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21 **UNITED STATES DISTRICT COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA**

23 DIECE-LISA INDUSTRIES, INC.,

24 Plaintiff,

25 vs.

26 DISNEY ENTERPRISES, INC., et al.,

27 Defendants.

Case No. 2:20-CV-09147-TJH-JCx

**NOTICE OF MOTION AND**  
**MOTION FOR LEAVE TO FILE**  
**AMICUS CURIAE BRIEF**

Judge: Hon. Terry J. Hatter Jr.

Courtroom: 9C

Date: April 6, 2026

Time: No appearance necessary

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on April 6, 2026, or as soon thereafter as the matter  
3 may be heard before the Honorable Terry J. Hatter Jr., United States District Court Judge,  
4 in Courtroom 9C of the United States District Court for the Central District of California,  
5 proposed *amicus curiae* the Motion Picture Association, Inc. (“MPA”) will and hereby  
6 does move the Court for leave to file the attached *amicus curiae* brief in support of  
7 Defendants Walt Disney Studios Motion Pictures’ and Buena Vista Home Entertainment,  
8 Inc.’s Motion for Reconsideration of the Court’s January 20, 2026 Order and Alternative  
9 Request for Certification Under 28 U.S.C. § 1292(B) (Dkt. 452).

10 The MPA is a not-for-profit trade association founded in 1922. It serves as the voice  
11 and advocate of the motion picture and television industry, advancing the business and art  
12 of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting  
13 the creative and distribution ecosystem that brings entertainment and inspiration to  
14 audiences worldwide. The MPA’s members often “clear” works—i.e., subject the content  
15 of their motion pictures and television shows to legal vetting before release—in part on the  
16 understanding that the framework introduced by the seminal *Rogers v. Grimaldi* decision  
17 will govern potential trademark claims involving those works. *Rogers*’ longstanding  
18 applicability to the content of motion pictures and television shows guides the legal  
19 analysis about whether to approve aspects of creative works, and promotes rather than  
20 chills the creation of those works.

21 In its Order issued January 20, 2026, this Court was the first to hold that a creator  
22 may lose the protection of *Rogers* for an expressive work if another corporate affiliate later  
23 sells associated merchandise that allegedly infringes the plaintiff’s mark. This decision  
24 threatens to unsettle the well-established framework MPA members and other creators rely  
25 upon to make creative works, instead forcing them to consider whether other corporate  
26 entities might engage in downstream merchandising of an underlying expressive work at  
27 some later point, generating great uncertainty at the moment creators are making artistic  
28 choices. The MPA submits this brief to provide the Court with the perspective of creators

1 that routinely rely on the *Rogers* jurisprudence, and to aid the Court in understanding how  
2 the *Rogers* jurisprudence carves out breathing space for creative expression in a way that  
3 balances First Amendment principles and the legitimate regulatory aims of the Lanham  
4 Act.

5 “‘There are no strict prerequisites that must be established prior to qualifying for  
6 amicus status’ although an individual or organization seeking to participate as *amicus*  
7 *curiae* must ‘make a showing that his participation is useful to or otherwise desirable to  
8 the court.’” *Congregation Etz Chaim v. City of Los Angeles*, No. CV 97-5042, 2009 WL  
9 1293257, at \*5 n.4 (C.D. Cal. May 5, 2009) (quoting *Infineon Techs. N. Am. Corp. v.*  
10 *Mosaid Techs., Inc.*, No. C 02-5772, 2006 WL 3050849, at \*3 (N.D. Cal. Oct. 23, 2006)).  
11 In this case, the MPA’s participation as *amicus* would be helpful to the Court in resolving  
12 the motion. The MPA’s member companies and their affiliates produce and distribute the  
13 vast majority of professionally produced filmed entertainment in the United States through  
14 the theatrical and home entertainment markets. The MPA’s members also own and enforce  
15 their rights in some of the most valuable trademarks in the world. The MPA is thus able  
16 to provide this Court with a well-informed perspective on the balance between protecting  
17 free expression and preventing consumer confusion, as well as the impact that the Court’s  
18 decision will have on creators of artistic works.

