

In the
United States Court of Appeals
for the
Tenth Circuit

MARTY STOUFFER; MARTY STOUFFER PRODUCTIONS, LTD.,
Plaintiffs-Appellants,

v.

NATIONAL GEOGRAPHIC PARTNERS, LLC;
NGSP, INC.; NGHT, LLC, d/b/a National Geographic Digital Media;
NGC NETWORK US, LLC; NGC NETWORK INTERNATIONAL, LLC,
Defendants-Appellees.

*Appeal from a Decision of the United States District Court for the District of Colorado (Denver),
Case No. 1:18-CV-03127-WJM-GPG · Honorable William J. Martinez, U.S. District Judge*

**BRIEF OF AMICI CURIAE TRADEMARK LAW PROFESSORS
IN SUPPORT OF DEFENDANTS-APPELLEES**

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are scholars of trademark and intellectual property law.¹ *Amici* have no direct interest in the outcome of this litigation. Our sole interest is in the orderly development of trademark law to serve the public interest. A full list of *amici* is attached as Appendix A.

¹ *Amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

As the District Court recognized, the Plaintiffs in this case seek to prevent the use of certain titles for fully First Amendment-protected works. The District Court was therefore entirely correct to be concerned about chilling First Amendment-protected speech. Unfortunately, the test it created to evaluate the claim will have the opposite effect and is inconsistent with the vast weight of jurisprudence on this question. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), is the appropriate starting point when the challenged use is not ordinary commercial speech like the labeling of a can of peas, but instead part of an expressive work entitled to the fullest protection of the First Amendment. *Rogers* protects a title against trademark claims unless (1) the use lacks any artistic relevance to the work, or (2) it is explicitly misleading.

After *Rogers*, two different approaches have developed to title-versus-title conflicts, in the Ninth and Second Circuits, but they both have the same bottom line: When the context—including the identity of the producer—enables reasonable audiences to distinguish one work from another, the First Amendment protects the use of a similar or even identical title. Thus, the First Amendment protected *Spy Notes* against a challenge from the makers of Cliff's Notes, despite visual similarities in the covers. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub'g Grp., Inc.*, 886 F.2d 490 (2d Cir. 1989). And it also protected Fox's television

show *Empire* about a New York recording empire against the challenge of a record company with the same name. *Twentieth Century Fox T.V. v. Empire Distrib., Inc.*, 875 F.3d 1192, 1196 (9th Cir. 2017). Amici believe that the Ninth Circuit’s formulation is easiest to apply and most consistent with the demands of the First Amendment as applied to noncommercial speech, but either version is superior to the convoluted and speech-chilling test developed by the district court below.

ARGUMENT

I. The Full Weight of First Amendment Protection Applies to Noncommercial Works, Including Their Titles

Over seventy years ago, the Supreme Court held that movies were fully subject to the protections of the First Amendment. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

The Supreme Court has routinely extended that treatment to other forms of non-advertising speech, even when it is sold for profit. *See, e.g., Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 790 (2011) (video games); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5 (1988) (“Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.”); *Smith v. People of*

California, 361 U.S. 147, 150 (1959) (“It is of course no matter that the dissemination [of books] takes place under commercial auspices.”). There can be no doubt that television shows are entitled to the same treatment.

Titles are part of the protected expression of a work. *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (opinion of four Justices) (names are “part of the expression of everyday life”); *Pursuing America’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 510 (D.C. Cir. 2016) (title or name is a “critical” way to identify an entity). *Rogers* explained:

The title of a movie may be both an integral element of the filmmaker’s expression as well as a significant means of marketing the film to the public. The artistic and commercial elements of titles are inextricably intertwined. Filmmakers and authors frequently rely on word-play, ambiguity, irony, and allusion in titling their works. Furthermore, their interest in freedom of artistic expression is shared by their audience. The subtleties of a title can enrich a reader’s or a viewer’s understanding of a work For all these reasons, the expressive element of titles requires more protection than the labeling of ordinary commercial products.

Rogers, at 998; *cf. Cohen v. California*, 403 U.S. 15, 26 (1971) (“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”). The case at bar exemplifies this function of titles. Every one of the titles at issue reflects, and provides a key to understanding, the remaining content of the audiovisual works: their exploration of American wilderness and wildlife.

