward Goettke and Lukas Goettke, J.D., whose love and support enabled its completion.

INTRODUCTION

There is significant debate surrounding the ideal jurisprudential treatment of parody in trademark law. Some scholars resolve the issue by referencing a copyright case and its progeny in the trademark space.¹ Others focus their discussion on fair use protection in cases of trademark dilution.² Still others caution against analyzing protection for parody and satire as distinct issues.³ All of these angles are necessary in this conversation, but there is a dearth of discussion surrounding the classification of comedy and its value in courts' analysis of parody and trademark claims. This Note outlines why this may be and explores how a different approach to understanding comedy may be a more comprehensive pathway to analyzing trademark claims that involve satire or parody. One example offered is Dan O'Shannon's theory of the comedic event, an event-based theory about why and how jokes work. This Note explores how this theory can offer guidance to courts on these issues, especially because it focuses on the presentation and reception of comedic information.⁴

Rather than looking at how comedians describe their own art, how scholars explore its significance, or how audiences receive it, court decisions often focus on a judicial definition separating parody from satire.⁵ In trademark law, determination of whether such parody is protected hinges on its "success," as defined by courts' definition of a successful parody.⁶ Although this approach seems to offer protection, it has the unfortunate effect of positioning judges as comedy critics. Judges have difficulty

1. See, e.g., William McGeeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 WASH. L. REV. 713, 715-16 (2015); The Challenge of Determining if a Parody is Likely to Cause Confusion. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:154 (5th ed. 2024).

2. See, e.g., Deborah J. Kemp et al., *Parody in Trademark Law: Dumb Starbucks Makes Trademark Law Look Dumb*, 14 J. MARSHALL REV. INTELL. PROP. L. 143, 155 (2015).

3. See, e.g., Aaron Jaroff, *Big Boi, Barbie, Dr. Seuss, and the King: Expanding the Constitutional Protections for the Satirical Use of Famous Trademarks*, 57 AM. U. L. REV. 641, 660 (2008).

4. See DAN O'SHANNON, *WHAT ARE YOU LAUGHING AT? A COMPREHENSIVE GUIDE TO THE COMEDIC EVENT* (2012). O'Shannon was a writer/producer of *Cheers*, *Fraiser*, and *Modern Family*. *Id.* at xii. In his book, he posits an event-based theory of how and why jokes work, focusing on the presentation and reception of comedic information. *Id.* at 7.

5. See Jaroff, *supra* note 3, at 660 (explaining how the current approach to parody and satire in trademark law often leaves works designated as satire unprotected).

6. *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007) (quoting *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir.2001)) ("For trademark purposes, '[a] "parody" is defined as a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner'... 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"). The opinion goes on to use this definition to determine if a parody is successful.

navigating this role, and it is often out of step with the intent and spirit of trademark protection.⁷ Additionally, parody's current analytic framework may favor well-known comics while providing sparse security for those lacking similar reputation. For reasons discussed in this Note, courts are not likely to develop and apply a straightforward test to protect parody. It is important, however, that judges recognize and think about the aesthetic judgments inherent in protecting parody and, indeed, all forms of comedy.

This Note posits that comedic theory in general, and the comedic event theory in particular, can be used to increase judicial awareness that aesthetic judgments are inherent in parody cases. An approach which recognizes, rather than ignores, comedic theory may align more closely with the principles of trademark law than the current approach. Part I provides a primer on trademark law. Part II explores how judicial decisions in copyright have defined parody and distinguished it from satire, and how this definition has been subsequently applied in trademark cases. Part III identifies some issues with applying a copyright test to trademarks. Specifically, it demonstrates the insufficiency of applying the parody/satire distinction developed in copyright in the trademark context, and the problems of the additional "success" requirement for parody protection under trademark law. Part IV explores why this method falls short in practice. It also proposes that a deeper understanding of the aesthetic judgments inherent in judicial decisions related to comedy is both important and helpful by using two examples: Bad Spaniels and Dumb Starbucks. Additionally, it explains how current approaches prefer established comedic voices over those of less established comedic reputation. Part V examines how failing to recognize judicial aesthetic judgments being made may lead to harsher restrictions on speech. It also provides background on how comedians and scholars alike have developed comedic theory and an understanding of comedy more broadly. Part VI argues that examinations of the mechanics of jokes, such as through comedic event theory, can aid in the analysis of comedy's function within trademark cases.⁸ Finally, Part VII examines how the law itself might change to be more encouraging of free expression.

7. BARTON BEEBE, TRADEMARK LAW: AN OPEN-ACCESS CASEBOOK 14 (10th ed. 2023) (explaining that the goals of trademark protection are described as preventing consumer confusion and incentivizing producers to maintain quality of things associated with their mark).

8. See O'SHANNON, *supra* note 4.

I. OVERVIEW OF TRADEMARK LAW AND FEATURES WHICH DISTINGUISH IT FROM COPYRIGHT

Trademarks fall under the umbrella of intellectual property (IP) protection, along with patents and copyrights.⁹ Despite this shared IP classification, each provides different protection for different interests. In broad terms, copyrights safeguard original works of authorship¹⁰ while patents may protect either non-obvious useful inventions (utility patents) or ornamental designs for products (design patents).¹¹ In contrast, trademarks do not protect a product or work itself, but rather the “designations of commercial source.”¹² As such, a trademark is “a word, name, symbol or device used in commerce in connection with goods or services to indicate the source of those goods or services as distinguished from those of others.”¹³ While the patent or copyright protects the seller’s right to their creation, the trademark protects the seller’s ability to distinguish themselves from other sellers.¹⁴

The basic requirements for obtaining a trademark are that the mark distinctively identifies something’s source, that the mark is used in commerce, and that the mark *not* be useful.¹⁵ While a creation may qualify for multiple protections (e.g., as something protected by copyright being used in commerce as a trademark), the protections each area of intellectual property provides remain distinct.¹⁶ In addition to these requirements, there are underlying theories that guide each form of intellectual property and inform how they function. Patents and copyright find their basis in the Constitution’s Intellectual Property Clause, which allows Congress to issue such time-limited protections to “promote the Progress of Science and useful Arts.”¹⁷ When patents and copyrights expire, the protected ideas and

9. BEEBE, *supra* note 7, at 17-20.

10. *Id.* at 20.

11. *Id.*

12. *Id.*

13. 1 GILSON ON TRADEMARKS § 1.05[1] (2023).

14. *See, e.g.*, 15 U.S.C. § 1051(a)(1)-(3)(D) (prescribing the Lanham Act, which allows for registration of a mark used in commerce; requiring verifier to complete information related to uses by others of same or similar marks); 17 U.S.C. § 102 (explaining that copyright protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” and listing some such works); 35 U.S.C. § 101 (allowing the inventor or discoverer of “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof” to obtain patent protection).

15. BEEBE, *supra* note 7, at 20.

16. *Id.* at 18.

17. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

works enter the public domain, allowing others to use them freely.¹⁸ This system balances an innovator's interest with that of society's interest. On the one hand, the system encourages innovation and creativity by allowing creators to benefit from their work. On the other hand, the system seeks to benefit society by allowing previous work to be built upon.¹⁹

By contrast, trademarks do not protect the product itself, but the means of designating the source of a good or service.²⁰ Trademarks find their basis in the Commerce Clause,²¹ and "use in commerce" is a prerequisite for obtaining a federal trademark registration.²² Trademarks protect marks to designate the source of goods and services in commerce, but the mark itself is not in the good or service being sold.²³ Trademarks protect the goodwill acquired by a producer of goods or services.²⁴ The theory behind providing such protections also differs from the theory undergirding patents and copyright. Current views of the purposes of trademarks include that they: "(1) minimize consumer search costs, and (2) provide incentives to producers to produce consistent levels of product quality."²⁵ Trademark law encourages trademark owners both to use their marks consistently and to not abandon them.²⁶ The law also encourages mark holders to enforce their marks and use them in such a way that they do not become generic terms.²⁷ Because trademarks are tied to use in commerce and their ability to designate the source of the good, mark holders risk losing protection for their mark if it is found to have been abandoned (the mark is no longer used) or become generic (the mark is a term for an entire class of product rather

18. BEEBE, *supra* note 7, at 17-18.

19. *Id.* at 18.

20. The Lanham Act contemplates special marks for the providers of services. 15 U.S.C. §§ 1051-1053, 1127. Technically, services should be protected by service marks, which both identify and distinguish the provider of a service from others who provide it. U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1301 (2022 ed.). However, as the distinction is immaterial for this Note, I use the term "trademarks" to refer both to trademarks and service marks. For a detailed analysis on the history and distinction between trademarks and service marks, see Peter J. Karol, *Affixing the Service Mark: Reconsidering the Rise of an Oxymoron*, 31 CARDOZO ARTS & ENT. L. J. 357 (2013).

21. BEEBE, *supra* note 7, at 20.

22. *Id.* at 214-15.

23. BEEBE, *supra* note 7, at 65 (quoting *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 118 (1938) ("[T]o be a valid trademark, a mark 'must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.'")).

