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International report - Honey badger don't care – transforming trademark infringement into artistic or expressive works

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African honey badgers became well known in 2011 for their feisty nature. At the peak of their popularity, a multitude of cars were plastered with bumper stickers decorated with such catchphrases as “honey badger don't care”, “honey badger don't give a s***” and other variations on that theme. The impetus behind the now-infamous honey badger is the humorous soundtrack recorded over a National Geographic video about African honey badgers and their prey, titled [The Crazy Nastyass Honey Badger](#), which was written and produced by comedian and writer Christopher Z Gordon.

The video went viral and honey badger catchphrases appeared on clothing, mugs, bumper stickers, posters and greeting cards, among other products. Gordon registered his copyright in the soundtrack, applied to the USPTO to register the catchphrases as trademarks and hired licensing counsel. He began policing third-party use of the catchphrases through various trademark infringement lawsuits, including against the defendants Drape Creative, Inc and Papyrus-Recycled Greetings, Inc. The defendants designed and produced greeting cards, including cards using variations of the honey badger catchphrases.

The US District Court for the Central District of California granted summary judgment for the defendants, holding that their greeting cards were expressive works and applied the *Rogers* test to bar all of Gordon's claims. Gordon appealed to the Ninth Circuit Court of Appeals, which reversed the district court decision and provided a detailed explanation of the *Rogers* test developed in the Second Circuit opinion [Rogers v Grimaldi](#), particularly regarding the ‘artistic relevance’ analysis.

Rogers test with a focus on artistic relevancy

The Ninth Circuit's opinion in [Gordon v Drape Creative, Inc](#) carefully explains how *Rogers* is useful for balancing the competing interests at stake when a trademark owner claims that an expressive work infringes on its trademark rights. The *Rogers* test interprets trademark law to apply only to artistic or expressive works where the public interest in avoiding consumer confusion outweighs the public interest in free expression. *Rogers* usually does not support the application of the Lanham Act, unless the use of the mark does not have any artistic relevance to the underlying work or it explicitly misleads consumers as to the source of the mark or the content of the work.

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Under the *Rogers* test, a defendant has the initial burden of proof to show that its allegedly infringing use is part of an artistic or expressive work protected by the First Amendment. If the defendant is successful, the plaintiff bears a heightened burden to prove that:

- it has a protectable trademark;
- the defendant's use of the mark is likely to cause confusion; and
- the mark satisfies one of *Rogers'* two prongs, that it either:
 - is not artistically relevant to the underlying work; or
 - explicitly misleads consumers as to the source or content of the work.

The standard for artistic relevance is not high; courts recognise that the level of artistic relevance of the mark or other identifying material in the work must merely be above zero. For artistic relevance to be above zero, the mark must relate to the defendant's work and the defendant must add its own artistic expression beyond that which is represented by the mark. This analysis stems from the Sixth Circuit case [*Parks v LaFace Records*](#), regarding the music duo Outkast's use of famous civil rights hero Rosa Parks's name as the title for one of their songs. The artistic relevance analysis does not simply assess whether the mark is relevant to the underlying work, but also examines whether the use of the mark is relevant to the defendant's own artistry. The use of a mark in an expressive work will be artistically relevant if the defendant uses it for its own artistic reasons. The use of a mark is not artistically relevant when a defendant uses it merely to appropriate the goodwill in the mark or for no reason.

Greeting cards

While greeting cards are generally considered expressive works, the Drape Creative defendants produced and sold seven different greeting cards using the honey badger catchphrases, some with more artistic relevance than others. Some examples of Drape Creative greeting cards were summarised by the Ninth Circuit:

- The front of two election cards featured a picture of a honey badger wearing a patriotic hat and read "The election's coming". The inside of one card said "Me and honey badger don't give a \$#%@! Happy Birthday" and the other said "Honey badger and me just don't care. Happy Birthday".
- The front of two birthday cards featured different pictures of a honey badger and stated either "It's your birthday!" or "Honey badger heard it's your birthday". The inside of both cards read "Honey badger don't give a s***".
- The front of two Halloween cards showed a picture of a honey badger next to a jack-o-lantern and stated "Halloween is here". The inside of the cards said either "Honey Badger don't give a \$#%@!" or "Honey Badger don't give a s***".
- A critter card employed a Twitter-style format showing a series of messages from "HoneyBadger@don'tgiveas***". The front stated "Just killed a cobra. Don't give a s***", "Just ate a scorpion. Don't give a s***" and "Rolling in fire ants. Don't give a s***". The inside read "Your birthday's here... I give a s***".

The Ninth Circuit panel did not resolve whether the defendants' use of Gordon's mark was artistically relevant to their cards as a matter of law, as it is a question of fact that a jury must decide. The panel reversed and remanded the case, and instructed the court on remand that:

Defendants' use of the mark is artistically relevant if the mark relates to defendants' work and defendants' added their own artistic expression beyond that represented by the mark. Defendants' use of the mark is not artistically relevant if defendants merely appropriated whatever goodwill consumers associate with the mark without adding their own artistic expression or elements. Defendants' use of the mark is explicitly misleading only if it explicitly misleads consumers into believing that Gordon sponsored or is somehow associated with defendants' cards. Simply using the mark is not enough. There must be something else about the cards that explicitly misleads consumers into believing that Gordon sponsored or is associated with the cards.

Comment

Catchphrases abound – whether spawned by social media, celebrities, sports commentators or politicians, many parties will attempt to exploit such catchphrases for their popularity. When launching an entertainment product, it is best practice to lock down the intellectual assets before launch to reduce the number of lawsuits required to protect the marks and related content.

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