That does not change because a title is also used to advertise or “sell” the underlying work in some sense. The fact that the artistic and expressive functions of titles of expressive works are “inextricably intertwined” with their commercial elements means that the First Amendment standard to be applied is that governing noncommercial speech. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech”). Suppressing the commercial aspects of the title would of necessity suppress the noncommercial aspects, since the restraint would be on the use of the title *itself*, unlike situations in which specific commercial promotions could be excised from otherwise noncommercial material. *Compare Board of Trs. v. Fox*, 492 U.S. 469 (1989) (finding educational presentations in “Tupperware parties” separable from accompanying sales pitches), *with, e.g., Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903, 906-07 (9th Cir. 2002) (the commercial purpose of using “Barbie” in a song title was “inextricably intertwined” with the “expressive elements” of the song) (citations omitted), *and Parks v. LaFace Records*, 329 F.3d 437, 449 (6th Cir. 2003) (“[I]f a song is sold, and the title is protected by the First Amendment, the title naturally will be ‘inextricably intertwined’ with the song’s commercial promotion.”) (citations omitted).

II. The *Rogers v. Grimaldi* Test Best Protects Noncommercial Speech

The content of noncommercial speech may be regulated only to further a compelling government interest; the regulation must be narrowly tailored and must be the least restrictive means of accomplishing that compelling interest. *Brown*, 564 U.S. at 799; *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). This distinguishes it from most of trademark law, which in its usual application is directed at unequivocally commercial speech, such as the label of a can of peas. As this Court has previously held, “trademark rights cannot be used to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.” *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Rsch.*, 527 F.3d 1045, 1052-53 (10th Cir. 2008) (citations omitted). However, this Court has not yet had occasion to articulate a general principle about the protections accorded to noncommercial speech against trademark claims.

Fortunately, it need not write on a blank slate. In *Rogers v. Grimaldi*, the Second Circuit considered the actress Ginger Rogers’s claim against the producers of *Ginger and Fred*, a Fellini film about two Italian cabaret performers who made a living by imitating Ginger Rogers and Fred Astaire. Rogers argued that the use of her name violated the Lanham Act by creating the false impression that she was involved with its making or otherwise endorsed the film. 875 F.2d at 997. The court recognized both that “Rogers’ name has enormous drawing power in the

entertainment world,” such that controlling its use was of value to her, and that movies were “indisputably works of artistic expression and deserve protection.” *Id.* The film producers’ use of the name “Ginger” in the title and content of the movie was noncommercial speech, the protection of which ordinarily is more important than Lanham Act interests: “We believe that in general the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” *Id.* at 999. As a result, “the balance will normally not support application of the Act unless [the use of the trademark] has no artistic relevance to the underlying work whatsoever, or if it has some artistic relevance, unless [the use of the trademark] explicitly misleads as to the source or content of the work.” *Id.* Because use of Ginger Rogers’s name was clearly artistically relevant and did not explicitly mislead, the court rejected Rogers’ claim even in the face of survey and anecdotal evidence of consumer confusion. *Id.* at 1001.

A. Subsequent Developments in Title-v-Title Situations Highlight the Benefits of the Rogers Test.

The *Rogers* Court confined its holding to “the context of allegedly misleading titles using a celebrity’s name” and expressly cautioned that “[t]his limiting construction would not apply to misleading titles that are confusingly similar to other titles.” *Rogers*, 875 F.2d at 999 n.5. In subsequent title-versus-title cases, however, the Second Circuit held that the animating principle of *Rogers*

requires special First Amendment scrutiny in those cases as well. *Cliffs Notes*, 886 F.2d at 495 n.3 (2d Cir. 1989) (“The *Polaroid* [multifactor likely confusion] test has its origin in cases of purely commercial exploitation, which do not raise First Amendment concerns. Thus, the *Polaroid* test is at best awkward in the context of [work which] constitutes original expression.”).