24. BEEBE, *supra* note 7, at 14.

25. *Id.*

26. GILSON, *supra* note 13, at § 3.10[3] (explaining marks must be valid and in use; because trademarks are tied to use and distinctiveness, protection can be lost if an owner is found to have "abandoned" the mark); see also BEEBE, *supra* note 7, at 49-50 (noting marks which become the name for a kind of product itself rather than simply the designation of the source of one manufacturer of such a product can be found generic and therefore canceled).

27. GILSON, *supra* note 13, at § 3.10[3].

than designating a version from a particular source).²⁸ Thus, mark owners may have valid concerns about policing their marks and protecting them from comedic exploitation—a plaintiff’s lack of a funny bone is not the impetus for all cases.

When mark holders enforce their trademarks, they have two main avenues: claims of trademark infringement and claims of trademark dilution.

A. Infringement

The unauthorized use of another’s exact mark (or a similar mark) may result in a trademark infringement claim. For an infringement claim to be successful, the court must find that there is a likelihood of consumer confusion regarding the source of the goods or services due to the similar form or use of the marks.²⁹ This is a highly fact-specific inquiry, and courts may consider and weigh a variety of factors in determining whether confusion is likely.³⁰ The actual factors and weight accorded to them vary by jurisdiction, but similar factors include: the intent of the second user (i.e., whether they intended to confuse consumers or profit off the goodwill of another), the degree of similarity of the marks (sight, sound, appearance, etc.), the amount of care consumers are likely to use when making their purchases, and the similarity between the goods using the mark.³¹

B. Dilution

Certain trademark owners can also enforce their marks through trademark dilution claims. Such claims are only available for famous marks and courts essentially ask whether the mark owner can argue that a secondary user is utilizing their mark (or a similar one) in a way that damages the original owner’s trademark interests.³² This controversial protection allows the owners of famous marks to bring an action against use by others which “blurs” or “tarnishes” their brand identity, even if this use is not likely to cause consumer confusion.³³ The Trademark Dilution Revision Act of 2006 (TDRA) made several changes to dilution law, including clarifying that a plaintiff need only show a likelihood of dilution,

28. *Id.*

29. *Id.* at § 5.01[1] (noting the important question is not whether such confusion is certain to occur or has occurred but that such confusion is likely).

30. BEEBE, *supra* note 7, at 338.

31. *Id.*

32. Kemp et al., *supra* note 2, at 155.

33. *Id.*

rather than actual dilution.³⁴ The update also introduced a defense for parody, but only when the mark at issue in the dilution claim is not being used as the mark of the junior user.³⁵ Therefore, parodists could face trademark issues even when such use would not qualify as infringement or actual dilution.³⁶

C. Key Differences Between Copyright and Trademark Analysis

Though both trademark and copyright law allow protection via claims of infringement, the method of inquiry differs significantly between the two areas of law. Unlike trademark infringement, courts do not engage in a likelihood of confusion analysis for copyright infringement.³⁷ Rather, copyright infringement requires showing both that the plaintiff has a valid copyright and that a subsequent user has copied expression protected under that copyright.³⁸ Demonstrating that protected expression has been copied requires proving both that copying occurred (copying in fact) and that the parts copied were protected expression.³⁹ To determine copying absent an admission, courts often employ a substantial similarity standard, though circuits differ in their definition and application of this standard.⁴⁰

The fair use defense to copyright infringement is broader than that of trademark law. In trademark law, fair use is limited to descriptive fair use and nominative fair use.⁴¹ Descriptive fair use occurs when a mark held by one party is also used by another party to describe their own products. For example: “Brand XTM presents our quietest mower ever,” might be descriptive fair use even though someone else has the mark QuietestMowerTM, because the other sellers need to use the terms “quietest” and “mower,” not as a mark, but to describe their own product.⁴² Nominative fair use applies when a secondary party uses the mark of an owner to reference the product to which the mark is affixed: “Brand XTM mows 35% better than QuietestMowerTM.”⁴³ Although there are many ways that courts may take parody into account when assessing likelihood of

34. *Id.* at 152-57.

35. *Id.* at 158-159 (arguing that because the TDRA allows parody and fair use to be defenses so long as the senior mark is not being used by the junior user as their own mark, courts may be less likely to allow defenses for parodies which target a brand).

36. *See generally id.*, for further discussion in the ways that the TDRA may impact the protection for brand parody.

37. PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 9.1 (3d ed. 2023).

38. *Id.*

39. *Id.*

40. *Id.* at § 9.1.1.

41. BEEBE, *supra* note 7, at 519.

42. *Id.* at 695.

43. *Id.* at 539.

confusion, there is not a specific fair use defense for parody in trademark infringement cases.⁴⁴

II. PARODY VS. SATIRE: TRADEMARK AND COPYRIGHT DISTINCTIONS

Trademark courts have often distinguished between satire and parody when assessing the protectability of comedic works from trademark infringement claims.⁴⁵ Despite the key differences between copyright and trademark law, this parody/satire analysis finds its footing in the copyright case *Campbell v. Acuff-Rose Music, Inc.*⁴⁶

In *Campbell*, the Supreme Court examined whether the rap group 2 Live Crew's song "Pretty Woman" infringed on Roy Orbison's song "Oh Pretty Woman."⁴⁷ 2 Live Crew had taken Orbison's original version and changed lyrics and other aspects of the song.⁴⁸ For example, Orbison's version goes: "Pretty woman, walking down the street, pretty woman the kind I like to meet."⁴⁹ The 2 Live Crew version goes: "Big Hairy Woman, you need to shave that stuff, Big Hairy Woman, you know I bet it's tough" among other lyrical changes.⁵⁰ Justice Souter, writing for the majority, explained that although 2 Live Crew's version of the song would otherwise have infringed under copyright law,⁵¹ fair use under the Copyright Act of 1976 protected it because it criticized and commented on the Roy Orbison's original piece.⁵² Justice Souter also emphasized that the correct analysis was not a bright-line rule, but a case-by-case approach.⁵³ He then applied the four statutory factors of fair use under the Copyright Act, explaining that they must be weighed together.⁵⁴ The four factors are (1) the purpose and character of the use (including whether the purpose is commercial or educational),⁵⁵ (2) the "nature of the copyrighted work,"⁵⁶ (3) the "amount and substantiality of the portion used in relation to the copyrighted work as a whole,"⁵⁷ and (4)

44. David A. Simon, *The Confusion Trap: Rethinking Parody in Trademark Law*, 88 WASH. L. REV. 1021, 1029 (2013).

45. *Id.* at 1024.

46. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

47. *Id.* at 572.

48. *Id.* at 573-74.

49. ROY ORBISON, OH, PRETTY WOMAN (Monument 1964).

50. 2 LIVE CREW, *Pretty Woman*, on AS CLEAN AS THEY WANNA BE (Luke Records 1989).

51. *Campbell*, 510 U.S. at 574.

52. *Id.* at 594.

53. *Id.* at 577.

54. *Id.* at 577-78.

55. *Id.* at 577 (quoting 17 U.S.C. § 107 (1988 ed. & Supp. IV)).

56. *Id.*

57. *Id.* at 574.

the “effect of the use upon the potential market for or value of the copyrighted work.”⁵⁸

In analyzing the first factor—the purpose and character of the use—Justice Souter distinguished between satire and parody to explain why 2 Live Crew’s song was fair use.⁵⁹ Souter explained that the use of a copyrighted work has a different justification in parody than in satire. Namely, parody must mimic an original work to be effective whereas satire “can stand on its own two feet and so requires justification for the very act of borrowing.”⁶⁰ In Justice Souter’s view, 2 Live Crew’s Song was parody rather than satire.

Justice Souter’s definitional distinction draws from the Greek origin of the word parody (“a song sung alongside another”)⁶¹ and dictionary definitions.⁶² He noted that in copyright, “the nub of the definitions, and the 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.”⁶³ *Campbell* was a significant case for copyright law; it protected parodists’ right to borrow to create their art. This became an important touchstone for fair use of copyrighted material.⁶⁴ However, Justice Souter’s effort to distinguish between satire and parody in a single sentence of the case, which was focused on allowing parodists to borrow material, has since become a threshold issue for whether expression is protected, both in trademark and copyright cases.⁶⁵

A. *The Satire and Parody Distinction in Trademark Cases*

The copyright law that has developed since *Campbell* that draws a dividing line of permissibility between parody and satire (“parody/satire distinction”) adds to the difficulty of navigating comedic use in trademark cases. Yet this issue has received little coverage, allowing satire and other forms of comedy which do not fit the parody definition to fall through the cracks. In his article, *The Imaginary Trademark Parody Crisis (and the Real One)*, William McGeeveran argues that post-*Campbell* concerns about the

58. *Id.*

59. *Id.* at 579, 584.

60. *Id.* at 581.

61. *Id.* at 580 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1440 (6th Cir. 1992) (Nelson, J., dissenting)).