19 Furthermore, in deciding whether to grant leave to certify a case for interlocutory  
20 appeal, “courts may consider ‘the opportunity to achieve appellate resolution of an issue  
21 important to other cases.’” *City of Los Angeles v. Citigroup Inc.*, No. 2:13-cv-09009, 2014  
22 WL 3942457, at \*2 (C.D. Cal. Aug. 12, 2014) (quoting 16 *Wright & Miller’s Federal*  
23 *Practice & Procedure* § 3930 (3d ed.)). The MPA respectfully submits that it is ideally  
24 situated to provide the Court with information as to the importance of the legal issues in  
25 this case and the ways in which they may recur in further litigation, thus also helping the  
26 Court in evaluating whether this case warrants certification for interlocutory appeal.

27 The proposed *amicus* brief is attached. Pursuant to Local Rule 7-3, counsel for  
28 proposed *amicus* contacted counsel for the parties to determine whether they oppose the

1 filing of this motion. Defendants consent to filing this motion. Plaintiff does not consent.

2 For the foregoing reasons, the MPA respectfully asks this Court for leave to submit  
3 the attached *amici curiae* brief.

4 Respectfully Submitted,

5 DATED: March 2, 2026

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25 Defendants.

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**[PROPOSED] BRIEF OF AMICUS  
 CURIAE MOTION PICTURE  
 ASSOCIATION, INC.**

Judge: Hon. Terry J. Hatter Jr.

Courtroom: 9C

Date: April 6, 2026

Time: No appearance necessary

**TABLE OF CONTENTS**

1

2 STATEMENT OF INTEREST ..... 1

3 SUMMARY OF ARGUMENT ..... 2

4 ARGUMENT ..... 4

5 I. Storytellers Rely on the *Rogers* Doctrine in Creating Expressive

6 Works. .... 4

7 II. *Rogers* Continues to Protect References to Brands in Expressive

8 Works. .... 6

9 III. The Court’s Order Threatens to Unsettle the Clarity Provided by This

10 Established Case Law..... 8

11 CONCLUSION..... 10

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

CASES

*Dewberry Group, Inc. v. Dewberry Engineers Inc.*, 604 U.S. 321 (2025)..... 8

*E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095  
(9th Cir. 2008)..... 6

*Hara v. Netflix, Inc.*, 146 F.4th 872 (9th Cir. 2025) ..... 4, 7, 9

*Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140 (2023).....3, 7, 8, 9

*Louis Vuitton Malletier S.A. v. Warner Bros. Entertainment Inc.*, 868 F.  
Supp. 2d 172 (S.D.N.Y. 2012)..... 9

*Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) ..... 6

*Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003) ..... 6

*Punchbowl, Inc. v. AJ Press, LLC*, 90 F.4th 1022 (9th Cir. 2024)..... 7

*Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)..... 5, 10

*Twentieth Century Fox Television v. Empire Distribution, Inc.*, 875 F.3d  
1192 (9th Cir. 2017)..... 6

1 **STATEMENT OF INTEREST**

2 *Amicus curiae* the Motion Picture Association, Inc. (“MPA”) is a not-for-profit trade  
3 association founded in 1922. The MPA serves as the voice and advocate of the motion  
4 picture and television industry, advancing the business and art of storytelling, protecting  
5 the creative and artistic freedoms of storytellers, and supporting the creative and  
6 distribution ecosystem that brings entertainment and inspiration to audiences worldwide.  
7 The MPA’s member companies—Amazon Studios LLC, Netflix Studios, LLC, Paramount  
8 Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt  
9 Disney Studios Motion Pictures,<sup>1</sup> and Warner Bros. Entertainment Inc.—and their  
10 affiliates produce and distribute the vast majority of professionally produced motion  
11 picture and television entertainment in the United States through the theatrical and home  
12 entertainment markets. Indeed, the MPA’s members create thousands of expressive works  
13 that entertain, educate, and inform the public. The MPA’s members also own and enforce  
14 rights in some of the most valuable and recognizable trademarks in the world. The MPA  
15 is thus uniquely positioned to provide this Court with a well-informed perspective on the  
16 balance between protecting free expression and preventing consumer confusion.

17 Creators regularly “clear” works—i.e., subject the content of their motion picture  
18 and television shows to legal vetting before release—in part on the understanding that the  
19 framework established by the seminal *Rogers v. Grimaldi* decision will apply to depictions  
20 of and references to trademarks in such works. *Rogers*’ longstanding applicability to the  
21 content of motion pictures and television shows guides the legal analysis about whether to  
22 approve aspects of creative works, and promotes rather than chills the creative process and  
23 creation of those works. Although claims based on depictions of trademarks within  
24 creative works may fail for other reasons, *Rogers* and its progeny provide important clarity  
25 for creators and permit them to lawfully depict trademarks and brands in their creative  
26 works without being stymied by the threat of a torrent of unfounded litigation.

