Proceedings of the 4th International Conference on Business and Policy Studies
DOI: 10.54254/2754-1169/167/2025.21177

Trademark Infringement and Dilution Defense in Social Networking Platforms - A Perspective on Trademark Parody

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Abstract: By 2024, active global internet users reached 470 million, with social media emerging as a key commercial platform due to its fast response, wide dissemination, and low cost. However, these advantages also lead to issues like trademark parody, where users imitate well-known brands for entertainment, criticism, or competition, potentially misleading consumers and harming brand reputation. This study explores the legal framework for regulating such behavior and the validity of parody as a defense. It proposes a model to identify and assess trademark parody to qualitatively determine whether the creation belongs to parody and to distinguish between commercial and non-commercial parody. On the basis of commercial parody, the model reviews whether it meets the constituent elements of infringement and dilution, and finally summarizes. This model can effectively define the scope and effectiveness of the defense claim based on trademark parody, fully protect the legitimate rights and interests of trademark owners, and at the same time protect the freedom of expression and creative enthusiasm of creators, thereby providing strong support for the healthy development of social network platforms.

Keywords: Trademark Parody, Infringement, Dilution, Social Media

1. Introduction

As brands expand into cyberspace, social media has become a key marketing tool. On Instagram, according to statistics, brand advertising participation reaches 81%, with a market size of 202.3 billion US dollars and it shows a trend of continuous growth[1]. While major trademarks benefit, small enterprises and independent creators also seek exposure, often leveraging well-known brands, leading to widespread trademark parody. This raises concerns over trademark infringement and trademark dilution. However, existing trademark laws mainly address offline scenarios and struggle to regulate virtual, entertainment-driven online parody. Traditional standards are inadequate for assessing trademark parody in social media.

Therefore, this paper will mainly focus on the specific circumstances and scope of application where trademark parody behavior constitutes a legitimate defense in online media platforms. By analyzing the categories of online media users and combining the judgment reasons of existing trademark parody cases, this paper attempts to construct a basic model for trademark parody defense, thereby providing a reference for the vast majority of cases suspected of online trademark infringement and trademark dilution. At the same time, this paper also hopes to provide new ideas

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DOI: 10.54254/2754-1169/167/2025.21177

for research in related fields and help improve the applicability of trademark law in the era of online media.

2. Social Media and Trademark Parody

Social media facilitates parody while diversifying its forms. In the digital age, clear identification and regulation are crucial to prevent misuse, protect right holders, and maintain economic order.

Social media usage continue to increase, with 59.3% of the global population engaging on at least one platform. In 2023 alone, user numbers grew by 1.9 million (4.2%). According to Sprout Social, brands and trademarks are increasingly using social media channels to attract their audiences and communicate with customers. Among Instagram users, 44% make purchases weekly, and 93% of US marketers plan to use this social platform to sell products [1]. This indicates that the media role of social media in brand marketing is gradually being amplified, becoming an important bridge connecting consumers and trademark owners. At the same time, consumers are also happy to rely on social platforms to receive advertising information, understand popular products, and seek customer service. Social networks have evolved into key hubs for marketing, consumption, and services, strengthening connections between brands and consumers. However, this environment also provides a convenient breeding ground for trademark parody behavior.

The vigorous development of social networks has driven economic benefits but also increased trademark infringement and dilution disputes. In China alone, from January 2019 to October 2020, the 12426 Copyright Monitoring Center monitored original short videos, key works on the copyright protection early warning list of the National Copyright Administration of China, and clips of key films, television, and variety shows. A total of 30.0952 million suspected infringing short videos were found, with a total click volume as high as 2.72 trillion times [2]. On a global scale, the impact is immense. Without strict regulation, such infringements threaten creators' rights, brand protection, and global digital trade. Therefore, how to effectively regulate trademark parody behavior in the network environment and avoid its adverse effects on trademark rights and market order is an urgent problem to be solved.

3. Trademark Parody

3.1. Definition and Requirements

Trademark parody refers to the use of the characteristics of existing trademarks (mostly well-known trademarks) for summarization, integration, and creation, forming a new product with social satirical and humorous qualities [3]. This behavior achieves a certain artistic effect by contrasting the ideal image of the well-known trademark in the public's mind with the creator's subjective impression and the comments, jokes, and satire what they wish to express about the brand or the stereotyped product through the trademark. From the definition of trademark parody, it can be seen that a qualified trademark parody must contain at least three basic elements: For the objective aspect, first, trademark parody is a combination of originality and non-originality. Consumers (or audiences) need to interpret the object of satire from the parody work without confusing the parody trademark with the well-known trademark. Second, the parody trademark must convey a social intention beyond commercial intent, usually political, humorous, or satirical, in line with the so-called "political speech" principle in the US Constitution [4]. For the subjective aspect, the author of trademark parody must show an intention to is concerned that consumers (or audiences) will confuse his "work" with the well-known trademark. This intention and goal of the parodist are the core manifestation of trademark parody.