62. *Id.*

63. *Id.*

64. Simon, *supra* note 44, at 1025.

65. Jaroff, *supra* note 3, at 649.

mistreatment of parody in trademark courts are overstated, but he does not fully acknowledge the wider impacts of the parody/satire distinction.⁶⁶ He highlights that trademark courts have increasingly ruled for parodists in cases against mark holders.⁶⁷ First, he explains that many secondary sources ignore changing judicial trends and cite pre-*Campbell* cases.⁶⁸ Where there are losses for those claiming to be parodists, he notes there is no consistent reason for such outcomes, and avers that sometimes the losses may be justified.⁶⁹

McGeveran warns that this misconception that trademark law disfavors parodists dissuades them from pursuing claims they might otherwise win.⁷⁰ He suggests that the real crisis for parodists actually comes from threats of litigation. Specifically, mark holders, aided by this misunderstanding of legal trends among lawyers and scholars, can intimidate parodists with threats of litigation, long before a case ever reaches a judge.⁷¹ Yet McGeveran's analysis does not fully address the aesthetic challenges posed by the parody/satire distinction that evolved from *Campbell*. He explains that the *Campbell* opinion does not draw a hard line distinction between satire and parody, rather: "the Court opines that a defendant's interest in using protected intellectual property (IP) diminishes accordingly (if it does not vanish) and requires justification."⁷² McGeveran argues that "*Campbell* does not create any special doctrinal treatment for parody, however; it simply analyzes the broadly applicable four-factor test for copyright fair use with sensitivity to a parody fact pattern."⁷³ This interpretation aligns neatly with Justice Souter's intent in *Campbell*, which cautions against courts judging the quality of art.⁷⁴ However, a definitional distinction nevertheless persists. McGeveran observes that "[l]ower courts have not always been so sensitive and have sometimes been clumsy in applying the 'parody' label."⁷⁵ He also acknowledges that, while the *Campbell* opinion may have avoided creating an "inflexible dichotomy" between parody and satire, "any identification of parody nonetheless presents interpretive problems that courts must resolve at the outset of the analysis."⁷⁶ Therein lies part of the issue. Determining this question at the outset is easier said than done and

66. McGeveran, *supra* note 1 at 715-16.

67. *Id.*

68. *Id.* at 728-30.

69. *Id.* at 733-36.

70. *Id.* at 744.

71. *Id.* at 742-45.

72. *Id.* at 722.

73. *Id.*

74. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-583 (1994).

75. McGeveran, *supra* note 66, at 722.

76. *Id.*

requires courts to make judgments about the amount of justification needed for a work to be a parody.

III. APPLYING A COPYRIGHT TEST TO TRADEMARK LAW: APPROACHES AND PROBLEMS

Justice Souter's distinction between satire and parody is a copyright analysis. The amount of a creative work another takes and uses is important for determining fair use under copyright law. This distinction is not without its controversy in copyright cases, and its application in trademark cases raises additional challenges. Despite the differences in legal theory between trademarks and copyrights, the *Campbell* parody/satire distinction has also found its way into trademark infringement cases.⁷⁷

The application of the parody/satire distinction has its share of controversy even within copyright law. Copyright courts deal directly with expression, and worries about judges becoming artistic critics led to the creation of the Bleistein principle of aesthetic nondiscrimination, which aims to prevent judges from determining copyright existence based on a work's aesthetic merit.⁷⁸ David Shipley avers that within copyright law, the parody/satire determination is often in tension with this principle. He argues that the distinction is too dependent on judges' personal opinions, arguing that the "[o]utcomes of cases should not turn on a judge's determination of whether a challenged spoof or take-off does or does not comment on the original because the parody/satire distinction is squishy and because of the considerable risk of contravening Bleistein's principle of aesthetic nondiscrimination."⁷⁹ Nevertheless, the use of the *Campbell* parody/satire distinction in a recent Supreme Court copyright decision affirms that definitional distinction in *Campbell* is still impactful in copyright jurisprudence.⁸⁰

In trademark cases, the danger of this parody/satire distinction may be that, while designed to highlight why parody receives protection within a copyright framework, it has evolved into more of a definitional threshold and

77. *Id.*

78. 1 Nimmer on Copyright § 2.01 (2024).

79. David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright*, 98 KY. L.J. 517, 564 (2010). The Bleistein principle refers to the principle that a court should not determine whether a copyright exists based on the work's aesthetic value. *Id.*

80. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 531 (2023) (using the parody/satire distinction in a copyright case as an example of when a use may be reasonably justified to achieve a different purpose).

less of a guide for a fact-specific inquiry.⁸¹ As a result, the more that this distinction is used without a fact-specific inquiry, the more courts seem to accept it as a judicial definition of a type of work itself. Misuse of a carefully reasoned example highlighting the importance of case-by-case analysis may distort that call into a one-sentence definitional basket with outsized and unintended dispositive effect.

In his article, *The Confusion Trap: Rethinking Parody in Trademark Law*, David A. Simon explains that the parody inquiry is significantly different in copyright and trademark cases.⁸² In copyright, parody functions as a fair use defense *after* infringement has already been established. In trademark cases, parody often factors into the initial determination of *whether infringement occurred*.⁸³

Fair use in copyright differs from fair use in trademarks. Copyright fair use analysis asks whether the use of another's work, which is otherwise infringing copyright, is allowed under fair use.⁸⁴ Recall that trademark infringement is determined under a likelihood of confusion analysis,⁸⁵ and trademark dilution actions are available for holders of famous marks who argue that alleged secondary use has a likelihood of dilution (either by tarnishing or blurring their marks)—even if there is no likelihood of confusion.⁸⁶ Trademark fair use is limited to nominative fair use (using a mark to refer to the product or producer the mark represents) and descriptive fair use (using a mark, not as a mark, but to describe one's own product).⁸⁷

Simon explains that courts do not uniformly approach parody in trademark cases. Some courts consider parody a factor in their likelihood of confusion analysis,⁸⁸ balancing it with the First Amendment,⁸⁹ or view parodic works as nominative fair use, naming the mark being parodied.⁹⁰ Still others, he explains, simply apply the confusion test as they would in

81. See e.g., *Elvis Presley Enters. v. Capece*, 141 F.3d 188, 199 (5th Cir. 1998) (citing Souter's parody definition as relevant in trademark context and using it for analysis, but not discussing whether satire might be justified in copying); *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 812 (2d Cir. 1999) (analyzing a motorcycle's allegedly parodic mark which was similar to Harley-Davidson under parody defense built off of *Campbell*, but not discussing an analysis of satire); *Cliff's Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp.*, 886 F.2d 490, 496 (2d Cir. 1989) (finding lower court erred in concluding on the record there was a high likelihood of confusion for 'Spy Notes' which claimed to be a satire of 'Cliff's notes' on the cover, but discussing them as parodies and noting that Spy Notes contended at oral arguments that in this instance 'satire' was the same as 'parody').

82. Simon, *supra* note 44, at 1026.

83. *Id.*

84. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994).

85. GILSON, *supra* note 13, at § 5.01[1].

86. Kemp et al., *supra* note 2, at 155.

87. BEEBE, *supra* note 7, at 519.

88. Simon, *supra* note 44, at 1030-31.

89. *Id.* at 1034.

90. *Id.* at 1039.

any other case, regardless of the parody alleged,⁹¹ or examine whether the parodist had other means to express their statement.⁹²

A. An Extra Hurdle in Trademark Cases: the Requirement of “Successful” Parody

In addition to distinguishing parody from satire as copyright courts do, trademark courts often assess whether works which pass this parody threshold are “successful.”⁹³ “Success” in the trademark context is measured by the parody’s ability to convey both that it is referencing the original mark and that it is not the original. “Unsuccessful” parodies, therefore, fail to mock and to differentiate simultaneously.⁹⁴

Simon argues that approaches which simply recast confusion tests without providing protection for speech interests, fall into a “confusion trap” in which valuable speech may be silenced because it could confuse consumers.⁹⁵ Simon explains that having some form of protection that is not grounded in a likelihood of confusion analysis is important because “parody is a type of speech that has value regardless of its potentially confusing nature.”⁹⁶

In theory, the requirement that parodies must be “successful” by not creating consumer confusion makes sense. It attempts to balance free speech concerns with the consumer protection purpose of trademark law. But as Simon’s “confusion trap” demonstrates, in practice, this method is not necessarily an effective evaluation of parody.⁹⁷ The very act of making a joke often means risking confusion for at least some members of an audience. As the parody newspaper *The Onion* noted in an amicus brief to

91. *Id.* at 1036.

92. *Id.* at 1040-41.

93. *See, e.g.,* *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007) (quoting *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001)) (defining parody in the trademark context as “a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner” which “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”).

94. *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1317 (N.D. Ga. 2008) (finding a parody “successful” because it invoked the mark holder while maintaining differentiation and conveying criticism, and using this determination to influence the application of the likelihood of confusion factors); *Louis Vuitton*, 507 F.3d at 261 (finding a parody was “successful” because it “deliberately conjures up” the trade dress of a mark holder while also conveying it was not the mark holder’s product, and using this determination to influence the application of other factors).

95. Simon, *supra* note 44, at 1033-36.

96. *Id.* at 1079-80.