27 \_\_\_\_\_  
28 <sup>1</sup> Walt Disney Studios Motion Pictures, one of the Defendants in this action, did not make  
any monetary contribution to fund the preparation or submission of this amicus brief.

1 In its Order issued January 20, 2026 (“Order”), Dkt. 448, this Court held that the  
2 *Rogers* test does not apply to Lanham Act claims against the two Disney entities  
3 responsible for the theatrical and home distribution of the *Toy Story 3* motion picture,  
4 simply because *other* Disney entities were involved in marketing and sale of allegedly  
5 infringing books, video games, and toys associated with the movie. In doing so, this Court  
6 was the first to hold that a creator may lose the protection of *Rogers* for an expressive work  
7 if another corporate affiliate sells associated merchandise that allegedly infringes the  
8 plaintiff’s mark.

9 The MPA’s members have a critical interest in this litigation. When they and other  
10 creators of artistic works depict or refer to trademarks *within* expressive works, they are  
11 using them to advance their storytelling, or to enhance the realism of a fictional world they  
12 create. By suggesting that the applicability of *Rogers* hinges on whether there are also  
13 merchandising tie-ins to an expressive work (including by related separate corporate  
14 entities), the Court’s Order throws this case law into doubt, undermining the predictability  
15 and clarity that *Rogers* provides to storytellers and creatives around the world. The MPA  
16 therefore submits this brief to aid the Court in understanding how the *Rogers* jurisprudence  
17 carves out breathing space for creative expression in a way that balances First Amendment  
18 principles and the legitimate regulatory aims of the Lanham Act.

19 **SUMMARY OF ARGUMENT**

20 The Court should grant reconsideration, or, in the alternative, certification for  
21 interlocutory appeal. The motion picture *Toy Story 3* makes one fleeting reference to the  
22 full name of a secondary character, “Lots-o’-Huggin’ Bear,” twenty minutes into its  
23 runtime. Plaintiff Diece-Lisa Industries alleges that the reference infringes Plaintiff’s  
24 mark, “LOTS OF HUGS.” Individual Defendants, Walt Disney Studios Motion Pictures  
25 (“WDSMP”) and Buena Vista Home Entertainment, Inc. (“BVHE”), only distributed *Toy*  
26 *Story 3* and did not create or sell any consumer products associated with it. The Court  
27 nonetheless held that because other Disney Defendants sold merchandise associated with  
28 the “Lots-o’-Huggin’ Bear,” WDSMP and BVHE may not claim the protections of *Rogers*

1 for the alleged use of the “LOTS OF HUGS” mark within *Toy Story 3*, and Plaintiff may  
2 take its trademark infringement claim against WDSMP and BVHE to trial.

3 This case raises an issue of critical importance to motion picture and television  
4 creators. In its seminal *Rogers v. Grimaldi* decision in 1989, the Second Circuit recognized  
5 that the First Amendment protects artistic works (such as the motion picture and television  
6 shows created by MPA members), and that, because those works are speech in and of  
7 themselves, audience members engage with them differently than consumers interact with  
8 consumer products. Rather than applying the standard likelihood-of-confusion test for  
9 Lanham Act liability, the court in *Rogers* applied a more speech-protective test: Where the  
10 claims involve an artistic work, the alleged use of the mark need only be artistically relevant  
11 and not explicitly misleading. For more than twenty years, this Circuit has embraced the  
12 *Rogers* framework and has developed an established jurisprudence addressing Lanham Act  
13 and related claims involving artistic works, which are subject to heightened First  
14 Amendment protection.

15 The creative works produced and distributed by MPA members often depict real-  
16 world trademarks for many reasons, such as to create a realistic or fanciful setting or to  
17 make a point about a character. The MPA’s members—and other creators—have thus  
18 relied on this line of First Amendment jurisprudence to reference trademarks in creative  
19 works and realistically depict the world in which we live, so long as those references are  
20 not explicitly misleading. The *Rogers* doctrine provides space for these creative decisions  
21 and prevents self-censorship due to concerns about litigation risk.