On this basis, it is able to determine whether an act constitutes trademark parody, providing the most basic defense for subsequent trademark infringement judgments, which facilitates in-depth analysis.

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3.2. The Necessity of Regulating Trademark Parody

Trademark parody balances creative freedom and trademark protection. However, it must be regulated for two main reasons: Firstly, it can cause irreversible reputational damage to well-known trademarks. In *Jack Daniel's vs. LLC Company*, Jack Daniel's company argued that a dog chew toy mimicking its whiskey bottle misled consumers, associating the brand with peg products and altering perceptions of its liquor. The court ruled in favor of Jack Daniel's, highlighting how humor in parody can seriously harm brand reputation [5]. Second, trademark parody increases the "association cost," making it harder for consumers to identify product sources, leading to confusion [6-7]. Trademarks, through years of operation and advertising, have formed unique product associations in the minds of consumers. Trademark parody invades this cognitive space by imitation, and interferes with consumers' purchasing decisions. The "association cost" theory is the direct motivation and theoretical basis for brands to tirelessly develop high-quality products and invest funds in advertising. If trademark parody is allowed to maliciously seize consumers' attention, disrupting the "trademark - product" link established by well-known trademarks, then all their efforts will be in vain. Trademark parodists, with just a slight imitation, destroy the long-term business achievements, which is undoubtedly an unfair competition and cannot be accepted by the market.

In order to effectively determine whether trademark parody can serve as a defense against infringement and dilution, this article refers to the judgment logic of the U.S. federal courts in trademark parody cases to construct a basic cognitive model. The model makes determinations through a "three-tier" approach, specifically identifying through the sequence of "commercial and non-commercial - trademark infringement - trademark dilution."

4. Construction of the Model

4.1. Types of Trademark Parody

The first step in constructing a trademark parody defense model is to distinguish between commercial and non-commercial parody. Non-commercial parody should be equivalent to ordinary speech in daily life and afforded the same level of protection as general freedom of speech. This ensures that trademark right holders cannot misuse their rights to suppress social criticism or interfere with everyday discourse, thereby promoting market competition and safeguarding citizens' freedom of speech. In contrast, commercial parody should adopt a stricter liability exemption determination, with specific criteria to be detailed later in the text.

4.1.1. Commercial Parody and Non-commercial Parody

To accurately distinguish between these two scenarios, this article introduces the legal concept of "commercial act," which refers to business activities conducted by individuals or entities with the primary goal of generating profit. The classification of trademark parody within a specific commercial act depends on its proportion and role in the overall business operation [8]. Based on this, three scenarios emerge: first, a trademark parody that does not appear in a commercial act constitutes non-commercial parody. Second, a commercial act includes a trademark parody, but the parody is merely auxiliary and has no direct connection to the main business operation. Third, product promotion that using trademark parody as a means.

The first and third scenarios are straightforward; however, the second requires careful analysis. Although the parody is not a main component of the commercial activity and may not even highlight the purpose of the commercial entity, it can still attract the attention of a specific consumer group and may even cause confusion. For example, in *L.L.Bean v. Drake Publishers*, although Drake used the parody in its for-profit magazine, the act was not to promote its own products and services by

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leveraging L.L.Bean's trademark. It was merely used as content under the label of "humor" or "spoof," intending to display the author's satire of relevant social phenomena [9]. Therefore, the U.S. court determined that the act was a "non-commercial activity" protected by the First Amendment of the Constitution. The key to determining scenario two lies in the two core criteria proposed by the U.S. Supreme Court in this case: "The parody does not directly target or intend to promote its own products and services" and "Consumer attention cannot be intuitively drawn by the parody work." The former is easy to understand; if a trademark parody is directly used to promote one's own products, then it is no different from the commercial parody in Scenario Three. The latter can be simply understood with Judge Caffrey's argument: "The article and the appellant's trademark did not appear on the front or back cover of the magazine." In summary, if the parody act does not have a direct profit-making intention and does not significantly affect consumers' perception and choice, then scenario two should be identified as non-commercial parody and protected.