97. *Id.* at 1027. “Parody is supposed to be a doctrine that insulates expressive speech from overzealous trademark owners. If instead it is merely a restated confusion test, then parody protects only so much speech as trademark law traditionally allows.” *Id.*

the Supreme Court, part of what makes a joke effective may be some likelihood of confusion—some jokes need to be told with “a straight face.”⁹⁸ *The Onion* submitted the brief in support of granting certiorari in a case where a man was arrested and prosecuted for parodying local officials on a Facebook page.⁹⁹ *The Onion* argued against the lower court’s assessment that the page wasn’t a joke, in part because the brunt of some humor requires that the joke looks real.¹⁰⁰ This need for telling some jokes “with a straight face” clashes with how courts define parody in trademark cases, where a “successful parody” must evoke the original mark while maintaining differentiation.¹⁰¹ Thus, successful parodies, at least in the eyes of some courts, are those that avoid confusion.¹⁰² All the same, from a comedic standpoint, confusion may happen in parody, and may in fact even be a part of the joke.

There have been some proposals for reconciling this tension. For example, Simon’s proposal to clarify the doctrine is to create a rebuttable presumption that parody is protected.¹⁰³ According to Simon, overcoming this presumption would require showing that the parody appears on “a closely related product or service” that a direct competitor offers for sale.¹⁰⁴ This proposal includes a “*Rogers*-style presumption” to ensure that courts favor speech-protective rules. This refers to the Second Circuit’s “*Rogers* test” which stems from a lawsuit by dancer and actress Ginger Rogers.¹⁰⁵ In that case, Rogers argued that a fictional work featuring dancers like her and

98. Brief for The Onion as Amici Curiae Supporting Petitioner at 3, *Novak v. City of Parma*, 143 S. Ct. 773 (2023) (No. 22-293), *cert. denied*, 143 S. Ct. 773 (2023). *See also* Andrew Cohen, *Peeling Layers: The Onion’s Head Writer Dishes on Satire and the World’s Funniest Amicus Brief*, BERKELEY L. BLOG (Nov. 18, 2022) <https://www.law.berkeley.edu/article/peeling-layers-onion-head-writer-mike-gillis-dishes-on-satire-and-worlds-funniest-amicus-brief/> (speaking with brief author).

99. Cohen, *supra* note 988.

100. Brief for The Onion as Amici Curiae, *supra* note 988, at 3.

101. *See, e.g., Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1317 (N.D. Ga. 2008) (finding a parody successful because it invoked the mark holder while maintaining differentiation and conveying criticism, and using this determination to influence the application of the likelihood of confusion factors); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 261 (4th Cir. 2007) (finding a parody successful because it “deliberately conjures up” the trade dress of a mark holder while also conveying it was not the mark holder’s product, and using this determination to influence the application of other factors).

102. *Louis Vuitton*, 507 F.3d at 261-63.

103. Simon, *supra* note 44, at 1080-81.

104. *Id.* at 1081.

105. *See Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (holding that although not fully insulated from all trademark claims, titles “combin[e] artistic expression and commercial promotion” which requires that the expressive nature of the title receive more protection). In *Rogers*, the court held that in the case of titles using a name, this balance of free speech and trademark protection “will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” *Id.* at 999.

Fred Astaire, titled “Ginger and Fred,” was misleading because it implied she was connected with the project.¹⁰⁶ The Second Circuit held that titles of “artistic works” receive additional protection because they had an expressive element which falls under First Amendment and because there was a low likelihood of confusion.¹⁰⁷

However, in *Jack Daniel’s Properties v. VIP Products LLC*,¹⁰⁸ the Supreme Court held that the *Rogers* test does not protect parodies that use another’s mark as their own, concluding that the likelihood of confusion test is generally sufficient to protect the interest in free speech.¹⁰⁹ This development presents potential issues for Simon’s suggestion of using a *Rogers*-style presumption to escape the confusion trap. Additionally, in dilution claims, where a presumption favoring parody might seem to exist, statutory protection is far less effective for brand parodies,¹¹⁰ which is where this confusion trap is likely to emerge.

Although these developments present challenges to Simon’s solution, they do not alleviate the fundamental issues with applying a copyright-based test, developed without concern for consumer confusion, to the consumer confusion-heavy analysis of trademarks. There remains the risk that trademark law will become a means to silence parody and satire. Additionally, strict adherence to the separation of satire and parody developed for copyright situations threatens to further dampen free expression in a society that is increasingly influenced by brands.¹¹¹

IV. BAD SPANIELS AND DUMB STARBUCKS: TWO EXAMPLES OF PARODY

To understand how parody manifests itself in commerce, and thus the various considerations important to finding solutions to reconcile parody and trademark jurisprudence, I examine two examples. First, the Supreme Court case, *Jack Daniel’s Properties v. VIP Prods. LLC*¹¹² (mentioned above), where a dog toy company sold parody dog toys, and second, “Dumb Starbucks”—an elaborate practical joke/coffee shop/art installation created for the HBO series *Nathan For You*.

106. *See id.*

107. Jaroff, *supra* note 3, at 652.

108. *Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140 (2023).

109. *Id.* at 145, 161.

110. Kemp et al., *supra* note 2, at 180.

111. *See* Jaroff, *supra* note 3, at 680 (arguing that satire of trademarks should be protected; because of the increased presence of trademarks in society, commenting on society may often include such marks).

112. *Jack Daniel’s Props.*, 599 U.S. 140.

A. *Bad Spaniels*

In *Jack Daniel's*, the Supreme Court further enshrined the parody/satire distinction in trademark law and reiterated the need for a parody to be successful.¹¹³ The Court ruled that because the brand being sued, VIP Products—makers of a dog toy mimicking a Jack Daniel's whisky bottle—had used Jack Daniel's mark as its own source identifier, application of the *Rogers* test was improper, regardless of whether the toy expressed a humorous message.¹¹⁴

The toy mimicked the Jack Daniel's brand's black label and square bottle, with a few adjustments.¹¹⁵ Where a normal bottle would read "Jack Daniel's," VIP's read "Bad Spaniels" and featured a picture of a spaniel dog. And where a Jack Daniel's bottle featured the trademark "Old no. 7 Brand Tennessee Sour Mash Whiskey," Bad Spaniel's featured the tagline, "The old no. 2 on Your Tennessee Carpet."¹¹⁶ Neither the name changes nor toilet humor tickled Jack Daniel's funny bone; they demanded VIP stop selling the toy. VIP sought a declaratory judgment that it had not infringed or diluted Jack Daniel's trademarks. Jack Daniel's filed for both dilution by tarnishment—Jack Daniel's did not seem to like the association of its product with "the old No. 2"—and infringement of its trademark.¹¹⁷

Since the Court of Appeals decided the case on the dilution by tarnishment claim, it did not reach the issue of likelihood of confusion that would have been necessary for an infringement analysis.¹¹⁸ The Court of Appeals ruled for VIP, applying the *Rogers* test protection for creative titles, but the Supreme Court rejected its application here.¹¹⁹ The Court held that the *Rogers* test did not apply because VIP used Jack Daniel's mark to identify the source of its own goods, and that claiming parody alone was insufficient to avoid dilution claims.¹²⁰ This case illustrates two key concerns of mark holders: associations with unsavory elements and lack of control over third-party product quality. Yet the Court's holding does not account for the wide range of possibilities related to parody. The Court maintained that the holding still protected public's interest in free expression: "When a mark is used as a mark (except, potentially, in rare

113. *Id.* at 161-62.

114. *Id.* at 157-59.

115. *Id.* at 148-49.

116. *Id.* at 149-50.

117. *Id.* at 151.

118. *Id.* at 144.

119. *Id.*

120. *Id.* at 145.

situations), the likelihood-of-confusion inquiry does enough work to account for the interest in free expression.”¹²¹

As Simon’s concerns about the confusion trap illustrate, situations where likelihood of confusion test proves insufficient in protecting free expression may not actually be so rare, especially in the case of comedy. Such uses may be worthy of protection even if there is a likelihood of confusion. As Christine Haight Farley explains, the Court’s assurance here that trademarks will be protected fails to note the distinction between “successful” and “unsuccessful” parodies: “Caselaw teaches that successful parodies are protected, while unsuccessful parodies are not. In other words, some parodic uses will be unsuccessful under the likelihood of confusion test.”¹²²

B. *Dumb Starbucks*

A different type of brand parody is exemplified by “Dumb Starbucks.” In 2014, a new coffee shop appeared in the Los Angeles neighborhood of Los Feliz.¹²³ It appeared to be a Starbucks from its logo, menu, and design—except for one major difference. Wherever a normal Starbucks would have the word “Starbucks,” this establishment had the words “Dumb Starbucks.”¹²⁴ The store generated buzz before its grand opening. Eventually it was revealed that Nathan Fielder, the host of the Comedy Central comedy docu-reality show, *Nathan For You*, opened the shop as part of the television show.¹²⁵ The general idea of the show *Nathan For You* was that Fielder would use his business degree to work as a consultant and “help” actual small businesses by developing wild strategies and plans; although Fielder delivers these plans with a “straight face,” they often incorporated parody and the absurd.¹²⁶

121. *Id.* at 159.