And such scrutiny is only logical: a title retains its expressive significance regardless of the source of rights claimed by the challenger. While the Second Circuit purports to use a modified multifactor likelihood-of-confusion test in title-versus-title cases, it does so with an eye to allowing maximum freedom of expression, primarily by (1) heavily weighting the presence of a “house mark” or other indication of the actual publisher of the challenged work against likely confusion and (2) treating “reasonable consumers” of expressive works as ordinarily capable of distinguishing among similar titles. *Id.* at 495–96; *Yankee Publ’g Inc. v. News America Publ’g Inc.*, 809 F. Supp. 267, 274-75 (S.D.N.Y. 1992).

When the producer of a new work properly labels the work as its own, distinguishing it from existing works with similar titles, the Second Circuit reaches the same result as in *Rogers* even while using the multifactor test. This makes sense, because proper labeling of source is one sound way to avoid being explicitly misleading.

The Ninth Circuit approach is more straightforward. The Ninth Circuit was right that no appellate court has ever actually applied the caveat in footnote five in *Rogers*.² The Ninth Circuit thus determined that the artistic relevance/explicit misleadingness test was appropriate across the board for determining when fully First Amendment-protected works could be held liable for trademark infringement. *Empire*, 875 F.3d at 1196–97.

The Ninth Circuit’s reasoning is further supported by the Supreme Court’s holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), decided after *Rogers*, which emphasized that the Lanham Act may not be used as a “mutant” copyright law to control the content of expressive works. *Id.* at 34. Under *Dastar*, the Lanham Act does not extend to alleged confusion over the source of the *expression* in a work; it provides a cause of action only when use of a mark causes confusion regarding the physical origin of products and services. *Id.* at 37. Faithful application of *Rogers* implements *Dastar* by precluding claims whose gravamen is alleged confusion about the source of expression embodied in a copyrightable work.

² Even the Second Circuit later recognized that the constitutional status of the accused work, rather than the source of the plaintiff’s claimed trademark, is the key consideration demanding modification of the confusion test used for ordinary commercial products and services. *See Cliffs Notes*, 886 F.2d at 497.

B. The District Court Below Properly Recognized the First Amendment Values at Stake, but the Test It Devised to Replace Rogers v. Grimaldi Cannot Achieve the Court's Stated Aims

The District Court recognized the well-settled principle that the Lanham Act needs a limiting construction to protect First Amendment interests. *Stouffer v. Nat'l Geographic Partners, LLC* (2019) (No. 18-cv-3127-WJM-SKC), 2019 U.S. Dist. LEXIS 140947 *29 (hereinafter "Order"). It incisively explained that, to avoid chilling expression, this test must be readily applicable before trial and, ideally, before a full likelihood of confusion multifactor analysis. *Id.* at 25. Similarly, the Court properly recognized that *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003), wrongly limited the scope of artistic relevance in ways that were particularly damaging to nonrepresentational art, and that *Gordon v. Drape Creative, Inc.*, 909 F.3d 257 (9th Cir. 2018), significantly muddied the waters in the Ninth Circuit. Order at 26-27. But the misapplications of the *Rogers* test are not a reason to depart from it altogether. And the test the district court crafted has its own problems.

1. One can reject *Parks* and *Gordon* without rejecting *Rogers*.

The District Court recognized that two particular post-*Rogers* cases went astray. One too narrowly defined artistic relevance, practically excluding art that isn't traditionally representational (*Parks*). The other conflicts with clear circuit precedent by treating the defendant's use of the claimed trademark as potentially

itself “inherently misleading” simply because the plaintiff produced similar greeting cards that also used the claimed trademark as a punchline to a joke, and the joke was the point of the cards (*Gordon*). This case provides the opportunity for this Court to embrace *Rogers* as the proper approach in cases involving noncommercial speech without having to specify the doctrine’s outer limits. Artistic relevance isn’t in question here, and Appellees created multiple hours of their own distinct content. But the analytical errors of *Parks*, *Gordon*, and the new test created below highlight the importance of the *Rogers* test to protect noncommercial speech against the unwarranted chilling effects of potential trademark liability.