22 In *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, the Supreme Court explicitly  
23 preserved existing case law from lower courts applying *Rogers* in favor of a narrow  
24 holding: that *Rogers* does not apply when a mark is being used “as a mark,” meaning as a  
25 designation of source for the defendant’s goods or services. Under *Jack Daniel’s*, the Court  
26 expressly did not disturb the *Rogers* doctrine’s heightened protection against claims  
27 involving the alleged depiction of a trademark in connection with an expressive work. *See*  
28 599 U.S. 140, 155–56 (2023). And the Ninth Circuit reaffirmed that principle last year in

1 *Hara v. Netflix, Inc.*, where it held that the *Rogers* test still applies “when the challenged  
2 mark in an artistic work is ‘used not to designate a work’s source, but solely to perform  
3 some other expressive function.’” 146 F.4th 872, 879 (9th Cir. 2025) (citation omitted).

4 If the Court’s Order stands, the application of *Rogers* may hinge on whether other  
5 corporate entities might engage in downstream merchandising of an underlying expressive  
6 work at some later point, generating great uncertainty at the moment creators are making  
7 artistic choices. When faced with a heightened risk of litigation and the potential inability  
8 to rely on the *Rogers* defense, creators and MPA members will have an incentive to self-  
9 censor and take more risk-averse approaches to their artistic works—a classic “chilling  
10 effect.” As such, the MPA respectfully contends that reconsideration is appropriate.  
11 Alternatively, given the potentially significant implications of the Order for creators, the  
12 MPA urges the Court to certify the Order for an interlocutory appeal.

### 13 ARGUMENT

#### 14 I. Storytellers Rely on the *Rogers* Doctrine in Creating Expressive Works.

15 Motion pictures and television programs frequently depict real-life brands and  
16 trademarks to tell a story, make a point, or convey a sense of reality. Creators evoke brands  
17 as shorthand to, for example, help the audience understand who a character is and what a  
18 scene is about. Use of known brands and marks also lends an aura of verisimilitude that is  
19 critical to effective storytelling. *Cf. Hara*, 146 F.4th at 880.

20 For example, to portray a car with any measure of reality, it must be recognizable as  
21 a Ferrari, Porsche, Ford, or Volkswagen. A top-of-the-line Ferrari in a heist film sets one  
22 tone. A beat-up Volkswagen camper in a homecoming story sets quite another. Such  
23 creative choices bring the writer’s and director’s vision to life and immerse the audience  
24 in that vision. Storytellers need to be able to make artistic decisions involving brands and  
25 trademarks to depict the world in which we live. And this necessity, of course, does not  
26 begin and end with car brands: Creators must be able to have their characters drink Coca-  
27 Cola, eat Pringles, use iPhones and MacBooks, and carry Gucci handbags, all without  
28 fearing repercussions or needing to fictionalize these items in ways that an audience would

1 readily recognize is not reflective of the real world. For decades, the *Rogers* doctrine has  
2 provided creators the predictability and breathing space to do just that.

3 In *Rogers*, the Second Circuit articulated the test that still governs today in this  
4 Circuit and every other circuit that has decided the issue. *See Rogers v. Grimaldi*, 875 F.2d  
5 994, 996–97 (2d Cir. 1989). *Rogers* concerned a fictional film about two Italian cabaret  
6 singers imitating Ginger Rogers and Fred Astaire. *See id.* Rogers alleged that the title  
7 “creat[ed] the false impression that the film was about her or that she sponsored, endorsed,  
8 or was otherwise involved in the film” in violation of the Lanham Act. *See id.* at 997.

9 The Second Circuit acknowledged that there can be a tension between an artist’s  
10 First Amendment rights and the government’s interest in preventing consumer deception.  
11 While “[m]ovies, plays, books, and songs are all indisputably works of artistic expression  
12 and deserve protection,” they are still “sold in the commercial marketplace like other more  
13 utilitarian products, making the danger of consumer deception a legitimate concern that  
14 warrants some government regulation.” *Id.* However, *Rogers* also recognized ways in  
15 which expressive works differ from other products regulated by the Lanham Act.  
16 Expressive works “are of a hybrid nature, combining artistic expression and commercial  
17 promotion.” *Id.* at 998. The public has an interest “in enjoying the results of the author’s  
18 freedom of expression”—expression which might be chilled if subjected to expensive and  
19 time-intensive litigation. *Id.* Moreover, consumers interact differently with expressive  
20 works than they do with other products. *See id.* at 1000.