122. Christine Haight Farley, *Trademark Fair Use Is No Joke*, 42 CARDOZO ARTS & ENT. L.J. 725, 741 (2024).

123. Rory Carroll, ‘Dumb Starbucks’: Comedian Nathan Fielder Reveals He Set Up Parody Store, *GUARDIAN* (Feb. 10, 2014, 9:43 PM), <https://www.theguardian.com/world/2014/feb/10/dumb-starbucks-parody-coffee-store>.

124. Dumb Starbucks, *Dumb Starbucks*, YOUTUBE (Feb. 10, 2014), https://www.youtube.com/watch?v=Bo_deCOd1HU.

125. Carroll, *supra* note 1233.

126. Joshua Alston, *In ‘The Movement,’ Nathan Fielder Continues His Journey Down the Left-Hand Path*, *AV CLUB* (Oct. 30, 2015, 11:00 AM), <https://www.avclub.com/in-the-movement-nathan-fielder-continues-his-journey-1798185634> (explaining Fielder often uses viral celebrity for his show and likening him to the “Michael Scott of small business consultants”). Alston goes on to say: “[s]ay what you will about the soundness of Nathan’s ideas, but it’s impossible to deny his skill at getting attention. He’s the best-worst, worst-best publicist of all time.” *Id.*

Under the conceit of the show, Dumb Starbucks attempted to help a struggling coffee shop take a “shortcut to . . . having brand recognition”¹²⁷ by using parody as a loophole to evade trademark infringement.¹²⁸ The episode was premised on the idea that by calling a copycat store “dumb” it could use otherwise protected intellectual property under the protection of “parody law.”¹²⁹ The original business owner, whom the idea was intended to help, dropped out before the shop was opened, meaning that the original intent to help the business increase sales arguably fell away.¹³⁰ This may have strengthened the argument that the shop was a parody as it was, at that point, fully created for the television show.

As part of the show, Fielder consulted an attorney who advised that establishing a reputation as a parody artist would help protect him.¹³¹ Fielder then worked to establish this “reputation” (although Fielder already had a reputation as a parodist by nature of starring in a Comedy Central show which included giving absurd advice to businesses for entertainment purposes).¹³² Nevertheless, as part of his quest to furnish a “reputation” for this project, Fielder performed parody songs and created a “parody art” installation, lampooning well-known trademarks like Bank of America (Tank of America), TGI Fridays (TGI Farts) and Coca-Cola (a person in a Coca-Cola suit holding a crossbow aimed at a child actor playing dead with a fake arrow in his chest).¹³³ Fielder posited that this installation gave him legal protection to claim that Dumb Starbucks was another art installation. Interestingly, the parody linked the concept of parody to art as well, informing customers that: “Dumb Starbucks needs to be categorized as a work of parody art. So, in the eyes of the law, our ‘coffee shop’ is actually an art gallery and the ‘coffee’ you’re buying is considered the art. But that’s for our lawyers to worry about. All you need to do is enjoy our delicious coffee!”¹³⁴ Dumb Starbucks closed quickly due to issues with the health department, which was seemingly unwilling to forego enforcing health code requirements on the argument that the coffee was art.¹³⁵ Many eventually forgot about the prank/parody/art gallery, and the event has not resulted in a trademark lawsuit. Still, Dumb Starbucks provides a set of facts

127. *Nathan for You: Dumb Starbucks* (Comedy Central television broadcast July 29, 2014).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See Alston, *supra* note 126.

133. *Nathan for You: Dumb Starbucks*, *supra* note 1277.

134. Carroll, *supra* note 1233.

135. *Id.*

demonstrating the interplay between knowing intent to engage trademark law, parody, and satire.

Some courts describe trademark law as finding a balance between protecting consumer goodwill and protecting the “linguistic commons” by protecting access to words that are either used for their common meaning or lack association with the goodwill of a product.¹³⁶ Dumb Starbucks is a unique situation because it contains both a textbook statement of intent to infringe on a trademark while also engaging with parodic defenses as part of a comedy show.

The lack of legal action may be due to the speed with which Dumb Starbucks shut down, or the later reveal of Fielder’s involvement. It was not initially clear that Fielder (a comedian filming a comedy show) was the mastermind behind the shop. Before Fielder revealed that Dumb Starbucks was his project and before the health department shut it down, Starbucks told USA Today that the store was not affiliated with the brand, that Starbucks was “evaluating next steps” and that, “while [Starbucks] appreciate[s] the humor, [the owner of Dumb Starbucks] cannot use our name, which is a protected trademark.”¹³⁷

Dumb Starbucks not only generated significant buzz online but also introduced a novel context for discussing trademark issues. In their article *Parody in Trademark Law: Dumb Starbucks Makes Trademark Law Look Dumb*, law professors Deborah J. Kemp, Lynn M. Forsythe, and Ida M. Jones use Dumb Starbucks as a case study to evaluate trademark law’s complicated relationship with parody. They also examine the unique issues presented by enforcing trademarks through claims of dilution even when use would not qualify as infringement.¹³⁸

For the purposes of their analysis, the authors assume that Fielder was engaging in commerce (although he gave away the coffee at Dumb Starbucks for free).¹³⁹ As such, they assume the protections for non-commercial uses of a mark would not apply to him.¹⁴⁰ Ultimately, they assert that Starbucks was unlikely to have an infringement claim because those flocking to Dumb Starbucks were doing so because they *weren’t* confused, they wanted to experience Dumb Starbucks in particular.¹⁴¹

136. OBX-Stock, Inc. v. Bicast, Inc., 558 F.3d 334, 339 (4th Cir. 2009).

137. Jolie Lee, *Starbucks Responds to Dumb Starbucks in L.A.*, USA TODAY (Feb. 11, 2014, 2:22 AM), <https://www.usatoday.com/story/news/nation-now/2014/02/10/dumb-starbucks-parody-free-coffee/5357597/>.

138. Kemp et al., *supra* note 2, at 159-61.

139. *Id.* at 198 n.9.

140. *Id.*

141. *Id.* at 147-48.

So it may seem the Supreme Court was right in *Bad Spaniels*—the likelihood of confusion test protects parody!¹⁴² However, Kemp Forsythe and Jones contend that even though Fielder may have defended an infringement claim by arguing no likelihood of confusion, he ultimately still would have been vulnerable to a dilution claim by Starbucks.¹⁴³ Although trademark dilution law appears to provide protection for parody, the law of dilution is unclear as to how and to what it applies.¹⁴⁴ They conclude that “trademark law would benefit by an explanation of what parody is in the context of trademark.”¹⁴⁵

V. THE STRUGGLES OF DEFINING COMEDY AND IMPORTANCE OF BEING AWARE OF AESTHETIC JUDGMENTS

Those seeking to reference famous marks must therefore fall on the “parody” side of the “parody/satire” distinction. To avoid trademark infringement, they must also create a “successful parody” that both calls to mind and comments on the famous mark and does not confuse. Even if there is no likelihood of confusion, they must hope that a court finds they fall under parody protection if a famous mark holder brings a dilution claim. Because courts may use the parody/satire distinction and successful parody analysis to determine whether a work is a parody, and because trademark dilution law offers little guidance, it is unclear how, if at all, the parody definition for dilution claims would differ from that of a “successful parody.”

The creation of legal terms of art and legal concepts using words from the wider lexicon is not unusual, as anyone who has had to learn the concept of negligence in a torts class might attest. However, the overlap between judicial terms of art and the language artists and scholars use to describe an art form threatens to place judges in the improper role of categorizing art and determining its effectiveness. Courts, even in the copyright context, usually claim to avoid value-based judgments on the quality of art.¹⁴⁶

When dealing with copyright issues, courts analyze the content and originality of creative works without basing their assessment on perceived

142. *Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140, 159 (2023).

143. Kemp et al., *supra* note 2, at 152-56.

144. *Id.* at 180, 189.

145. *Id.* at 184.

146. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903) (noting concerns with judges determining whether art is of high quality).

quality of the works.¹⁴⁷ Because copyrights apply to the content of works, this tension is predictable and likely inevitable. While courts may claim to avoid such aesthetic judgments, some argue courts should make them more openly and actively embrace aesthetic theories to underpin such judgments.¹⁴⁸ In their article *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, Robert Kirk Walker and Ben Depoorter argue that copyright courts' claim of avoidance while making aesthetic judgments creates confusion and fails to provide clear guidance to artists.¹⁴⁹

In trademark cases, it might seem like courts can implement a doctrine of aesthetic avoidance with more success. After all, the trademarks generally deal not with content but with source designation. However, transplanting copyright rules into trademark law has introduced aesthetic judgments which, at least in the context of trademark law, are arguably less appropriate.¹⁵⁰ Trademark protection involves a restriction on speech. In protecting a mark owner's rights in their trademark, trademark laws limit other users' ability to employ that protected mark. The dual goals of trademark law justify this dynamic: consumer protection and incentivizing brand quality.¹⁵¹

147. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544 (2023) (stating that while "a court should not attempt to evaluate the artistic significance of a particular work," a secondary work's meaning should be considered in the purpose and use prong of a fair use analysis in copyright).

148. Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 347-49 (2015).

149. *Id.* at 349.

150. There are many works debating the implications and flaws of the *Campbell* holding in the copyright arena; however, because the focus of this Note is the impact of the framework as applied to the trademark context, I do not take a strong stance on whether or not the standard is effective for the fair use inquiry in copyright for which it was created. *See, e.g.*, Adriana Collado, *Unfair Use: The Lack of Fair Use Protection for Satire Under § 107 of the Copyright Act*, 9 J. TECH. L. & POL'Y 65 (2004); Annemarie Bridy, *Sheep in Goats' Clothing: Satire and Fair Use After Campbell v. Acuff-Rose Music, Inc.*, 51 J. COPYRIGHT SOC'Y U.S.A. 257 (2004); Daniel Austin Green, *Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire*, 11 CHAP. L. REV. 183 (2007).

151. BEEBE, *supra* note 7, at 14.

However, the narrow definitional divides of the current approach are unclear and problematic. For example, distinguishing parody from satire based on whether the reference is “needed” raises significant issues. Given corporations’ increasing influence in our society and politics, a prohibition on referencing such institutions or products would limit speech in ways that go beyond the typical goals of trademark law.¹⁵² Some courts treat parody as nominative fair use, which provides some protection against overreach by mark owners.¹⁵³ However, this can be restrictive, as nominative fair use requires needing to use a mark in order to identify the product or service and using only so much of another’s mark as needed.¹⁵⁴ This inquiry can therefore easily morph into the analysis undergirding the whole problematic parody/satire distinction in the first place—could the comic have used something else? Did they *need* to reference *this* mark?

The limitations of this inquiry become evident when looking at the ways we might define the many layers of possible jokes in Dumb Starbucks. Depending on the definition used, some may fall under a *Campbell* parody definition, while others might be categorized as satire. For example, the concept of a small business parodying a specific major company with minimal effort could be considered a *Campbell*-style parody if it pokes fun at the company. However, it can also be argued that it is a satire because it comments on society in general. In other words, it didn’t *need* to reference Starbucks; “Dumb Dunkin’” could also have worked for the joke. But at some point, this joke would require the use of *some mark*, even if it works with other possible marks.

Then there is the parody of Starbucks itself, calling everything “Dumb.” Regardless of the humor of the parody on its own, it could be argued that it passes the *Campbell* parody/satire threshold. To parody Starbucks, Starbucks must be mentioned. But there are also deeper considerations at play here, including the public fascination with Dumb Starbucks—even before Fielder was revealed as the proprietor. Is this not also satirical? It

152. See Jaroff, *supra* note 3, at 699-71 (arguing that commenting on modern society often requires reference to trademarks and that satire is speech which is unfairly limited by trademark law’s application of a test which elevates parody); Kemp et al., *supra* note 2, at 179-80 (explaining that the distinction of parody and satire in copyright law “does not seem workable in trademark law and causes defendants and courts to work hard to characterize a work as a parody”).

153. Simon, *supra* note 44, at 1038.

154. *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

[A] commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Id.

may be commentary on the unfair power of virality, or a demonstration of how established chains make it hard for small businesses to practice originality. Some have suggested Fielder was making fun of trademark law¹⁵⁵—but one may also argue that he was poking fun at the way corporations leverage trademark law.¹⁵⁶ What about media speculation that the proprietor was Banksy?¹⁵⁷ Perhaps Dumb Starbucks functions as a piece of performance art that satirizes the concept of art itself.

Simon explains that this analysis based on the relative necessity of the usage of a mark can silence works, and it is ultimately at odds with concepts of free speech.¹⁵⁸ Indeed, comedy and free speech have a long history of interaction within the law, and it may be that this history influences how cases are approached when judges recognize the aesthetic judgements at play.

VI. FREE SPEECH AND AESTHETIC JUDGMENTS—THE USEFULNESS OF COMEDIC THEORY

Conversations of comedy and the law often invoke First Amendment issues. Lenny Bruce, a stand-up comedy icon, may be as famous for his obscenity arrests and legal battles as he is for his comedy, and his legacy is deeply intertwined with free speech.¹⁵⁹ Similarly, George Carlin’s “Seven Dirty Words” bit holds an important place in both legal and comedic history.¹⁶⁰

155. Kemp et al., *supra* note 2, at 148 (asserting that Fielder was more making fun of trademark law than the coffee chain itself).

156. If this was the intention, Starbucks’s response letter would add to the joke. Lee, *supra* note 1377.

157. David Hochman, ‘Dumb Starbucks’ in Los Angeles Tests Parody Law as Coffee Lovers Laugh, *FORBES*, (Feb. 9, 2014, 12:16 PM), <https://www.forbes.com/sites/davidhochman/2014/02/09/fake-starbucks-in-los-angeles-tests-parody-laws-as-coffee-lovers-laugh/?sh=609ee7ab5d99> (describing the buzz surrounding the shop before its real proprietor was revealed and suggesting that it could be well-known street artist Banksy or someone similar).

158. Simon, *supra* note 44, at 1040.

159. Bruce, who passed in 1966, received New York state’s first posthumous pardon in 2003, which then Governor George Pataki referred to as “a declaration of New York’s commitment to upholding the First Amendment.” John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, *N.Y. TIMES* (Dec. 24, 2003), <https://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html>.

160. The comedy bit was famously litigated all the way to the Supreme Court after being played on a radio station. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 774 (1978) (holding that FCC sanctions could be imposed on a radio station which played the bit over the airwaves). The bit itself taught a generation of comedians a new way of thinking about words and context. *See, e.g.*, Timothy Bella, *The ‘7 Dirty Words’ Turn 40, but They’re Still Dirty*, *THE ATLANTIC* (May 24, 2012), <https://www.theatlantic.com/entertainment/archive/2012/05/the-7-dirty-words-turn-40-but-theyre-still-dirty/257374/> (discussing the legal and cultural impacts of the bit 40 years after its release); *GEORGE CARLIN’S AMERICAN DREAM: PART ONE* (HBO 2022).

Because comedy is a form of both expression and speech predicated on prompting a reaction, some concerns related to free speech are necessarily intertwined with discussions of comedy in the law. However, as previously discussed, the First Amendment concerns in trademark decisions are not always as clear. Trademarks inherently restrict certain uses in commerce by those other than the mark holder—and therefore may not be considered as intimately connected with free speech as other issues may be. Haight Farley argues that *Bad Spaniels* suggests that the Supreme Court is comfortable with the idea that trademark law does not conflict with free speech rights, which has allowed the Court to ignore larger questions of how trademark law conflicts with other kinds of speech, such as satire and nominative fair use.¹⁶¹ In *Guilty Pleasures: Comedy and Law in America*, Laura Little explains that the law regulates humor in various ways.¹⁶² Little cautions that when judges are not presented with a “clear” First Amendment issue of prior restraint, they may “unselfconsciously” exert restraint on speech.¹⁶³ Little also explains that courts have become comedy critics in cases where they “indirectly regulat[e] humor.”¹⁶⁴

Trademark parodists face a free speech protection one-two punch. First, trademark cases may be less likely to set off First Amendment alarm bells. Second, because of this legal history, courts may be more likely to be on notice of a free speech issue when faced with a developed bit or performance by a known comedy personality. Indeed, in trademark law, I posit that comedians’ notoriety may help them avoid claims of infringement and dilution. I aver that it is possible that well-known comedians function themselves as a sort of source identifier—audiences grow to expect a certain level of joking from a professional comic like Nathan Fielder.

This notoriety might therefore allow such comics to argue that the likelihood of confusion is reduced. However, this fails to protect instances where those engaging with trademarks in commerce are seen as “less respected” or “real” comedians. This distinction does not escape the heavy issue of identifying the function of comedy in trademark cases, nor does it avoid granting protection to “higher quality” bits. Not every instance of parody will be “Seven Dirty Words,” or even Dumb Starbucks, but that does not mean they are not worth protecting.

161. Farley, *supra* note 1222, at 737. Haight Farley also argues that a focus on parody in trademark hurts wider free speech concerns within trademark jurisprudence. She writes, “The belief that trademark parodies will fare well under existing trademark law has been an impediment for courts to think through how to structure speech protection in trademark law generally.” *Id.*

162. LAURA LITTLE, *GUILTY PLEASURES: COMEDY AND LAW IN AMERICA* 22-23 (2018).

163. *Id.*

164. *Id.*

A. Differing Comedic Theories: Clayton

The theories behind comedy, how it functions, and what its goals are, are varied and often debated. In her book, *Funny How?*, Alex Clayton explores why we laugh and what makes humor effective.¹⁶⁵ Clayton first explores canons of comic theory, which usually fall into three types.¹⁶⁶ The first is the Superiority Theory, which posits that we laugh because we find a conception of ourselves that is in some way better than another.¹⁶⁷ Under this theory, even a pun involves a comparison because we, in getting the pun, are superior to our past selves, who did not understand the joke.¹⁶⁸ Another theory is the Incongruity Theory, which proposes that we laugh because we experience something which does not conform to our expectations.¹⁶⁹ Still another theory, the Relief Theory, explains that we laugh because some sort of energy has been released; this may be anxiety, nervous energy, or the relief from social pressure to act correctly when laughing at a taboo joke.¹⁷⁰

However, Clayton cautions against rigid definitions for all comedy based on these theories, explaining that speaking “with authority about other people’s responses, without consulting them, is to risk presumptuousness.”¹⁷¹ Indeed, for the purposes of jurisprudence, the danger in applying rigid boxes to comedy is that this application would narrow the parody/satire distinction and concept of an “effective parody” into an even more limiting test, rather than aiding judges in creating a jurisprudence flexible enough to allow for a range of comedic expression.

