



Speaking freely about parody

An Argentine perspective

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Graciela Pérez de Inzaurraga

Agenda

- ✓ Legal framework
 - Constitutional rights
 - Trademark law
 - Civil law
 - Copyright law

- ✓ Parody related cases
 - Parody and trademarks
 - Parody and comparative advertising
 - Parody and copyright/trademark
 - Parody and personal rights

- ✓ Conclusions

Legal framework

Constitutional provisions

- ✓ Art. 14
 - Freedom of speech
 - no previous censorship

- ✓ Art. 17
 - Inviolability of property
 - Copyright as a property
 - Author's exclusive rights thereupon
(for the term foreseen by law)

- ✓ Art. 32
 - Federal Congress shall not pass laws to limit freedom of speech

Legal framework

Trademark law

✓ Art. 4

Exclusive right to use the mark vested on trademark owner

➤ right to oppose registration or use by third parties

✓ Art. 31

Actions against

- Fraudulent imitation of a trademark
- Unauthorized use of a third party's trademark
- Unauthorized use of a fraudulent imitation of a third party's trademark

AR law 22362, December 26, 1980

Legal framework

Civil law

✓ Art. 51

Acknowledgement and respect of dignity of natural person

✓ Art. 52

Right to take action against damages to honor, reputation, image or dignity

✓ Art. 53

Consent required to capture or reproduce a person's image or voice, except:

- in attendance to public function
- scientific, cultural or educational primary interest
 - provided measures to prevent unnecessary damage are taken
- news information

Legal framework

Copyright law

- ✓ Art. 2
Author's property rights include the right to adapt his work
- ✓ Art. 4
Author's right to authorize a third party to adapt or modify his work
 - Rights over authorized derivative work vested on author of such derivative work
- ✓ Art. 25
Rights over adapted, modified or parodied work vested on author of such adaptation, modification or parody, if authorized by owner of original work
- ✓ Art. 26
Works in public domain: rights over adapted, modified or parodied work exclusively vested on author of such adaptation, modification or parody
 - cannot prevent other parties from adapting, modifying or parodying same original work

Parody and trademarks

“Danza Armonizadora” case – scenario



DANZA ARMONIZADORA

Class 41
(all services in the class)

- Tiger: defense, harmony, sense of belonging
- Bird: fantasy, freedom, bonds
- Snake: self esteem, achievement, seduction
- Hippo: pleasure, relax, contact



Alternative therapy to bring emotional and physical balance through movement/dance



VIDEOMATCH



- Popular TV variety show
- Sketch aired Nov. 1997
- “Tiger” and “bird” dances expressly mentioned
- References to “danzas armonizadoras”
- Humorous?/grotesque? dance performed by pseudo-therapist

Parody and trademarks

“Danza Armonizadora” case – decision

- ✓ Parody featured names and dances which the public could associate with services provided by TM owner
 - ✓ There is no use of another’s TM to designate defendant’s services, nor in the context of comparative advertising ➤ descriptive/nominative use
 - ✓ Use of another’s TM for entertainment purposes
 - No matter of public concern
 - No political speech
 - No commentary or criticism
- freedom of speech:
- strict criteria to establish infringement
 - not an absolute right
- ✓ Commercial use: defendant profits from parodying plaintiff’s mark

Merely grotesque or ridicule

- Discredit/denigration of TM
- Not necessary for entertaining

Interferes with informative function of TM
Damages attractive function of TM

*Noverazco, Elida E. v. Television Federal S.A. and Tinelli, Marcelo H
Civ. Comm. Fed. Chamber of Appeals, Section II, September 30, 2004*

Parody and trademarks

“Qué te pasa Clarín” case – scenario



Clarín newspaper
News reporting on
elections for governor
in Catamarca,
Argentina
March 9, 2009



Nestor Kirchner
Political speech
Criticism to media
conglomerates
March 9, 2009



Matias Castañeda, journalist
Domain name and blog
www.quetepasaclarin.com
Opinion and information
March 28, 2009

Parody and trademarks

“Qué te pasa Clarín” case – decision

- ✓ **Unauthorized use of another’s TM and distortion of logo**
- ✓ **Tension between freedom of speech and TM rights**
- ✓ **Limitations to TM owner’s rights**
 - **TM is not used in a distinctive function**
 - **No confusion, unfair advantage, denigration, unfair competition, deceit**
- ✓ **Use of another’s TM relevant to convey a message (citing US Mattel vs. MCA)**
 - **Reflects criticism on the role of media in general and Clarin group in particular**
 - **No risk of association to the TM owner**
 - **No ruling on logo distortion**
- ✓ **Preferential protection to freedom of speech**
 - **Not for profit activity**
 - **Commentary, debate, opinion, criticisms**

Major media group

- 2 million readers a day
- 50% market share in Buenos Aires area

vs.

