

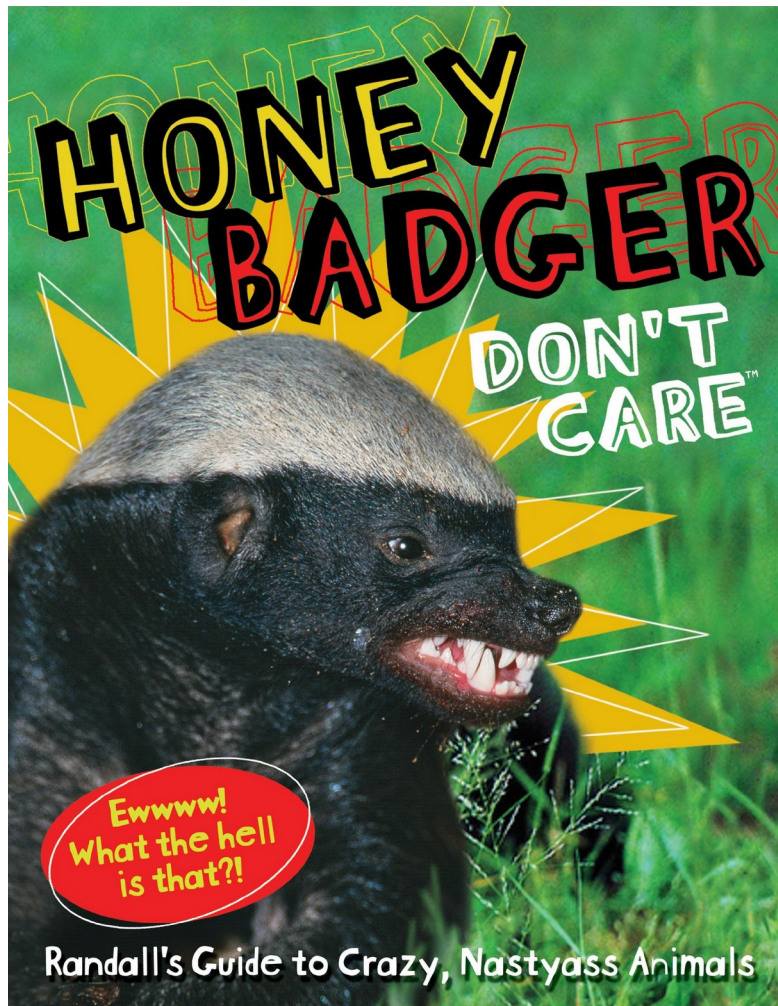
Honey Badger Don't Care About Trademark Infringement, But The Ninth Circuit Does

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by Ben Kappelman

Long ago (by internet standards), a spoof of Discovery Channel-style nature videos went viral. “The Crazy Nastyass Honey Badger” is a three-minute montage of wild honey badgers running across the desert, hunting prey, and, perhaps most disgusting, eating a snake, all set to classical music. The narrator, Christopher Gordon, describes the honey badgers’ activities without resorting to “science-y” language, saying things like “watch it run in slow motion”; “watch it dig, look at that digging,” and “it doesn’t care about being stung by bees, nothing can stop the honey badger when it’s hungry.” Gordon’s patter drove the video to more than 89 million views on YouTube. Gordon repeatedly tells the viewer “honey badger don’t care,” “honey badger don’t give a s- -,” and more vulgar variations.

After the internet-consuming public went nuts for honey badgers, Gordon



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obtained federal trademark registrations for “Honey Badger Don’t Care” for audio books, greeting cards, mugs, clothing, Christmas products, and similar goods. Gordon licensed the mark for honey badger costumes, toys, apparel, posters, and other products. Gordon also licensed the phrase for greeting cards, leading to heartfelt birthday greetings like, “Honey Badger Don’t Care About Your Birthday.” (Gordon never registered “honey badger don’t give a s- -”).

Around the same time, Drape Creative, Inc. and Papyrus-Recycled Greetings, Inc. started developing their own honey-badger themed greeting cards. Their products doubled down on the “honey badger don’t give a s- -” phrase, featuring it on Election Day, birthday, and Halloween cards. Drape Creative’s president drafted the cards. He later testified that he did not recall what inspired his designs and that he had never heard of a video involving a honey badger.

Gordon sued in 2015, alleging trademark infringement under the Lanham Act and other claims. The district court entered summary judgment for the defendants, concluding the First Amendment protected their products. Gordon appealed, and the Ninth Circuit reversed.

The appellate court applied *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which modifies the two-element likelihood of confusion test for trademark infringement claims to protect freedom of expression. Usually, a trademark plaintiff only need prove that it has a valid, protectable mark and that the defendant’s use of the mark is likely to cause confusion. Under *Rogers*, the Lanham Act applies to an expressive work only if a defendant’s use of a protected mark (1) is not artistically relevant to the work, or (2) explicitly misleads consumers as to the source or content of the work. To invoke the *Rogers* test, a defendant must make a threshold showing that its allegedly infringing use is part of an expressive work protected by the First Amendment. The plaintiff must then prove at least one of the *Rogers* criteria in addition to the two Lanham Act elements. The Ninth Circuit easily concluded that Gordon had failed to prove the first *Rogers* criterion—the honey badger phrases used in the greeting cards were the punchlines on which the cards’ humor turned.

The second *Rogers* criterion gave the court pause. In all of its previous decisions applying *Rogers*, the court had held that the First Amendment protected the accused use. The court decided, however, that this case demonstrated *Rogers*’ “outer limits.”

The court sought to clarify the “explicitly mislead” requirement, while ensuring it remained harder to satisfy than the usual likelihood-of-confusion element of a Lanham Act claim. The court held that an affirmative misleading statement of the mark holder’s sponsorship or endorsement it not required to run afoul of the *Rogers* test. But, the court continued, use of a mark alone might explicitly mislead a consumer if consumers would ordinarily identify the source of the product by the mark itself, and the junior use was sufficiently similar to the senior use of the mark to create confusion.

The court contrasted the honey badger cards with earlier works found to be protected by the First Amendment. Those included the song “Barbie Girl” by the Danish band Aqua, a

1997 pop hit that parodied values the songwriter associated with Barbie dolls. (Despite pre-dating YouTube, “Barbie Girl” is vastly more popular than the honey badger video, garnering more than 568 million views.) The court also distinguished the use of a name similar to that of a trademark-protected name for a club in East Los Angeles in the video game Grand Theft Auto: San Andreas. The court said these junior users utilized the marks in different ways than the senior user—no one would think Mattel produced the “Barbie Girl” song, nor would anyone think a sophisticated video game originated from a small Los Angeles club.

The appellate court decided there was a jury question as to whether use of the phrase “honey badger don’t give a s- - -” was explicitly misleading. Defendants’ use of the phrase without other text and evidence that consumers rely on marks inside of cards to identify their source both suggested the explicitly misleading criterion was satisfied. A jury could conclude defendants used the phrase in the same way Gordon did on his greeting cards and added minimal artistic expression, leading to liability. On the other hand, the court noted that the defendants used slight variations on the phrase and included their website on the back of the cards, which could lead a jury to find in their favor.

The case now goes back to the trial court. Absent settlement or a loss on other grounds, one federal jury will be lucky enough to enjoy (or endure) an amusing take on wild honey badgers, their athletic and eating habits, and what it all means for the sale of greeting cards.