Parks, *Gordon*, and the District Court’s newly derived factors have in common one fundamental flaw: they burden artistic expression that also has a motive to attract attention (which is to say, to find an audience). Artistic expression and desire to attract attention are not opposites; indeed, they regularly travel together. In *Rogers*, for example, Fellini’s basic motivation was to make a film about two dancers who were called Fred and Ginger—and one sensible way to characterize that motivation is that it at least included “a desire to tap into Ginger Rogers’s fame” to make the story intelligible. *Order* at 29. It is impossible to disentangle artistic motives to make art and to garner an audience. A legal test that requires such a distinction would run afoul of the neutrality principles the First

Amendment was meant to avoid. Moreover, any test that attempts such a distinction misdescribes the ways creators work and earn a living and bakes incoherence into the inquiry.

2. A desire to attract attention—as opposed to a desire to engage in commercial deception—is a constitutionally-protected motive for speech.

The First Amendment generally protects the right of speakers to choose their topics and the ways in which they want to speak about those topics. This includes the choice of techniques to attract attention (in nondefamatory ways). *See, e.g., Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185-86 (9th Cir. 2001) (defendant magazine’s use of an altered film photo to “attract attention” as part of use of celebrities to “rev up” its image did not diminish First Amendment protection). At the core of the idea of First Amendment-protected “newsworthiness” is that matters of legitimate public interest attract attention, and attracting attention is a perfectly legitimate goal for a for-profit publication, as for any other speaker. *See, e.g., Messenger v. Gruner + Jahr Printing & Publ’g*, 208 F.3d 122, 126 (2d Cir. 2000) (holding that a use “solely or primarily to increase the circulation” and profits of a newsworthy article is still fully protected; “most publications seek to increase their circulation and also their profits”) (citing *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984)); *Jenkins v. Dell Publ’g Co.*, 251 F.2d 447, 451 (3d Cir. 1958) (illustrated magazine article

describing high profile crime was within privilege that protected normal news items from claims of tortious invasion of privacy). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (holding that video games sold for profit were entitled to full First Amendment protection); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (selling for profit does not negate First Amendment protections). This result is a positive good, not an accident or unfortunate consequence of other rules. First Amendment law adopts the principle that the public benefits when there is a wide variety of speech from diverse authors and origins about topics and people of public interest.

The District Court recognized that Appellees' titles were highly descriptive of their content. Order at 31. There is both an obvious artistic reason to choose a descriptive term as a title and an equally obvious marketing function, which is to tell consumers the subject matter of the shows. In short, the artistic and profit-driven motivations are unified. And this situation demonstrates the wisdom of the First Amendment's protection not just for speakers' choices of topics, but also for their choices of how to speak about those topics. *See, e.g., Matal*, 137 S. Ct. at 1760 (opinion of four Justices) ("powerful messages can sometimes be conveyed in just a few words," meaning that trademarks implicate the First Amendment); *Cohen*, 403 U.S. at 26 (the First Amendment protects the choice of how best to

communicate a message); *Pursuing America's Greatness*, 831 F.3d at 510 (title/name is a “critical” way to identify a subject of speech).³

Trademark law has always recognized that descriptive terms in particular must be available to all parties seeking to describe the nature of their goods or services. *See, e.g., KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 119 (2004) (trademark law has long protected truthful descriptive uses even in the presence of confusion); *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 544 (1920) (explaining pro-competitive justifications for allowing descriptive use even if some consumer confusion results). Just as plaintiff should be able to communicate the subject matter of his works with a title, so should National Geographic; it should not be required to choose an unhelpful or meaningless name for its show.

Consistent with these principles, trademark law can provide protection for consumers against material deception in purchasing decisions, including in the

³ The alternative would be to ask whether, in the Court’s judgment, there were acceptably similar ways to communicate the same message. But this Court has already recognized that an “alternative avenues” inquiry, while relevant to restrictions on the timing or sound volume of speech, is inappropriate when it requires rewriting the content of the challenged speech. *See Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 971 (10th Cir. 1996) (“Intellectual property ... includes the words, images, and sounds that we use to communicate, and ‘we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.’”) (quoting *Cohen*, 403 U.S. at 26).

marketplace for expressive works,⁴ but it should not provide particular speakers with the means to prevent other speakers, who identify themselves as such, from also using descriptive titles. And the test applied to communicative works should be focused on the specific risks of government intervention into the content of communicative works.

3. Any focus on “motive” as opposed to objective meaning is inherently incompatible with an inquiry that can be performed on a motion to dismiss.