Blogger (independent journalist)

- 94 entries in 4 months

- **Increased exposure to criticism but better access to means to fight**

Arte Grafico Editorial Argentino S.A. v. Castañeda, Matías
Civ. Comm. Fed. Chamber of Appeals, Section III, February 11, 2014

Parody and comparative advertising

“LeMans” case

Parody of competitor’s advertisement

- no explicit references to competitor’s mark



- ✓ Difficulty to draw a distinction between humor and ridicule or discredit.
- ✓ Humor as a mean to react to competitor’s advertising strategy
 - WINSTON associated to “the American way” but product imported from Uruguay

- no denigration or discredit of competitor’s mark
- no false assertions



commentary
criticism

Fair use

*Japan Tobacco, Inc. and Nobleza Piccardo S.A. v. Massalin Particulares
Civ. Comm. Fed. Chamber of Appeals, Section I, June 14, 2001*

Parody and comparative advertising

“Energizer” case



Parody of
competitor's marks



- ✓ Protection to freedom of speech applies to advertising works
 - provided there is no infringement to TM rights nor unfair competition
- ✓ Use of competitor's TM in comparative advertising may be lawful provided that
 - no discredit or denigration of competitor's TM
- ✓ Injunction granted
 - misleading advertisement: comparison between non homologous products
 - no ruling on parody related issues (disparaging use of competitor's mark)
 - parties settled

*The Gillette Company. v. Energizer Argentina S.A.
Civ. Comm. Fed. Chamber of Appeals, Section I, March 26, 2009*

Parody and trademarks/copyright/trademark “Vicky mouse” conflict



The Walt Disney Company
Intl. entertainment conglomerate
Famous brands

- Family/children target
- Wholesome image

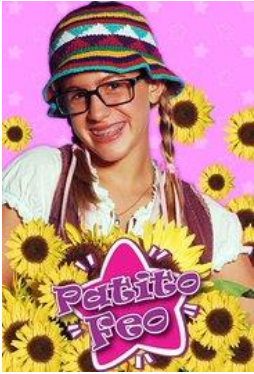
Victoria Xipolitakis
Local starlet
Frequent scandals
Disney's fan
Aired show on internet

- Adult target
- Mild sexual content

Case settled, no litigation
Would the Court have applied Pillsbury v. Milky Way criteria?

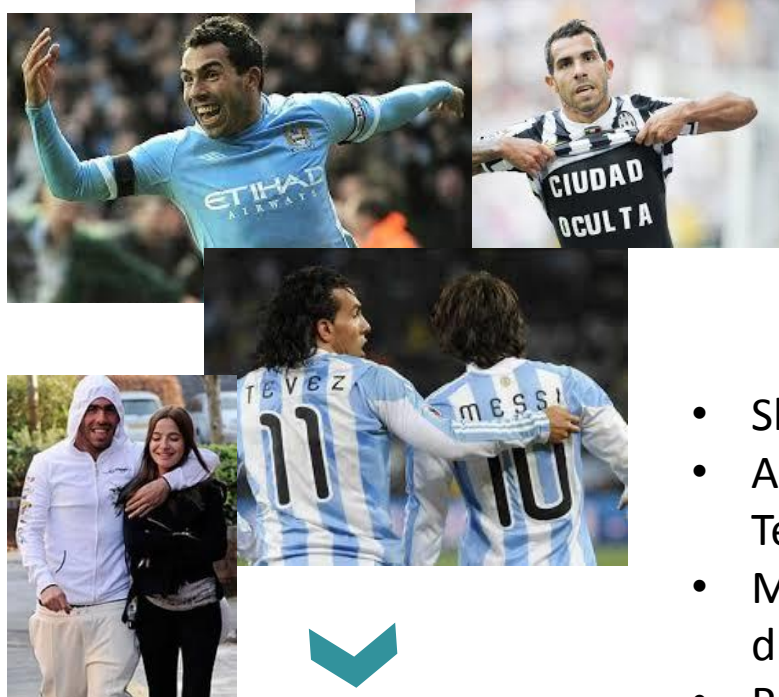
Parody and personal rights

“Carlitos feo” case - scenario



Original work

- Soap opera for teenagers
- Co-starring Brenda Asnicar



Carlos Tevez

- Renowned football player
- Humble upbringing
- Distinctive scar
- Basic education and social skills
- Proud of his humble origins
- Brief affair with Brenda Asnicar



Parody

- Sketch in late show
- Animated dummy resembles Tevez's appearance
- Mimicks Tevez' voice and poor diction
- Portraits Tevez as a coarse and vulgar person


Parody and personal rights

“Carlitos feo” case - decision

- ✓ **Humor is a subjective concept**
 - **may turn into denigration/aggression when making fun of personality flaws, origin, family, upbringing**
 - **damage to dignity, reputation, honor or fame**
- ✓ **Coarse and humiliating acts and language not necessary to accomplish entertainment purpose**
- ✓ **Fictional situation beyond ridicule and humor**
- ✓ **Estoppel/aquiescence does not apply**
 - **Tevez does not hide nor is ashamed of his humble origin and upbringing and occasionally makes fun of himself**
 - **not an excuse for a third party to denigrate him (and the neighbourhood where he grew up)**
- ✓ **Whether damage is willful or not is irrelevant when personal rights are concerned**
- ✓ **Liability applies to all defendants: host, producer, TV channel**

*Tevez, Carlos A. v. Petinatto, Roberto, Portal, Gastón, GP Media S.A. and América TV S.A.
Civ. Chamber of Appeals, Section E, July 13, 2016*

Conclusion

- ✓ Use of another's TM in parody constitutes nominative/descriptive use
 - Unfair (unlawful) if denigrates, discredits, offends, damages reputation or attractive or informative functions of the mark, in particular if
 - commercial use
 - targets competitor
- ✓ Freedom of speech prevails over IP rights if
 - no commercial use
 - comment, information or criticism purpose
- ✓ No clear standards to define noncommercial use
 - use which brings profits  use to propose a commercial transaction
- ✓ No parody defense admissible when damages personal rights (dignity, honor, reputation, fame)
- ✓ Humor or entertainment not an excuse to ridicule, denigrate or discredit
- ✓ Special considerations to the circumstances of each case



Questions are welcome!



Graciela Pérez de Inzaurraga