Class 21: Expressive Use of Trademarks and the Rogers Test
Class Outline

• Expressive Fair Use
  • For-Profit Parodic Use
  • Rogers Test for artistically relevant use of TM
The Play Pen Gentlemen’s Club in Los Angeles
The “virtual” Pig Pen Club in the Grand Theft Auto San Andreas game
The Play Pen

The Pig Pen
The Play Pen in East Los Angeles (Street View, Google Maps)

1107 South Santa Fe Avenue, Los Angeles, California, United States
Address is approximate
The Pig Pen in East Los Santos (Grand Theft Auto)
“An artistic work’s use of a trademark that otherwise would violate the Lanham Act is not actionable ‘unless the [use of the mark] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless [it] explicitly misleads as to the source or the content of the work.’”
The Rogers Test

[Preliminary inquiry: Do we have an “artistic work”?]

(1) Does the use of the mark have any “artistic relevance” to the work?

   YES

   (2) Does use of the mark explicitly mislead as to source or content of the work

      YES

      Infringing (Assuming P proves L of C)

      NO

   NO

   Non-infringing
IT'S YOUR BIRTHDAY!

HONEY BADGER
DON'T GIVE A SH*T.

I, on the other hand,
love you loads.

Dad XXX
There's a little McDonald's in everyone™
Louis Vuitton v. Haute Diggity Dog

$20

$2000
Parody as a fair use defense to dilution:

LA 43(c)(3)(A)(ii):
“The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection: (A) Any fair use...other than as a designation of source for the person’s own goods and services, including use in connection with...parodying...”
Dilution of Trade Dress

What if these were chewable medicine tablets? Fertilizer pellets?