The District Court correctly determined that a standard regularly allowing early dismissal is necessary to protect speakers against chilling effects. Order at 24-25; *see also* David A. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 83 (2017) (explaining that prophylactic rules can be justified “simply to limit the chilling effects on speech that would result from a more complex and nuanced doctrinal structure”); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (arguing that courts regularly and legitimately craft prophylactic rules to protect constitutional values).

A standard in which motive is central cannot perform this function. For example, the addition of “private” statements as relevant to motive would invite

⁴ As discussed above, clear labeling of the actual source—here, National Geographic—is a simple way to protect against material deception about the source of noncommercial speech. *See, e.g., Blinded Veterans Ass’n v. Blinded Am. Veterans Found.*, 872 F.2d 1035 (D.C. Cir. 1989) (requiring defendant to use reasonable means to prevent confusion but not requiring change of name).

delay-causing fishing expeditions, allowing every plaintiff to argue that discovery should be required even though private statements cannot possibly deceive consumers. If the objective features of a work do not indicate likely confusion, private intent is irrelevant, as it was with the district court’s example of a trademark-referencing work created by a jazz trio. Order at 28.

The District Court tried to avoid authorizing too many such fishing expeditions by stating that, “to adequately protect First Amendment interests, the objective facts may sometimes excuse further inquiry into the junior user’s subjective motives.” Order at 29. But a balancing test with multiple factors, especially ones including “motive,” provides no predictability to any speaker, and provides potential plaintiffs an easy way to plausibly threaten a lawsuit and thus to suppress speech. *See, e.g., Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 214 (2000) (“Competition is deterred . . . not merely by successful suit but by the plausible threat of successful suit”); William McGeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 WASH. L. REV. 713, 745-53 (2015) (emphasizing the importance of clear rules that can be applied early in litigation in order to protect speech); William McGeveran & Mark P. McKenna, *Confusion Isn’t Everything*, 89 NOTRE DAME L. REV. 253 (2013) (same); *cf.* Glynn Lunney, *Trademark’s Judicial De-Evolution: Why Courts Get Trademark Cases Wrong Repeatedly*, 106 CAL. L. REV. 1195 (2018) (explaining that the costs of

litigation mean that complex tests for liability in trademark law will inevitably suppress legitimate uses even if those uses would be protected after full-scale litigation).

4. Any factor examining whether the parties “use the mark to identify the same kind, or a similar kind, of goods or services” is necessarily overbroad.

The District Court’s inquiry into whether the parties made the “same kind or a similar kind” of use as part of its First Amendment balancing appears to have been modified from *Gordon*, the Ninth Circuit case about greeting-card content. But this factor serves to confuse the issue rather than clarify the test, and it underprotects speech. The plaintiff in *Gordon* claimed to have been using “Honey Badger Don’t Care” as the punchline of a joke—that is, as part of the content of the greeting card, and not just as the brand name of the cards. The Ninth Circuit found that a defendant who used the same punchline could be “explicitly misleading” about the source of the cards, primarily because the parties allegedly competed and the court didn’t see much else on the cards that served as an indication of source. While the Second Circuit purports to modify *Rogers* only for title-versus-title conflicts, the *Gordon*/District Court approach invites a freewheeling inquiry into the content of a work, with a far greater risk of chilling protected speech.

To say that “same use” cases are more likely to result in liability than “different use” cases has the effect of creating a special, more liability-friendly rule

for title-versus-title conflicts, a problem in and of itself. But it also wrongly expands that approach to other components of a work, chilling even more protected speech. For example, Cheerios licenses some publishers to make books featuring Cheerios. *See generally* Zahr K. Said, *Mandated Disclosure in Literary Hybrid Speech*, 88 WASH. L. REV. 419, 427-32 (2013) (exploring the variety of sponsorships in film, television, literature, and other media). This licensing relationship should in no way mean that an unauthorized book about Cheerios, but not explicitly claiming endorsement or sponsorship, should get less First Amendment protection than an unauthorized book about Trader Joe's O's. The existence of an authorized celebrity biography likewise does not make it more likely that an unauthorized biography infringes a celebrity's trademark rights. *Rogers*, 875 F.2d at 1000 (while a biography falsely labeled "authorized" could be actionable, a biography merely using the subject's name and possibly implying authorization would not; citing *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 260 (N.Y. 1968), for the proposition that estate of Ernest Hemingway "had no cause of action for 'palming off' or 'unfair competition' against author of biographical memoir entitled 'Papa Hemingway'").