4.1.2. Definition of Users Nature

On social networking platforms, the determination of whether trademark parody is commercial or non-commercial also applies the aforementioned criteria but requires a more detailed division in conjunction with the nature of the users. This article posits that the influence generated by trademark parody on video platforms relies on the user's own influence, namely the user's "number of followers." Therefore, the division between commercial and non-commercial trademark parody on video platforms should be assessed based on the category of the user.

This article categorizes users into two types based on influence: "influential users" and "general users," and classifies them in combination with the video platform's standards for user influence employment (such as number of followers, video views, etc.). Specifically, "general users" are usually ordinary members of the public who post videos mainly for entertainment purposes, and their video posting activities are mostly unrelated to commercial behavior, thus the aforementioned criteria can be directly applied. "Influential users," upon analysis, are composed of brand parties and celebrities who have registered on the platform, and their behaviors require further analysis.

The primary purpose of brand parties registering on social platforms is to promote products and enhance brand recognition, and their activities on these platforms exhibit distinct commercial characteristics. Therefore, even if they display content in a teasing manner through parody, as long as it involves the brand marks of competitors and may affect market fair competition, their behavior should be deemed as commercial parody. Especially in the second scenario (where the commercial act only partially includes trademark parody content), in order to prevent brand parties from engaging in unfair competition under the guise of "teasing," their parody behaviors should be strictly restricted. For celebrity users with a large fan base and social influence, although their purposes are not entirely commercial, any evaluation or teasing of a brand can provoke a strong reaction from their fan groups, thereby having a substantive impact on the related brand, such as boycotting a certain brand. This level of influence exceeds that of ordinary users, and a higher duty of care should be set. Therefore, to maintain market order and reduce potential unfair competition, when celebrity users' parody behaviors involve the second scenario, they should be treated the same as brand party users, and their actions should be presumed to be commercial parody.

In summary, the definition of the nature of video platform users is a key factor in assessing the commerciality or non-commerciality of trademark parody. Parody behaviors of general users can be considered as non-commercial expressions, while parody behaviors of influential users (brands and celebrities), especially those in scenario two, should tend to be identified as commercial parody and should be appropriately regulated by law.

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4.2. Trademark Parody Infringement Defense Model

4.2.1. Consumer Confusion Theory

On the basis of determining the behavior is commercial parody, further exploration is to discuss whether it can serve as a defense against trademark infringement. The core of this section's determination lies in the "possibility of consumer confusion," that is, the degree of similarity between the parody trademark used in online platforms or video content and the well-known trademark in reality, whether it is sufficient to cause consumers to be confused when purchasing related products or services.

Based on the analysis of the constituent elements of trademark parody in the previous text, true trademark parody can make consumers aware of its connection with the well-known trademark while also significantly distinguishing the two. Therefore, theoretically, trademark parody should not cause consumer confusion. However, in specific practice, there is almost no such thing as a "perfect trademark parody." If we judge by such an absolute standard, in essence, it completely blocks the path of trademark parody as a defense against infringement, especially in online short videos, where the fragmentary information and the partial absorption of information make it difficult to require users to make rational and correct judgments in the first time.

In light of the aforementioned practical dilemmas, this article suggests that after determining the eligibility of trademark parody, an independent objective criterion should be established to assess the likelihood of confusion for some "quasi-trademark parodies" that are not severe. Referring to *the 2007 Louis Vuitton v. HHD Company* case, this article summarizes the following three criteria for judgment: whether there is similarity in goods or services, whether there is similarity in advertising and sales channels, and whether there is clear evidence of actual consumer confusion [10]. Under the scrutiny of these three criteria, commercial trademark parody can officially serve as a defense against trademark infringement, thereby obtaining a certain legal protection status.

4.2.2. Application of the "Used as a Trademark" Criterion

When the trademark parody reaches a level that causes consumer confusion, it is necessary to further determine whether it meets the "used as a trademark" criterion. If it does not satisfy this standard, it should not be deemed as infringement.

The key to determining "used as a trademark" lies in whether the user of the trademark is the actual beneficiary of the trademark. This means that not all users who use and share the parody trademark can be superficially classified as the subjects of trademark use. Only when there is a subjective intention to profit from the trademark and an objective result of actual benefit can the behavior be deemed as trademark use. Secondly, determining "as a trademark" should be from the consumer's perspective. That is, instead of relying on the user's subjective purpose, the behavior should be analyzed from the perspective of a general rational consumer to see whether the parody trademark is used to indicate the source of its goods. If consumers mistakenly regard the parody trademark as an identifier of the source of goods, it can be considered as "used as a trademark."

