

Case No. 26-5274

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DIECE-LISA INDUSTRIES, INC.,
Plaintiff-Respondent,

v.

WALT DISNEY STUDIOS MOTION PICTURES AND BUENA VISTA HOME
ENTERTAINMENT, INC.,
Defendants-Petitioners.

On Petition for Permission to Appeal from the United States District Court
for the Central District of California (Western Division)
Case No. 2:20-cv-09147-TJH-AYP
Hon. Terry J. Hatter, Jr.

**BRIEF OF *AMICUS CURIAE*
THE MOTION PICTURE ASSOCIATION, INC.
IN SUPPORT OF DEFENDANTS-PETITIONERS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for the Motion Picture Association, Inc. (“MPA”) states that the MPA is a not-for-profit trade association. The MPA’s members are Amazon Studios LLC, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. The MPA does not have any parent companies, and no publicly held company owns 10% or more of the MPA.

Dated: August 17, 2026

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This brief is accompanied by a motion for leave to file.¹

STATEMENT OF INTEREST

Amicus curiae the Motion Picture Association, Inc. (“MPA”) is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the motion picture and television industry, advancing the business and art of storytelling and protecting storytellers’ creative and artistic freedoms. The MPA’s member companies—Amazon Studios LLC, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.—and their affiliates produce and distribute the vast majority of professionally produced motion picture and television entertainment in the United States.

The MPA can thus provide a uniquely well-informed perspective on the importance to creators of clear and consistent application of the *Rogers v. Grimaldi* doctrine, which applies to depictions of and references to real-life or fictitious brands in creative works. Creators regularly “clear” works—*i.e.*, subject the content of their motion picture and television shows to legal vetting before release—in part on the

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party or party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund its preparation or submission; and no person other than the MPA, its members, or its counsel did so. Neither Petitioner Walt Disney Studios Motion Pictures nor Petitioner Buena Vista Home Entertainment, Inc., nor any other Disney affiliate, nor their counsel, authored this brief in whole or in part or contributed money intended to fund its preparation or submission.

understanding that *Rogers* will apply. *Rogers*'s longstanding applicability guides the legal analysis about whether to approve aspects of creative works, and promotes rather than chills the creative process.

In its January 20, 2026 Order, Dkt. 1-1, Petition ("Pet.") Ex. C ("Order"), the district court held that the *Rogers* test does not apply to Lanham Act claims against the two Disney entities responsible for the theatrical and home distribution of the *Toy Story 3* motion picture, simply because other Disney entities later sold allegedly infringing merchandise associated with the movie. In doing so, it became the first court to hold that a creator may lose *Rogers*'s protection if a corporate affiliate sells associated merchandise that allegedly infringes the plaintiff's mark. That holding cannot be reconciled with precedent from both this Court and the Supreme Court.

The MPA's members have a critical interest in this litigation. When they and other creators depict real-life or fictitious brands *within* expressive works, they are using them to advance their storytelling or to enhance the realism of a fictional world they create, not using a trademark as a mark to sell a product or service. By suggesting that whether *Rogers* applies to a claim alleging trademark infringement through the production or distribution of an expressive work hinges on whether there are *also* merchandising tie-ins to that work, the district court's Order throws this case law into doubt, undermining the predictability and clarity that *Rogers* provides to

storytellers. The MPA therefore submits this *amicus* brief in support of the petition for permission to appeal.

SUMMARY OF ARGUMENT

The Court should grant the petition for permission to appeal. The motion picture *Toy Story 3* makes one fleeting reference to a secondary character's full name, "Lots-o'-Huggin' Bear," twenty minutes into its runtime. Plaintiff Diece-Lisa Industries alleges that the reference infringes Plaintiff's mark, "LOTS OF HUGS." Petitioners Walt Disney Studios Motion Pictures ("WDSMP") and Buena Vista Home Entertainment, Inc. ("BVHE") only distributed *Toy Story 3* and did not create or sell any consumer products associated with it. The district court nonetheless held that because other Disney entities sold merchandise associated with the "Lots-o'-Huggin' Bear," *Rogers* does not apply to WDSMP's and BVHE's alleged use of the "LOTS OF HUGS" mark within *Toy Story 3*.

This case raises an issue of critical importance to motion picture and television creators. In the seminal *Rogers v. Grimaldi* decision in 1989, the Second Circuit recognized that the First Amendment requires a more speech-protective test to assess trademark claims where the marks are allegedly used in association with expressive works. The MPA's members—and other creators—have relied on this line of First Amendment jurisprudence to reference real-life or fictitious brands in creative works and realistically depict the world in which we live, so long as those references are

not explicitly misleading. The *Rogers* doctrine provides space for these creative decisions and prevents self-censorship due to concerns about litigation risk.

If the district court’s Order stands, the application of *Rogers* may hinge on whether merchandise collateral to an underlying successful expressive work is offered to consumers, generating great uncertainty for storytellers at the moment of artistic choice. Faced with heightened litigation risk and the potential loss of the *Rogers* defense, creators will have an incentive to self-censor and take more risk-averse approaches to their artistic works—a classic “chilling effect.” The district court certified this question for interlocutory appeal, finding this “an extraordinary case with extraordinary circumstances.” Pet. Ex. D at 3. The MPA agrees. The Order’s consequences extend far beyond the parties to other creators, including the MPA’s members. The MPA respectfully urges the Court to grant the petition.