The philosopher Ludwig Wittgenstein proposed that many of the problems that philosophers encounter occur due to their refusal to examine how words are used.¹⁷² There is a similar argument to be made here. I argue that by defining satire and parody as two separate comedic concepts, the courts have created an issue that meaning in the legal context does not reflect the concepts they seek to engage with. When this discrepancy between meaning and use goes unrecognized, the effect of a policy decision based on a perception of artistic value goes unexamined.

165. ALEX CLAYTON, *FUNNY HOW?: SKETCH COMEDY AND THE ART OF HUMOR* 9 (2020).

166. *Id.*

167. *Id.* at 9-10.

168. *Id.*

169. *Id.* at 13.

170. *Id.* at 11-12.

171. *Id.* at 13 (emphasis omitted).

172. Stefan Giesewetter, “Meaning is Use” and Wittgenstein’s Treatment of Philosophical Problems, 1 NORDIC WITTGENSTEIN REV. 3, 69-70 (2014).

One possible solution is a linguistic reframing in which courts simply define permissible comedic copying and impermissible comedic copying. This more clearly describes the use of these terms and would be more likely to place judges and the public on notice of the free speech and policy issues at stake. However, this definition would require a clearer decision of what the law seeks to protect, so it is still helpful to look to comedic theory in exploring this possibility.

Clayton suggests that rather than try to place humor into a rigid frame, we should look at the different possible ways to ask the question, “Why do we laugh?”¹⁷³ Clayton proposes five such “senses” to start with: Causal (how is laughter caused—what stimulated or triggered it?), Motivational (what is the intent we have when we laugh?), Functional (what is the role or advantage of laughing?), Perceptual (why do we as individuals find things funny?), and Aesthetic (how is something funny? What are the elements of a comic object at which we are directing out laughter?).¹⁷⁴

This approach is valuable from a jurisprudential standpoint because it highlights a more use-based understanding of comedy. The appeal of this approach is that it more closely mirrors the actual experiences at play in comedy rather than attempting to fit such experiences into pre-created definitional modes. This helps address a hidden concern with the satire and parody distinction: it does not mirror how comedians do their art.

But the viability of this approach is still concerning for trademark law. This system requires multiple inquiries that would likely be difficult to apply in trademark cases where judges are already balancing multiple factors for likelihood of confusion. Additionally, this bears the risk of being used as a factor test rather than as a way of forming a greater understanding of comedy.

B. Differing Comedic Theories: O’Shannon’s Comedic Event Theory

Dan O’Shannon’s comedic event theory provides a similar use-based definition of comedy which may avoid some of these pitfalls while allowing for a more layered understanding of comedy.¹⁷⁵ O’Shannon, a longtime comedy writer and producer, describes himself as a “comedy detective,” interested in understanding why we laugh and how comedy works.¹⁷⁶

O’Shannon explains: “There is simply no joke or joke-type that always works, nor one that accounts for every laugh or successful comedic event.

173. *Id.*; CLAYTON, *supra* note 1655, at 13.

174. CLAYTON, *supra* note 1655, at 14-15.

175. O’SANNON, *supra* note 4, at xii.

176. *Id.* at xi.

This is not merely a case of people having individual senses of humor.”¹⁷⁷ O’Shannon proposes that comedy occurs in an event structure, which at its simplest structure, occurs when a person receives comedic information and has a response.¹⁷⁸ Receivers of comedy must first recognize the *potential* for material to have comedic effect.¹⁷⁹ O’Shannon explains that whether the comedic information is enjoyed is a secondary matter.¹⁸⁰ This trigger can either be the recognition of incongruity (Dumb Starbucks is a low effort way to go up against a huge company) or by a cognitive or social trigger (“Knock Knock” tells us a joke is beginning, or we can tell sarcasm from inflection).¹⁸¹ Every receiver comes to a comedic event with what O’Shannon describes as “reception factors”—things that change how they receive a joke.¹⁸² For example, people may want to laugh more at a joke told by someone they admire rather than by someone they dislike, or one may be more open to jokes when they are relaxed with friends as opposed to when they are in front of their boss.¹⁸³ Once understood, the joke triggers emotions in the receiver which can either enhance or inhibit their response.¹⁸⁴ Things such as distaste for foul language might inhibit their response, while their feelings about a certain political figure might enhance the receivers’ response.¹⁸⁵ A receiver’s awareness of a joke’s occurrence impacts them.¹⁸⁶ O’Shannon describes these triggers as “aspects of awareness” and explains that “we not only experience the joke, we experience the experience of the joke.”¹⁸⁷

As O’Shannon describes it, the simple process of receiving a joke works as follows: before receiving any comedic information, certain reception factors prime the receiver, such as their health, feelings for the jokester, and so on.¹⁸⁸ The receiver receives information and either the recognition of incongruity or of some cognitive or social information that prepares them to receive potentially funny information triggers the receiver.¹⁸⁹ This information requires cognitive processing, assembly, and understanding by the receiver.¹⁹⁰ Aspects of the receiver’s awareness—including the

177. *Id.* at 23.

178. *Id.* at 7.

179. *Id.* at 25.

180. *Id.*

181. *Id.*

182. *Id.* at 10.

183. *Id.*

184. *Id.* at 11-12.

185. *Id.* at 13.

186. *Id.* at 14.

187. *Id.*

188. *Id.* at 15.

189. *Id.* at 11.

190. *Id.*

enhancers or inhibitors relevant to the situation—inform the receiver’s response.¹⁹¹ Different factors might be dominant in different events or within different people.¹⁹² Within these enhancers and inhibitors, O’Shannon explains that we can find many of the definitional comedic theories—some jokes may induce laughter based on incongruity, while others may function based on identification.¹⁹³

O’Shannon’s form of analysis may be helpful in the trademark analysis of comedy. Rather than imposing an artificial distinction between parody and satire—which Dumb Starbucks shows us might overlap in a comedic piece—it looks at how the piece develops. Consumers are primed with pre-existing information: their knowledge and feelings about Starbucks, their knowledge and feelings about big companies’ use of trademarks, and so on. They receive the comedic information of “Dumb Starbucks.” They are triggered to regard it as funny information, perhaps due to the incongruity of “parodying” Starbucks, simply by saying it is “dumb” and making money off that endeavor by doing essentially the same thing that “dumb” company does.

In line with the consumer protection aspect of trademark protection, such an audience and event focused approach allows the court to consider the audience interacting with a parody, instead of asking whether it is clear to everyone that the parody is critiquing and distinguishing itself from the original mark holder. Rather than creating a bright-line rule about what comedy is permissible or “successful,” I suggest courts may use this reasoning in coordination with their likelihood of confusion test.

As I have noted, a likelihood of confusion test is the inquiry for trademark infringement.¹⁹⁴ The current treatment of parody in the likelihood of confusion analysis is unclear and may be overcritical of speech which may deserve protection. I am not suggesting that this theory tests whether a joke is worth protecting, but rather that understanding comic theory can help courts understand the many factors that may go into creating a comedic event. The theory of the comedic event is helpful in that it helps to account for the many ways that jokes can look, and how and why they may induce different reactions in different people.

Another way the comedic event theory could be a helpful tool in trademark analysis is that it parallels the multifactor approach taken in a

191. *Id.* at 12-14.

192. *Id.* at 15.

193. *Id.*

194. BEEBE, *supra* note 7, at 341. Circuits differ on what specific factors they apply. *Id.*

likelihood of confusion analysis.¹⁹⁵ Much as the comedic event theory is based on understanding audience reaction,¹⁹⁶ likelihood of confusion analysis often tries to reflect consumers' reaction to encountering similar trademarks.¹⁹⁷ The openness and distinction of the comedic event theory allows for an analysis of potential confusion tailored to a specific event, delivery, and audience. Distinguishing parodic and comedic uses of trademarks from bad faith attempts to infringe may always require some level of aesthetic judgment, but comedic event theory helps ask whether audiences perceive a joke, rather than depending on whether a judge finds that it fits within the tight restraints of a "successful parody."¹⁹⁸

A court's likelihood of confusion analysis may include factors that examine the consumers likely to engage with a product and what the presentation of a similar mark would lead them to believe.¹⁹⁹ Similarly, the comedic event theory focuses on factors that shape a receiver's reception and reaction to a piece of comedic information.²⁰⁰ In *Jack Daniel's*, the Supreme Court stated that successful parody requires drawing distinctions such that it is unlikely to generate confusion.²⁰¹ However, this places an effort requirement which both functions as an aesthetic judgment on what makes a parody successful and fails to account for things like Dumb Starbucks, where the low effort criticism is part of what makes the parody effective.

