

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-148

JACK DANIEL'S PROPERTIES, INC., PETITIONER

v.

VIP PRODUCTS LLC, RESPONDENT

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO MOTION OF AMICUS CURIAE THE MOTION
PICTURE ASSOCIATION, INC. FOR LEAVE TO PARTICIPATE IN
ORAL ARGUMENT AND FOR DIVIDED ARGUMENT

Jack Daniel's Properties, Inc. respectfully opposes the Motion Picture Association, Inc. (MPA)'s motion to participate in oral argument and for divided argument. "Divided argument is not favored." Sup. Ct. R. 28.4. Amici curiae making such requests without consent must demonstrate that their participation "would provide assistance to the Court not otherwise available," and their requests are granted only in the "most extraordinary circumstances." Sup. Ct. R. 28.7. MPA's motion should be denied.

1. This case presents *two* questions. MPA's brief discusses only the first question, relegating the second question presented to a footnote. MPA Br. 32 n.15. That fact alone justifies denial of the motion.

2. The Solicitor General has moved to participate in oral argument. Granting MPA's motion would set a dangerous precedent,

as MPA offers the Court no way to distinguish between its interest and that of the other 22 amici, who have their own interests and perspectives on both questions presented.

a. MPA does not define its claimed interest as representing “content creators” or explain why it is unique. Jack Daniel’s, through its affiliates, is a content creator producing expressive labels and trade dress. Petitioner’s Br. 10-11, 34-35. Respondent VIP Products LLC claims the same status. Respondent’s Br. 13. Multiple other amici in this case similarly create content or represent content creators. *E.g.* Authors Alliance, ComicMix, MSCHF, Chamber of Commerce.

b. MPA claims an interest in defending *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). But VIP, as well as many other amici, advocate *Rogers*’ continued application. Moreover, Jack Daniel’s offers the Court an alternative argument supporting *Rogers*’ application to works like movies. Petitioner’s Br. 38-39.

MPA is in any event wrong to assert an interest (at 2-3, 5) in maintaining *Rogers*’ “stab[le]” and “predictab[le]” test, claiming that “every circuit to consider *Rogers* has embraced it.” The Seventh Circuit has expressly reserved whether to adopt *Rogers*. *Eastland Music Grp., LLC v. Lionsgate Ent., Inc.*, 707 F.3d 869, 871 (7th Cir. 2013). Lower courts have reached no consensus about how or when to apply *Rogers* or even what it means. Compare Pet.App.31a (applying *Rogers* because dog toy “communicates a humorous message” (internal quotation marks omitted)); *Univ. of Alabama Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th

Cir. 2012) (applying *Rogers* to calendar because it is an “artistically expressive work”), with *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 415 (S.D.N.Y. 2002) (*Rogers* did not apply to pet perfume “making an expressive comment”); *Harley Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 813 (2d Cir. 1999) (*Rogers* did not apply to “a trademark parody”); see also Pet.App.30a (*Rogers* requires plaintiffs to establish that use is “not artistically relevant” or “explicitly misleads consumers” before analyzing likelihood of confusion); *Twin Peaks Prods. Int’l, Ltd. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993) (a “particularly compelling” finding of likelihood of confusion can “outweigh the First Amendment interest recognized in *Rogers*”).

Nor do the amici agree on when *Rogers* applies. MPA maintains that *Rogers* should apply to “quintessentially artistic works, including movies and television programs.” MPA Br. 24. But MPA also “concur[s]” with the International Trademark Association (INTA) that *Rogers* should not apply “to any product that would retain its primary functionality even if all expression has been stripped from it.” *Id.* at 25 (cleaned up). The American Intellectual Property Law Association argues that *Rogers* should apply to “a very slim subset of trademark disputes involving ‘artistic works,’” not “ordinary commercial products.” AIPLA Br. 13. The Intellectual Property Owners Association would apply *Rogers* to “traditionally protected expressive works such as literary titles, songs, photographs, greeting cards, etc.” IPO Br. 7. In contrast,

INTA would apply *Rogers* to “products where expression is inextricably intertwined with the product itself.” INTA Br. 5. And the Electronic Frontier Foundation (at 26-28) thinks the Ninth Circuit did not go far enough.

c. The cases MPA cites involving amici with “unusually strong interest[s]” (Mot. 1-2) therefore are inapposite. And in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the amici Tribes obtained consent of the parties. See Joint Application of the Parties, the United States, and the Muscogee (Creek) Nation for Divided Argument, *McGirt v. Oklahoma*, No. 18-9526 (Mar. 30, 2020).

3. MPA also is not “presenting an important argument that neither party raises,” nor is it defending a portion of the decision below that the parties have abandoned. *Contra* Mot. 2, 4-5. Like VIP, MPA claims that its members are engaged in artistic expression that should receive special First Amendment protection from trademark liability. *E.g.* MPA Br. 15; Respondent’s Br. 24. MPA claims no other party will present the argument that “*Rogers should apply to artistic works, but should not apply to consumer products.*” Mot. 5. But many other amici offer similar tests. See Chamber Br. 19; Scholars et al. Br. 8. And MPA’s brief offers no unique insight about how that test applies. MPA does not even define “artistic works,” MPA Br. 24-25, much less provide guidance on how to differentiate “artistic works” from “consumer products,” and oddly defers to other amici about how to resolve cases “near the line,” *id.* at 25.

MPA also neglects to mention that Jack Daniel's alternative argument resembles the position MPA advocates. See Petitioner's Br. 39 (arguing *Rogers* drew a "distinction between 'artistic works' and 'utilitarian products,'" and that "VIP's dog chew toy falls on the utilitarian side"); MPA Br. 25 ("*Rogers* does not apply to consumer products including dog toys."). MPA's participation therefore would not "provide assistance to the Court not otherwise available." Sup. Ct. R. 28.7.

Jack Daniel's requests that the Court deny MPA's motion.

Respectfully submitted,

/s/ Lisa S. Blatt
Lisa S. Blatt
Counsel of Record
WILLIAMS & CONNOLLY LLP
680 Maine Ave., S.E.
Washington, DC 20024
(202) 434-5000

February 27, 2023

CORPORATE DISCLOSURE STATEMENT

Petitioner Jack Daniel's Properties, Inc. is a wholly owned subsidiary of Brown-Forman Corporation, a publicly traded company.