Relatedly, and highlighting the potential for a broadly worded test to chill First Amendment rights, the District Court made an error of fact: It stated that *Rogers* didn't involve a competing product or service with which the film *Ginger*

& *Fred* might conflict. Order at 29. Ginger Rogers’s films were in fact competing products with Fellini’s films, and she adequately alleged that she remained persistently well-known. *See Rogers*, 875 F.2d at 1000-02. It will be simple for future plaintiffs to allege similar competition.

Whatever the proper rule for title-versus-title disputes, courts should not allow trademark owners’ strategic decisions to license certain expressive works to become a justification for giving them control over other expressive works.

5. Any factor that evaluates the quality of the artistic use requires the court to be an art critic.

The District Court incisively analyzed the flaws of *Parks*, including the fact that “incongruity, irrelevance, and randomness can themselves be artistic choices.” Order at 29. But to make the quality of the artistic use into a factor, as it then did, is to ensure that the error of *Parks* be repeated and worsened. One man’s vulgarity is another man’s lyric, even among federal judges. *Cohen*, 403 U.S. at 25.

The quality of the artistic use also bears no obvious relationship to the question with which trademark law is properly concerned: Will consumers be materially deceived to their detriment by the challenged use? The indirect-at-best relationship between artistic quality or technique and consumer confusion makes it even more indeterminate as a factor in a likely confusion test. Setting art criticism aside—as most lawyers should—the core problem with this and other factors created by the District Court is how unpredictable and unprincipled it will make

the overall balance, worsening the uncertainty of a multifactor test by adding deep subjectivity to the factors. *See e.g. Norma Kristie, Inc. v. Okla. City*, 572 F. Supp. 88, 91 (10th Cir. 1983) (“The First Amendment is not an art critic.”); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 352 (2d Cir. 2002) (“Courts should not be asked to draw arbitrary lines between what may be art and what may be prosaic as the touchstone of First Amendment protection.”); *Hart v. Elec. Arts*, 717 F.3d 141, 154 (3d Cir. 2013) (test that tries to weigh expression against commerciality “is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot co-exist [It is improper] for courts to analyze select elements of a work to determine how much they contribute to the entire work’s expressiveness.”).

6. The addition of a transformativeness factor assessing what “expressive content” the junior user added is particularly inappropriate.

The District Court’s transformativeness factor inappropriately imports copyright considerations into a trademark question, creating a deep conflict between trademark and copyright. Copyright is the constitutional mechanism by which Congress provides economic incentives for new expression. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). Importantly, copyright does not protect short words and phrases of the kind at issue here (and in trademark law generally). U.S. Copyright Off., Circular 33, Works Not Protected

By Copyright (2017) (“[S]logans, and other short phrases or expressions[,] cannot be copyrighted”). “Trademark, by contrast, is aimed not at promoting creativity and invention but rather at fostering fair competition.” *Phx. Entm’t Partners v. Rumsey*, 829 F.3d 817, 825 (7th Cir. 2016); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 216 (2d Cir. 2012) (“[T]rademark law is not intended to ‘protect[] innovation by giving the innovator a monopoly’ over a useful product feature. Such a monopoly is the realm of patent law or copyright law, which seek to encourage innovation, and not of trademark law, which seeks to preserve a ‘vigorously competitive market’ for the benefit of consumers.”) (citations omitted).

Trademark law is not a substitute for copyright when copyright is unavailable; indeed, the unavailability of copyright counsels *against* providing trademark protection for the creative aspects of uncopyrightable material, since copyright has drawn a careful balance between what can be owned by a single creator and what must be left for free use for all. *Dastar*, 539 U.S. at 34 (“[I]n construing the Lanham Act, we have been careful to caution against misuse or over-extension of trademark and related protections into areas traditionally occupied by patent or copyright.”).

It is beyond question that the creativity added by Appellees is enough to qualify their television shows for copyright protection. Courts should not further

inquire into their artistic merit. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). According to the district court’s balancing test, however, a factfinder could apparently find that television shows, while creative and copyrightable, nonetheless added insufficient creativity to justify the use of a title. Such a new standard for maintaining the boundaries between the public domain and protectable expression would force trademark and copyright into conflict.