In addition to the above two main criteria, other factors should be taken into account comprehensively, such as the user's subjective intention, the nature of the trademark itself, commercial activities, indicative use, and special use situations, to make an overall and structured judgment [11].

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4.3. Trademark Parody Dilution Defense Model

4.3.1. Analysis of Dilution Methods: Tarnishment, Blurring, and Free Riding

Even if the trademark parody doesn't cause confusion, it cannot simply be concluded to be free from trademark dilution. In other words, parody itself is not an absolute defense against dilution. Whether dilution is constituted should be judged from three aspects: tarnishment, blurring, and free riding. However, because free riding is rarely applied in practice, and the element of free riding involves the likelihood of consumer confusion due to the two trademarks, which contradicts commercial parody, this article does not include it in discussion.

Regarding "blurring," *the Federal Trademark Dilution Revision Act of 2006* has established six standards for determination, which can be referenced to supplement the legislative gaps concerning trademark dilution: the degree of similarity between the mark or trade name and the well-known trademark; the extent of inherent or acquired distinctiveness of the well-known trademark; the scope of the trademark owner's substantial exclusive use of the mark; the degree of recognition of the well-known trademark; whether the user of the mark or trade name intends to create an association with the well-known trademark; and any actual association between the mark or trade name and the well-known trademark. The key to the criteria of determination lies in whether the distinctiveness and recognizability of the well-known trademark have been reduced [12]. In contrast, the criteria for determining "tarnishment" are not explicitly defined. In conjunction with the criteria for "blurring," this article posits that the key lies in whether the reputation of the famous trademark has been damaged. However, it should also be recognized that any parody will have a certain degree of impact on the reputation of the trademark. If this alone is used as the basis for judgment, it would effectively prohibit all trademark parody. Therefore, this article advocates for raising the standard for "tarnishment" in such cases, and it is more reasonable to make a comprehensive judgment from two aspects: theoretically, "whether the trademark parody would cause ordinary consumers to refuse to purchase the goods or services," and practically, "whether the trademark parody has caused damage to the turnover."

4.3.2. Scope of Fair Use

Beyond the specific criteria for determination, fair use constitutes another defense. The scope of fair use includes parodies that "do not use others' well-known trademarks as an indication of the source of goods or services," and such parody behavior can serve as a defense against trademark dilution. However, *the Federal Trademark Dilution Revision Act of 2006* limits "not using others' famous trademarks as an indication of the source of goods or services" to only nominative or descriptive uses, without including it as a condition for parody. Therefore, there are two possible interpretations for fair use: first, all parodies, regardless of whether they "use others' well-known trademarks as an indication of the source of goods or services," are considered fair use, which seems to contradict previous case law. Second, an expansive interpretation, where only those parodies that "do not use others' well-known trademarks as an indication of the source of goods or services" are considered fair use, but parodies that can be exempted are not limited to those constituting fair use. Instead, they should be specifically assessed in conjunction with the elements for determining "blurring" or "tarnishment" [13]. The case of Louis Vuitton, heard by the Fourth Circuit Court of Appeals, adopted the second approach mentioned above and can serve as a reference.

5. Conclusion

The initial construction of a judgment model for trademark parody as a defense in online platforms has been completed in the aforementioned text. This model draws on the standards for trademark

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parody defense in the common law jurisdictions, evaluating in a progressive order of "eligible trademark parody-trademark infringement-trademark dilution." It also integrates the concept of "commercial act" from the civil law system, innovating in the initial stage of distinguishing between commercial and non-commercial parody. This is sufficient to address most trademark parody behaviors in the physical domain but still does not meet the needs for resolving infringement and dilution disputes in social networking platforms. Based on this situation, after reviewing numerous online trademark infringement cases, this article believes that the key issue lies in the identification of user nature. Different recognition standards should be given to users with different levels of influence so that users with extensive social influence bear a higher standard of responsibility, thereby maintaining fair competition in both the online and physical markets. Of course, giving different liability standards to civil subjects of equal status in civil law will inevitably lead to an unequal distribution of interests, causing users with greater online influence to bear more burdens for the sake of public interest, which is clearly against the principle of fairness. Based on this, whether to provide certain compensation to the aforementioned subjects whose rights have been impaired or to reduce the amount of compensation on the basis of their liability assumption should be considered in future research. In addition, whether the criteria for judging user influence should be limited to the number of followers and views is also worth considering. Perhaps factors such as the type of browsing users and the main market of the infringed trademark could be included in a comprehensive assessment.

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