21 The Second Circuit therefore adopted a two-part test that has come to be known as  
22 the “*Rogers* test:” Trademark infringement liability based on an expressive work attaches  
23 only (1) if “the title has no artistic relevance to the underlying work whatsoever” or (2) “if  
24 [the title] has some artistic relevance, [where] the title explicitly misleads as to the source  
25 or the content of the work.” *Id.* at 999. The Second Circuit held that the title “Ginger and  
26 Fred” had artistic relevance to the underlying work, since the characters’ nicknames did  
27 “have genuine relevance to the film’s story.” *Id.* at 1001. The court further found the title  
28 was not explicitly misleading, since it “contains no explicit indication that Rogers endorsed

1 the film or had a role in producing it.” *Id.* The court thus resolved *Rogers*’s Lanham Act  
2 claim without resorting to a conventional likelihood-of-confusion analysis.

3 The Ninth Circuit has long embraced the *Rogers* doctrine, beginning with *Mattel,*  
4 *Inc. v. MCA Records, Inc.*, a case brought by the maker of Barbie against the music  
5 companies that produced the song “Barbie Girl.” 296 F.3d 894 (9th Cir. 2002). There, the  
6 Ninth Circuit recognized *Rogers*’ underlying rationale: that when it comes to use of a  
7 trademark in association with a creative work, “[c]onsumers expect a title to communicate  
8 a message about the book or movie, but they do not expect it to identify the publisher or  
9 producer.” *Id.* at 902. As the Ninth Circuit put it: “If we see a painting titled ‘Campbell’s  
10 Chicken Noodle Soup,’ we’re unlikely to believe that Campbell’s has branched into the art  
11 business. Nor, upon hearing Janis Joplin croon ‘Oh Lord, won’t you buy me a Mercedes-  
12 Benz?,’ would we suspect that she and the carmaker had entered into a joint venture.” *Id.*

13 The Ninth Circuit’s subsequent jurisprudence has further developed the contours of  
14 First Amendment protection for use of marks in association with the body of creative  
15 works, rather than just the title. *See, e.g., E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*,  
16 547 F.3d 1095, 1099 (9th Cir. 2008); *see also Mattel, Inc. v. Walking Mountain Prods.*,  
17 353 F.3d 792, 796, 807 (9th Cir. 2003) (applying *Rogers* to photographs depicting a Barbie  
18 doll “in danger of being attacked by vintage household appliances”). The Ninth Circuit  
19 has also recognized that *Rogers* must apply to promotional activities for the expressive  
20 work that incorporate the challenged element of that work; otherwise, the creator of an  
21 expressive work would be forced to advertise with one hand tied behind their back. *See*  
22 *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192, 1196–97 (9th  
23 Cir. 2017).

## 24 **II. *Rogers* Continues to Protect References to Brands in Expressive Works.**

25 The Court’s Order focused on the Supreme Court’s *Jack Daniel’s* decision.  
26 Importantly, however, the Supreme Court in *Jack Daniel’s* did not fundamentally disturb  
27 the *Rogers* standard or the Ninth Circuit’s case law elaborating upon that standard. Indeed,  
28 the trademark dispute in *Jack Daniel’s* did *not* implicate any motion picture or television

1 show—the creative works at the heartland of the *Rogers* doctrine—but instead involved  
2 two quintessential consumer products. Specifically, VIP Products LLC produced a line of  
3 chewable dog toys, one of which emulated a bottle of Jack Daniel’s whiskey reimagined  
4 as “Bad Spaniels.” *Jack Daniel’s*, 599 U.S. at 144.