In dilution cases, adjusting the likelihood of confusion test to account for a more accurate understanding of how audiences receive comedic information does not help. Dilution does not require a showing of a

195. Over time, circuits have developed multifactor likelihood of confusion tests, which look at the facts in each specific case. *Id.* at 337-39, 341.

196. O'SHANNON, *supra* note 4, at 15.

197. BEEBE, *supra* note 7, at 341.

198. Multiple courts have held that trademark parodies must be successful by both calling to mind a mark and avoiding confusion. *See e.g.*, *Jack Daniel's Props. v. VIP Prods. LLC*, 599 U.S. 140, 161 (2023); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1317 (N.D. Ga. 2008); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 261 (4th Cir. 2007).

199. Although each circuit has developed its own multifactor test, they have similarities between them, and they often include looking at how consumers react to marks. BEEBE, *supra* note 7, at 341. For example, the Second Circuit's "Polaroid Factors" include looking at the sophistication of buyers of a particular good. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). The Seventh Circuit's "Helene Curtis Factors" include looking at the degree of care customers are likely to exercise and actual confusion. *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977). The Ninth Circuit's "Sleekcraft Factors" look at the "type of goods and the degree of care likely to be exercised by the purchaser." *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).

200. O'SHANNON, *supra* note 4, at 15.

201. *Jack Daniel's Props. v. VIP Prods. LLC*, 599 U.S. 140, 161 (2023) ("[T]o succeed, the parody must also create contrasts, so that its message of ridicule or pointed humor comes clear. And once that is done (*if* that is done), a parody is not often likely to create confusion."). *See also* Kemp et al., *supra* note 2, at 163 ("With good parody there is little or no consumer confusion, so parody was protected as a factor in considering likelihood of confusion, but not as a defense in itself.").

likelihood of confusion.²⁰² However, since parody is a defense to allegations of dilution,²⁰³ a broader understanding of comedy that expands the copyright definition to reflect the likelihood of confusion may also aid in protecting against dilution claims.

While utilizing comedic event theory might not necessarily help courts identify “good” or “bad” art or help them avoid the pressure of aesthetic decisions, it may still provide some room for courts to be clear and honest about the amount of similarity between works that is legally permissible in commerce for the purpose of the joke.

VII. A FINAL SUGGESTION TO PROTECT COMICS—PROTECTION FOR MARK HOLDERS

One argument against broader First Amendment protections is that speech itself is not chilled because those wishing to avoid infringement claims can stray away from use in commerce. Fielder likely could have maintained this claim because he did not charge for coffee at Dumb Starbucks.²⁰⁴ However, it is unclear whether the trademark in his show was a use in commerce. For example, what if Fielder had used clips from the episode to advertise for the show, what about selling ads while the episode aired? Such lines are not always easy to draw.

Additionally, not all people who create this kind of art can afford to do so for free, and the current regime can create instances in which artists may not be able to profit from their own comedic work. For example, hard seltzer manufacturer White Claw benefited from a viral online comedy video by Trevor Wallace where he declares, “Ain’t no laws when you’re drinkin’ Claws!”²⁰⁵ The video helped boost both Wallace’s online profile and White Claw’s sales, but the company stepped in to stop Wallace from selling a shirt with the slogan.²⁰⁶ Wallace refunded those who had bought the shirt, losing out on the ability to profit from people who wanted the shirt because

202. Kemp et al., *supra* note 2, at 152-53.

203. *Id.* at 163.

204. In addition to a parody defense, the dilution statute provides a defense for non-commercial use which can be effective. BEEBE, *supra* note 7, at 592-94. Because Fielder did not take money in exchange for the coffee, he could argue the goods were never sold or transported in commerce. See 15 U.S.C. § 1127 (a mark on goods is deemed to be used in commerce for the purposes of the Lanham act when it is both: “(A) . . . placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce.”).

205. Barry Enderwick, *Learn from White Claw’s Potential Brand Blunder*, MEDIUM, (Sept. 11, 2019), <https://kaizenbarry.medium.com/aint-no-laws-when-you-re-drinkin-claws-kinda-777e1ce79c8a>.

206. *Id.*

of its association with his comedy.²⁰⁷ The company cited concerns about policing its trademark.²⁰⁸

For concerns about dilution, some have suggested that dilution law should be altered to include a rebuttable presumption of “non-likelihood of dilution for any mark appearing to be expressive speech under the First Amendment.”²⁰⁹ As the White Claw incident highlights, it may be helpful to protect free speech from the other side of the law as well. Free speech might be further protected both from actual action and chilling threats if allowing for such free expression will not result in penalties for the mark holder. Perhaps what is ultimately necessary to allow for this kind of speech is some sort of protection for trademark owners against cancellation for abandoning their marks if they choose not to go after uses of their marks in a comedic tone. This adjustment to the law might take some of the pressure off mark holders to squash parodic and satiric uses of their marks but would still let mark owners enforce their mark *if the mark holder believed* this use was infringing and damaging their rights, or if they had a qualifying dilution claim.

CONCLUSION

In sum, the current approach to parody in trademark law fails to properly conceive of the layered aesthetic concerns that operate within the parody context. Furthermore, the distinction between parody and satire is both ineffective as a sorting tool when applied to trademark law and fails to properly reflect the reality of comedy as an art form. At the very least, clarity is required. Does the court require an elemental test for legally protectable parody, or does it look for some implied quality of the forms of expression? Special illumination of the seemingly artificial distinctions on the forms of creativity would go a long way toward outlining the aesthetic judgments at play.

In determining which forms of expression merit protection, courts are indeed making aesthetic judgments about the quality of art, and as a result, they are valuing satire less than parody. The original copyright intention behind this distinction was to examine the reason for copying another's

207. Kate Bernot, *Last Call: Turns Out, There Are Laws When You're Drinkin Claws*, THE TAKEOUT (July 11, 2019, 4:33 PM), <https://thetakeout.com/aint-no-laws-drinkin-white-claws-shirt-cease-desist-1836290580>.

208. Enderwick, *supra* note 2056.

209. Kyle Serilla, “*What's in a Name? A Parody by Any Other Name Would Smell as Sweet:*” *A Dueling Case Study and Comment*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 460, 480 (2017).

work and does not fairly track the likelihood of confusion analysis at issue in trademark infringement cases.

These concerns highlight a need for a trademark-specific understanding of comedy beyond the parody/satire distinction of copyright. Aesthetic theories of comedy may help fill this gap. The theory of the comedic event clarifies this both for the Wittgenstein-ian examination of meaning as use and to inform judges about how comedy functions on multiple levels. The benefits of the comedic event theory here are two-fold. First, it helps to avoid the rigid structures imposed by artificial distinctions like the parody/satire distinction and theories of comedy based on specific ideas of why we laugh. Second, because the comedic event theory focuses on the delivery and receipt of comedic information, it provides a useful parallel with the likelihood of confusion test and may help to avoid confusion traps. It is my hope that comedic theory can aid in the development of a clearer standard for parody protection within trademark law. Clarity will hopefully give comedic expression more leeway.

At the same time, however, issues of inequity and insufficiency are likely to remain in issues of comedy. Well-known, professional comedians are likely to maintain more protection than lesser-known individuals still working non-comedic day jobs. Well-known comedians may themselves function as a source identifier and their status as recognized artists in the field may place a thumb on the scale of protecting speech. Furthermore, they will likely receive more leeway than companies whose main engagement in commerce is not entertainment but selling products, as they are more likely to run into issues of being seen as using another's mark as their own.²¹⁰

Additionally, the very nature of comedy, satire, and parody conflicts with the development of standards or tests in the law. One effective avenue of parody and satire is in pushing boundaries, and legal standards inherently create a status quo. For every rule we develop there will likely be comedy created that walks up to, along, and across such lines.

This should not, however, be the impetus for denying a more transparent process in analyzing comedy in the trademark context. A clearer expression

210. Additionally, well-known creators of comedic material may themselves have their own trademarks, raising questions about how to parody a parodist. *The Onion* itself has numerous trademark registrations, including, THE ONION, Registration No. 6918324 (its name); THE ONION LOGO, Registration No. 2450948 (logo); and THE ONION AMERICA'S FINEST NEWS SOURCE, Registration No. 2450947 (slogan). Ironically, anyone publishing a fake *Onion* article would be infringing on the fake newspaper's trademark. Functionally, the name *The Onion* provides an important indicator that the work at issue is not to be taken very seriously, but as a well-known source of humor, it is understandable that *The Onion* takes steps to protect the brand it has cultivated.

of what judges are doing when they analyze comedy in the trademark context (i.e., making aesthetic judgments) and the many ways one joke may function are more likely to produce a fairer analysis of trademark usage in comedy when comedy overlaps with commerce.