

Not Just The Gutting of Rogers: A Window Into Modern Trademark Challenges

Graeme Dinwoodie

Chicago-Kent College of Law - Illinois Institute of Technology

The Rogers defense has been an important star in the contemporary constellation of U.S. trademark defenses. Rogers facilitated the unauthorized use of marks in a wide range of expressive works such as movies, books, songs, and video games. In *Jack Daniel's Properties v. VIP Prods.*, the US Supreme Court at first glance appears to imperil certain expressive uses of marks that Rogers had protected from liability. But, especially taken with other recent trademark decisions by the Court, Jack Daniel's also hints at a quite different approach to the structure of defenses (and perhaps to trademark law more generally). In particular, it suggests that trademark law might need to confront more fully the relevance of broader jurisprudential developments. We are in a new judicial era, where judges increasingly indulge the fantasy that a review of incomplete statutory text will alone provide answers to all questions. This is a challenge for U.S. trademark law, which has for 150 years been a common law field overlaid by intermittent statutory interventions. This is not an entirely new dilemma. Nor is it unique to trademark law. In this paper, I use this apparent rethink of Rogers to explore what room remains to develop defenses to a claim of trademark infringement, and more broadly the challenges that the current era presents for fashioning a coherent law of trademark and unfair competition.