5 The question before the Supreme Court in *Jack Daniel’s* was whether *Rogers*  
6 properly applied to a dog toy parodying the Jack Daniel’s trademark and trade dress. The  
7 Court held that the *Rogers* test (or any other “threshold First Amendment filter”) does not  
8 apply “when the accused infringer has used a trademark to designate the source of its own  
9 goods—in other words, has used a trademark as a trademark.” *Id.* at 145, 153 n.1. *Jack*  
10 *Daniel’s* recognizes that when a party is using a mark as a source identifier, such as on a  
11 commercial product, that puts it squarely in the domain typically covered by trademark  
12 law, and further afield from the expressive uses implicated by the *Rogers* doctrine.  
13 Ultimately, “[w]hen a mark is used as a mark . . . , the likelihood-of-confusion inquiry does  
14 enough work to account for the interest in free expression.” *Id.* at 159. The Supreme Court  
15 explicitly did not rule on the validity of *Rogers* writ large, and thus did not unsettle any of  
16 the Ninth Circuit’s governing precedent. *See id.* at 145, 153, 155, 163. Instead, its decision  
17 “was confined to a ‘narrow’ point of law that *Rogers* does not apply *when a mark is used*  
18 *as a mark.*” *Punchbowl, Inc. v. AJ Press, LLC*, 90 F.4th 1022, 1031 (9th Cir. 2024)  
19 (emphasis added and citation omitted).

20 Indeed, the first time the Ninth Circuit was asked to interpret *Jack Daniel’s* as it  
21 applies to the content of an expressive work—in that case, a television show—the Ninth  
22 Circuit was unequivocal that *Rogers* applied precisely because the alleged use was not  
23 source-identifying. *Hara v. Netflix, Inc.* concerned a cartoon series called *Q-Force* about  
24 a group of LGBTQ spies who fight crime and navigate life in West Hollywood. 146 F.4th  
25 at 874, 883. Plaintiff Lance Hara, professionally known as the drag queen Vicky Vox,  
26 sued under the Lanham Act, claiming that an animated version of her likeness appeared in  
27 one episode of *Q-Force* and materials promoting the show. *Id.* at 874. The Ninth Circuit  
28 held that Hara failed to allege that Netflix used her likeness “*as a mark*” to suggest that

1 “she was the source or origin of the series.” *Id.* at 880. Accordingly, the Ninth Circuit  
2 found it appropriate to “apply the guiding principle that when the challenged mark in an  
3 artistic work is ‘used not to designate a work’s source, but solely to perform some other  
4 expressive function,’ the *Rogers* test applies.” *Id.* at 879 (quoting *Jack Daniel’s*, 599 U.S.  
5 at 154).

6 The Ninth Circuit also reaffirmed its precedent that *Rogers* applies to promotional  
7 activities for expressive works. Hara argued that, at a minimum, *Rogers* should not protect  
8 Netflix’s alleged use of her likeness in the official teaser and still image promoting *Q-*  
9 *Force*. *See id.* at 882. But the Ninth Circuit reiterated that “it requires only a minor logical  
10 extension of the reasoning of *Rogers* to hold that works protected under its test may be  
11 advertised and marketed by name.” *Id.* (quoting *Empire Distrib.*, 875 F.3d at 1196–97).  
12 As such, “promotional activities, even those that produce revenue, are auxiliary to the work  
13 itself,” and thus “subject to the *Rogers* test.” *Id.*

### 14 **III. The Court’s Order Threatens to Unsettle the Clarity Provided by This** 15 **Established Case Law.**

16 At the very least, the Court’s Order calls this settled jurisprudence into significant  
17 question. The Order suggests a limitation to the *Rogers* doctrine for references to  
18 trademarks in expressive works in cases where a corporate affiliate sells merchandise that  
19 is associated with the expressive work and allegedly infringes the plaintiff’s mark. That  
20 limitation is not supported by governing law, and the possibility of other courts applying a  
21 similar approach in future cases will have a chilling effect on creators.

22 As an initial matter, as WDSMP and BVHE note in their Motion, the Court’s Order  
23 is difficult to square with the Supreme Court’s recent decision in *Dewberry Grp., Inc. v.*  
24 *Dewberry Eng’rs Inc.*, 604 U.S. 321 (2025). There, the Supreme Court held that separately  
25 incorporated affiliates must be treated as separate legal entities for purposes of Lanham  
26 Act liability. *Id.* at 326–27. And this case illustrates precisely why that distinction makes  
27 sense: The relevant question here is whether “the *accused infringer* has used a trademark  
28 to designate the source of *its own goods*.” *Jack Daniel’s*, 599 U.S. at 145 (emphasis added).

1 But here, while other Defendants sold merchandise, WDSMP and BVHE distributed the  
2 *Toy Story 3* motion picture itself. That motion picture is an expressive work, which  
3 requires applying *Rogers* to WDSMP’s and BVHE’s use of the mark.