ARGUMENT

I. The District Court’s Order Threatens to Unsettle the *Rogers* Doctrine on Which Creators Rely in Crafting Expressive Works.

Motion pictures and television programs frequently depict brands to tell a story, make a point, or convey a sense of reality. Creators evoke brands as shorthand to, for example, help the audience understand who a character is and what a scene is about. Use of known brands and marks—or fictitious brands that evoke a sense of realism—also lends an aura of verisimilitude that is critical to effective storytelling. *Cf. Hara v. Netflix, Inc.*, 146 F.4th 872, 880 (9th Cir. 2025).

For example, to portray a car with any measure of reality, it must be recognizable as a Ferrari, Porsche, Ford, or Volkswagen. A top-of-the-line Ferrari in a heist film sets one tone. A beat-up Volkswagen camper in a homecoming story sets quite another. Storytellers need to be able to make artistic decisions involving brands to depict the world in which we live. Beyond car brands, creators must be able to have their characters drink Coca-Cola, eat Pringles, use iPhones and MacBooks, and carry Gucci handbags, all without fearing repercussions or needing to fictionalize these items in ways that an audience would readily recognize is not reflective of the real world. For decades, the *Rogers* doctrine has provided creators the predictability and breathing space to do just that.

In *Rogers*, the Second Circuit held that, rather than the traditional multifactor likelihood-of-confusion test for trademark infringement, a more protective test should apply given the countervailing interest in “artistic expression.” Namely, trademark liability based on an expressive work should attach only (1) if “the title has no artistic relevance to the underlying work whatsoever” or (2) “if [the title] has some artistic relevance, [where] the title explicitly misleads as to the source or the content of the work.” *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). For over twenty years, this Court has embraced *Rogers* and established jurisprudence applying it to alleged infringements of trademarks not just in the titles of expressive works, but also within the body of those works. *See Mattel, Inc. v. MCA Records*,

Inc., 296 F.3d 894, 902 (9th Cir. 2002); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796, 807 (9th Cir. 2003); *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099-1101 (9th Cir. 2008). Even if the uses in these cases would ultimately not be found infringing under the traditional multifactor test, this Court’s decisions recognize that when addressing depictions of or references to brands in expressive works, it is often not necessary to wait for trial or even for discovery to dismiss an infringement claim. *See, e.g., Hara*, 146 F.4th at 874 (affirming dismissal on the pleadings). In turn, they give creators comfort that they can realistically depict the world without courting claims that, even if they would ultimately fail, would result in costly and burdensome litigation.

The Order focuses on the Supreme Court’s decision in *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140 (2023). *See* Order at 7-10. However, *Jack Daniel’s* did not fundamentally disturb the *Rogers* standard or the Ninth Circuit’s case law elaborating upon that standard. The trademark dispute in *Jack Daniel’s* did not implicate any motion picture or television show—the expressive works at the heartland of the *Rogers* doctrine—but instead involved two quintessential consumer products. 599 U.S. at 144. The Court held that the *Rogers* test (or any other “threshold First Amendment filter”) does not apply “when the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark.” *Id.* at 145, 153 n.1. “When a

mark is used as a mark ..., the likelihood-of-confusion inquiry does enough work to account for the interest in free expression.” *Id.* at 159. The Court expressly did not unsettle existing circuit case law applying *Rogers*, and indeed cited approvingly case law applying *Rogers* to dismiss claims based on alleged use of trademarks in creative works. *Id.* at 154-55, 163.

The first time this Court applied *Jack Daniel’s* to the *content* of an expressive work, it was unequivocal that *Rogers* applied precisely because the alleged use was not source-identifying. In *Hara*, the plaintiff alleged that an animated version of her likeness appeared in one episode of the Netflix cartoon series *Q-Force*. 146 F.4th at 874. This Court held that the plaintiff failed to allege that Netflix used her likeness “as a mark” to suggest that “she was the source or origin of the series.” *Id.* at 880. Accordingly, it was appropriate to “apply the guiding principle that when the challenged mark in an artistic work is ‘used not to designate a work’s source, but solely to perform some other expressive function,’ ... the *Rogers* test applies.” *Id.* at 879 (quoting *Jack Daniel’s*, 599 U.S. at 154).