Take the situation here as an example: If a factfinder were allowed to determine that the overlap in the parties’ ideas—a show about American wilderness—was enough to conclude that Appellees didn’t add enough new material to justify their use of a descriptive phrase under trademark law, then the distinction copyright makes between ideas and expression would be eviscerated. Courts would inevitably be dragged into the very inquiry *Bleistein* insisted they avoid—assessing whether art was *creative enough* for protection. This is contrary to repeated warnings from the Supreme Court that trademark should not be expanded to interfere with the proper boundaries of copyright. *Dastar*, 539 U.S. at 33-34; *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232-33 (1964).

C. Resolving Title-Versus-Title Conflicts in a Way that Respects First Amendment Interests

Although the Second Circuit created a special First Amendment-sensitive version of the likely confusion test for title-versus-title conflicts, that was

unnecessary. *Rogers* provides a sufficiently clear line. Even where the use of a trademark has some artistic relevance, *Rogers* provides that the Lanham Act can be applied if the use of the trademark “explicitly misleads as to the source or content of the work.” *Rogers*, 875 F.2d at 999. This test is firmly rooted in the Lanham Act, whose false advertising jurisprudence routinely distinguishes literal or explicit falsity from potentially misleading matter. *Zoller Labs., LLC v. NBTY, Inc.*, 111 F. App’x. 978, 982 (10th Cir. 2004); *see also Hutchinson v. Pfeil*, 211 F.3d 515, 522 (10th Cir. 2000) (noting the categories and collecting cases); 15 U.S.C. § 1125 (a)(1)(B).

Where the “artistic relevance” test is easy to satisfy, the “explicitly misleads” exception is sharply limited. As the Second Circuit has noted, it is not enough that a likelihood of confusion exists. In light of the First Amendment concerns at stake for noncommercial speech, this finding must be “particularly compelling.” *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993). Because it cannot be enough to argue that an expressive use itself is misleading, *Rogers* did not reincorporate the multifactor likely confusion test into the “explicitly misleading” element. *See, e.g., Brown*, 724 F.3d at 1245 (“It is well established that the use of a mark alone is not enough to satisfy [the explicit misleadingness] prong of the *Rogers* test.”); *Univ. of Ala. Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1279 (11th Cir. 2012) (similar); *Mil-Spec Monkey*,

Inc. v. Activision Blizzard, Inc., 74 F.Supp.3d 1134, 1144 (N.D. Cal. 2014) (use of claimed mark in promotional materials for video game was not explicitly misleading where actual source of game was clear).

When a use is ambiguous and requires the audience to draw a significant inference, it's not explicitly misleading; "explicitly" means *explicitly*. *Rogers* "insulates from restriction titles with at least minimal artistic relevance that are ambiguous or only implicitly misleading." *Rogers*, 875 F.2d at 1000; *see also id.* at 1001 (rejecting any reliance on survey evidence showing that the public did tend to misunderstand *Rogers*' involvement in the film, because that misunderstanding was "not engendered by any overt claim"); *see Brown*, 726 F.3d at 1245 (holding that survey evidence showing that the majority of consumers believe that identifying marks cannot be included in games without permission "changes nothing" in the *Rogers* analysis without explicit misleadingness); *Empire*, 875 F.3d at 1199.

Courts' treatment of this distinction between explicit and implicit in Lanham Act § 43(a)(1)(B) false advertising cases, 15 U.S.C. § 1125(a)(1)(B), is consistent with the treatment of ambiguity in *Rogers*, and it can further guide the analysis here.⁵

⁵ *Cf. United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998) ("The greater the degree to which a message relies upon the viewer or consumer to

One ready way to avoid explicitly misleading in a case where the challenged use involves a title is through labeling of the actual source. When the producer or publisher of a work identifies itself, that identification can remove uncertainty about what explicit message is being communicated. Thus, Debra Baker's article *Who Wants to Be a Millionaire?* in the ABA Journal is not explicitly misleading about its lack of connection with the well-known television show. Debra Baker, *Who Wants to Be a Millionaire?*, 86 A.B.A. J. 36 (2000). Baker has clearly identified herself as the author.