4 Nevertheless, the Court appears to have found that WDSMP and BVHE each  
5 somehow used “Lots-o’-Huggin’ Bear” as a source-identifier at least in part, such that their  
6 use was not entitled to *Rogers* protection. But that logic dramatically unsettles the  
7 protections of the *Rogers* doctrine. It is undisputed that WDSMP and BVHE only  
8 distributed the motion picture *Toy Story 3*, not any merchandise associated with “Lots-o’-  
9 Huggin’ Bear.” It is further undisputed that the motion picture only makes one spoken  
10 reference to “Lots-o’-Huggin’ Bear,” a character that was introduced for the first time in  
11 the movie. Although *Jack Daniel’s* did not fully explicate what it means for a trademark  
12 to be used “as a mark,” *Jack Daniel’s* by its terms only involved a consumer product. None  
13 of the indicia of trademark use in *Jack Daniel’s* apply to references to trademarks in  
14 connection with expressive works, *cf. Jack Daniel’s*, 599 U.S. at 160—particularly where  
15 the allegedly infringing mark is only used fleetingly in the body of the work.

16 It is difficult to understand, then, how WDSMP and BVHE could have used “Lots-  
17 o’-Huggin’ Bear” “to designate the source of [their] own goods,” or how other motion  
18 picture and television creators could avoid doing the same. *See Jack Daniel’s*, 599 U.S. at  
19 145. In fact, the Supreme Court even observed in *Jack Daniel’s* that simply depicting a  
20 trademark in a movie generally should not constitute use of that trademark as a source  
21 identifier. *See id.* at 154 (citing *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, 868  
22 F. Supp. 2d 172 (S.D.N.Y. 2012)). Likewise, the Ninth Circuit found that the alleged  
23 depiction of the plaintiff in *Hara* did not act as a source identifier, and noted that if a  
24 fleeting reference in “an animated series does not trigger the *Rogers* test, then it is hard to  
25 imagine when the *Rogers* test would ever apply.” *Hara*, 146 F.4th at 882.

26 Ultimately, the reasoning in the Court’s Order would create a dual class of  
27 expressive works, whereby any works with expected or actual merchandising tie-ins that  
28 allegedly incorporate the plaintiff’s mark are no longer afforded the protection of *Rogers*.

1 That is not an outcome consistent with the First Amendment, *Rogers*, *Jack Daniel’s*, or the  
2 Ninth Circuit precedents applying both. After all, *Rogers* itself held that its balancing test  
3 applies to expressive works “of a hybrid nature, combining artistic expression and  
4 commercial promotion.” *Rogers*, 875 F.2d at 998. *Rogers* recognized that artistic works  
5 are commercial products, and consumers “have an interest in not being misled” as to their  
6 source. *Id.* But at the same time, consumers “have an interest in enjoying the results of  
7 the author’s freedom of expression,” and for that reason, artistic works require the  
8 heightened First Amendment protection provided by the *Rogers* doctrine. *Id.*

9 For those reasons, the Order greatly undermines the certainty and predictability that  
10 *Rogers* affords to creators. Without reconsideration of the Court’s Order, or certification  
11 for interlocutory appeal, it may be years before this decision is reviewed. In the meantime,  
12 in the absence of more precedential authority on this topic, district courts and attorneys will  
13 look to the Order for guidance. Under the framework contemplated by the Order, when  
14 considering whether to allow a reference to a trademark in a creative work, the MPA’s  
15 members and other creators would unacceptably—and impossibly—need to assess not just  
16 whether the use within the work serves as a source identifier, but also whether that use  
17 might be viewed as a source identifier due to distinct, down-the-road merchandising. The  
18 resulting lack of predictability would chill important—and constitutionally protected—  
19 creative speech and expression. The Court should reconsider its Order and make clear that  
20 WDSMP and BVHE did not engage in trademark use, particularly the kind of source-  
21 identifying use in consumer products before the Court in *Jack Daniel’s*, or else certify the  
22 issue for Ninth Circuit review.

### 23 CONCLUSION

24 For the foregoing reasons, *amicus curiae* the MPA respectfully urges this Court to  
25 reconsider its January 20, 2026 Order, or, in the alternative, certify a controlling question  
26 of law for interlocutory appeal.  
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Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

This certifies the MPA’s brief complies with the requirements of Local Rule 11-6. The brief contains 3,655 words as calculated by the word processing program.

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