The district court appears to have determined that WDSMP and BVHE each somehow used “Lots-o’-Huggin’ Bear” to identify the source of *Toy Story 3* at least in part, such that, under *Jack Daniel’s*, *Rogers* does not protect their use. The relevant question here is whether “the accused infringer has used a trademark to designate the source of its own goods.” *Jack Daniel’s*, 599 U.S. at 145. But here, it

is undisputed that WDSMP and BVHE only distributed the motion picture *Toy Story 3*, not any merchandise associated with “Lots-o’-Huggin’ Bear.” It is further undisputed that the motion picture only makes one spoken reference to “Lots-o’-Huggin’ Bear.” The Supreme Court observed in *Jack Daniel’s* that simply depicting a product or brand in a movie generally does not constitute trademark use as a source identifier. 599 U.S. at 154-55 (citing *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, 868 F. Supp. 2d 172 (S.D.N.Y. 2012)). Likewise, in *Hara*, this Court noted that if a fleeting reference in “an animated series does not trigger the *Rogers* test, then it is hard to imagine when the *Rogers* test would ever apply.” 146 F.4th at 882.

The district court’s Order calls this settled jurisprudence into significant question. The Order suggests a limitation to the *Rogers* doctrine for references to real-life or fictitious brands in expressive works where allegedly infringing merchandise collateral to an underlying successful expressive work is later offered to consumers, including, as here, where that merchandise is sold by a separate corporate affiliate. That limitation is not supported by this Court’s application of *Rogers* or by *Jack Daniel’s*, and the possibility of other courts applying a similar approach will have a chilling effect on creators, who generally must make decisions about the content of expressive works well before it is known whether the underlying expressive work will be successful and prompt consumer desire for collateral merchandise. Indeed, this Court has held that even promotional activities for a

protected work (*e.g.*, trailers) remain “auxiliary to the work itself,” and thus “subject to the *Rogers* test.” *Hara*, 146 F.4th at 882. At minimum, as Petitioners explain, Pet. 23, the district court’s Order is difficult to square with the Supreme Court’s decision in *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, 604 U.S. 321 (2025), holding that separately incorporated affiliates must be treated as separate legal entities for purposes of calculating the “defendant’s profits” under the Lanham Act. 604 U.S. at 326-27. This case illustrates why the distinction between expressive and merchandising uses—let alone the distinction between corporate defendants—matters: even though WDSMP’s and BVHE’s uses should be unquestionably protected under *Rogers*, the district court collapsed those uses with the separate act of marketing allegedly infringing merchandise and did not correctly assess whether the alleged use of the “Lots-o’-Huggin’” mark within *Toy Story 3* was infringement.

II. The Certified Question Warrants This Court’s Immediate Review.

The certified question satisfies every requirement of 28 U.S.C. § 1292(b). The district court correctly framed it as a categorical question of law, asking whether, applying *Jack Daniel’s*, *Hara*, and *Dewberry*, “a defendant that makes expressive use of a name in a movie is barred from invoking *Rogers* . . . , because its corporate affiliates use the same name to sell merchandise based on the movie.” Pet. Ex. D at 3. That pure legal question is resolvable without further factual development, and its resolution ““may appreciably shorten the time, effort, or expense of conducting’

the district court proceedings.” *ICTSI Oregon, Inc. v. Int’l Longshore & Warehouse Union*, 22 F.4th 1125, 1131 (9th Cir. 2022) (quoting *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1027 (9th Cir. 1982)).

Moreover, “substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue’s resolution, not merely where they have already disagreed.” *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). A novel legal issue like this one therefore “may be certified for interlocutory appeal without first awaiting development of contradictory precedent.” *Id.* The Order’s reasoning would create a dual class of expressive works, in which any work with expected or actual merchandising tie-ins loses the protection of *Rogers*. That is not an outcome consistent with the First Amendment, *Rogers*, *Jack Daniel’s*, or the Ninth Circuit precedents applying them. After all, *Rogers* itself held that its balancing test applies to expressive works “of a hybrid nature, combining artistic expression and commercial promotion.” 875 F.2d at 998. At the same time, consumers “have an interest in enjoying the results of the author’s freedom of expression,” and for that reason, expressive works require the heightened First Amendment protection provided by the *Rogers* doctrine. *Id.*

For those reasons, the Order greatly undermines the certainty and predictability that *Rogers* affords creators. Absent interlocutory review, it may take years for a final judgment to reach this Court, be briefed and argued, and yield a

decision. In the meantime, district courts and attorneys will look to the Order for guidance. Under the Order's framework, the MPA's members and other creators would unacceptably—and impossibly—need to assess not just whether a use within a work serves as a source identifier, but also whether it might be so viewed due to down-the-road collateral merchandising. The resulting lack of predictability would chill constitutionally protected expression. These are precisely the exceptional circumstances in which immediate review is warranted.

CONCLUSION

For the foregoing reasons, the MPA respectfully urges this Court to grant the petition for permission to appeal.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number 26-5274

Susan J. Kohlmann, counsel for *amicus curiae* the Motion Picture Association, Inc. (“MPA”), hereby certifies that:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Ninth Circuit.

2. This Brief complies with the applicable type-volume limitation because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, this document contains 2,598 words, less than one-half the maximum length authorized for a petition for permission to appeal by Federal Rule of Appellate Procedure 5(c)(1), consistent with Rule 29(a)(5).

3. This Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this document has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the **Brief of *Amicus Curiae* The Motion Picture Association, Inc. in Support of Defendants-Petitioners** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 17, 2026. I further certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the Court's CM/ECF system.

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