Recognizing the importance of labeling is consistent with trademark's historical relationship to unfair competition law. Even when trademark protection is not available to wholly prevent a use, courts may bar "passing off" and require competitors to distinguish themselves, for example by using a "house mark" such

integrate its components and draw the apparent conclusion, . . . the less likely it is that a finding of literal falsity will be supported. Commercial claims that are implicit, attenuated, or merely suggestive usually cannot be characterized as literally false."); *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 2001 WL 588846, at *8 (S.D.N.Y. Jun. 1, 2001) (same; ads with "several plausible meanings" are not explicitly false); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1282 (S.D.N.Y. 1990) (alleged misrepresentation about Weight Watchers was not explicit because Weight Watchers wasn't mentioned in the challenged statement on the product package).

To be clear: For the ordinary commercial speech covered by false advertising law, statements that are explicitly false *or* literally true but shown to be misleading are actionable, *Clorox*, 140 F.3d at 1181; noncommercial speech requires the greater certainty of the *Rogers* line.

as a publisher or network name. See Mark P. McKenna, *Property and Equity in Trademark Law*, 23 MARQ. INTELL. PROP. L. REV. 117 (2019); see also *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 940 (7th Cir. 1968) (explaining that “passing off” occurs when consumers think they are dealing with one party but are really dealing with another).⁶

This focus on labeling is also consistent with this Court’s holding in *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1245 (10th Cir. 2013). This and similar cases hold that, in the context of internet keyword advertising, proper labeling avoids confusion even in the presence of direct competition. *Id.* (citing and quoting *Network Automation v. Advanced Sys. Concepts*, 638 F.3d 1137, 1154 (9th Cir. 2011), for importance of “labeling and appearance of the advertisements and the surrounding context” as “critical factor” in confusion analysis).

Amici believe that *Rogers* is the best prophylactic rule even in title-versus-title cases because the key is to protect noncommercial speech from chilling effects of plausible threats of suit. When a publisher or producer of noncommercial speech

⁶ A far broader and more amorphous range of “confusion” is actionable under modern trademark law in ordinary commercial speech cases. This allows trademark owners to sue, and even win, on the theory that consumers might think that the parties had some sort of relationship, even though consumers understand with whom they are dealing. Glynn S. Lunney, Jr., *Trademark’s Judicial De-Evolution: Why Courts Get Trademark Cases Wrong Repeatedly*, 106 CAL. L. REV. 1195, 1208–1213 (2018); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 422–26 (2010). *Rogers* recognizes that, for noncommercial speech, such expansive theories are inappropriate.

identifies itself, its First Amendment interests in using an artistically relevant title should, as a rule, prevail. And they should do so without having to balance factors like motive and transformativeness that cannot readily be resolved early in the case.

CONCLUSION

The district court aimed to distinguish “a genuine artistic motive” from “a desire to profit from the senior user’s goodwill.” But those are not opposites. The right distinction is between the need to protect a substantial number of consumers against material deception, on the one hand, and the First Amendment right to engage in expression, including expression for profit, on the other.

Speech-protective tests deliberately decline to try to identify every possible bad actor because of the speech-suppressive costs a plausible threat of suit would impose on legitimate speakers. Prophylactic rules are required to protect First Amendment interests in free speech. A multifactor balancing test inherently works against this aim.

Rogers v. Grimaldi, as interpreted by *Twentieth Century Fox TV v. Empire Distribution, Inc.*, 875 F.3d 1192, 1195 (9th Cir. 2017), states the proper rule for

analysis of trademark claims against artistic works. Stouffer has not justified the suppression of National Geographic's artistically relevant titles.

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APPENDIX A
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CERTIFICATE OF COMPLIANCE

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Circ. R. 29(a)(5) because this brief contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for *Amicus Curiae* Trademark Law Professors certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

Counsel also certifies that any and all hard copies submitted to the Court are exact copies of the ECF filing from November 9, 2020.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 12.0.7874; Definitions version 88086 – 7.86520 [November 9, 2020]; Vipre engine version 3.9.2671.2 – 3.0), and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on November 9, 2020, which will automatically send notification to the counsel of record for the parties.

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