

IN THE  
*Supreme Court of the United States*

JACK DANIEL'S PROPERTIES, INC.,  
*Petitioner,*

v.

VIP PRODUCTS LLC,  
*Respondent.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

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

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Pursuant to Rule 28.4 and 28.7 of the Rules of this Court, *amicus curiae* the Motion Picture Association, Inc. (“MPA”) respectfully moves for leave to participate in the oral argument in *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, No. 22-148. MPA requests that oral argument time be enlarged by ten minutes and that MPA receive ten minutes of time. Alternatively, if the Court does not enlarge argument time, MPA requests that it receive five minutes of time from each side. MPA alerted petitioner and respondent to this motion, but neither party has stated a position.

Although this Court grants motions for leave to participate in oral argument only “in the most extraordinary circumstances,” S. Ct. R. 28.7, this is the extraordinary case. Petitioner and respondent advocate positions that would unsettle a line of trademark jurisprudence that has provided important protection to content creators such as the motion picture industry for more than thirty years. Yet neither party is a member of that industry. To decide a case that could have a chilling effect on content creators’ First Amendment-protected expression argued only by a liquor company and a dog toy manufacturer would be like Hamlet without the Prince. MPA’s *amicus* brief in support of neither party advocates an interpretation of the Lanham Act that fairly balances the interests of content creators with the interests of trademark holders and offers the Court real-world understanding of the potential impact of the case. The Court should permit MPA to present those distinct positions at oral argument.

Historically, this Court has permitted non-federal *amici* to participate in oral argument in two circumstances. First, *amici* have participated in oral argument when they had an unusually strong interest in the outcome of the case, despite their status as

non-parties. *See, e.g., McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (permitting *amici* Tribes to participate in oral argument in case concerning scope of those Tribes’ reservations); *FCC v. Nextwave Personal Commc’ns, Inc.*, 537 U.S. 293 (2003) (permitting *amici* creditors to participate in oral argument in case concerning whether FCC could revoke debtor’s licenses). Second, *amici* have participated in oral argument when they presented an important argument that neither party raised. *See, e.g., Ortiz v. United States*, 138 S. Ct. 2165 (2018) (permitting *amicus* law professor to participate in oral argument to present jurisdictional argument presented by neither party); *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438 (2009) (permitting *amicus* American Antitrust Institute to participate in oral argument to defend reasoning of lower court that respondent declined to defend).

Both circumstances are present here. ***First***, MPA has an exceedingly strong interest in this case. Indeed, the legal standards articulated here matter significantly more to MPA’s members than to the parties themselves.

This case presents this Court’s first opportunity to address the so-called “*Rogers* test” that lower courts have applied for over three decades. In *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), the Second Circuit held that the Lanham 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. Under the *Rogers* test, that condition is satisfied only where the use of a mark “has no artistic relevance to the underlying work whatsoever,” or, if it does have artistic relevance, the use of the mark “explicitly misleads as to the source or the content of the work.” *Id.* Since *Rogers* was

decided, every circuit to consider *Rogers* has embraced it, it has been applied in scores of cases, and a recent House Report has recognized its critical importance. MPA Br. at 10, 23. MPA’s members rely on the stability and predictability of *Rogers* and its progeny when referencing trademarks to convey a sense of realism or to evoke the cultural significance associated with a brand. *Id.* at 12–20.

The existence, and scope, of the *Rogers* test is of great importance to MPA’s members. In most lower court cases addressing *Rogers*, the trademark defendant is a content creator such as a moviemaker. In *Rogers* itself, Ginger Rogers claimed that a film entitled “Ginger and Fred” violated the Lanham Act because a viewer might believe that she sponsored or endorsed the film. Other cases have involved similar lawsuits against creators of television shows, video games, musical works, and other artistic works protected by the First Amendment. *See, e.g., MGF B Props., Inc. v. Viacom Inc.*, 54 F.4th 670, 680–83 (11th Cir. 2022) (“Floribama Shore” television show); *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099–1101 (9th Cir. 2008) (“Grand Theft Auto: San Andreas” video game); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 807 (9th Cir. 2003) (photography series); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) (“Barbie Girl” song). In these cases, lower courts have applied *Rogers* and ensured adequate breathing space for artistic expression. MPA’s members and other content creators have come to rely on *Rogers* as an important standard in the trademark landscape. MPA Br. at 2–3, 21–23.

As noted above, neither petitioner nor respondent is a content creator. As such, the Court is in the unusual position of deciding the future of *Rogers* in a case where

neither party comes from the industry to which *Rogers* matters most. The Court should allow MPA to participate in oral argument so that the perspective of content creators can be heard.

*Second*, MPA is presenting an important argument that neither party raises.

Both petitioner and respondent are advocating extreme positions that, if adopted by this Court, would harm MPA's members and other content creators. Petitioner advocates abolishing the *Rogers* test and subjecting content creators to a standard likelihood-of-confusion analysis. As MPA's amicus brief explains, that approach would chill the exercise of First Amendment rights, suppressing creative freedom and undermining the reliance interests of MPA's members and other content creators. MPA Br. at 6–23.

Respondent, for its part, advocates extending the *Rogers* test to ordinary commercial products so long as the use of a mark purports to be a “parody” that “attacks the strong for their strength’s sake.” Resp. Br. at 23. That approach is also misguided because it conflicts with *Rogers*’ rationales and would create an end-run around the Lanham Act. MPA Br. at 23–30. While there should be space for businesses to market *genuine* parody products, the traditional likelihood-of-confusion test accommodates those products. MPA Br. at 30–32. The Court should not attempt to fit the square peg of commercial products into the round hole of *Rogers*. Respondent’s approach would harm MPA’s members by facilitating infringement of those members’ marks—some of the most valuable marks in the world. Moreover, respondent’s approach would harm the public,

by allowing unscrupulous sellers to deceive consumers as to the origin of their products via purportedly “parody” consumer products.

The United States, as *amicus*, adopts an approach similar to petitioner’s. The United States offers no defense of *Rogers* and suggests that, if *Rogers* applies at all, it applies only to the titles of artistic works. U.S. Br. at 26, 28 n.4.

Neither petitioner, nor respondent, nor the United States presents MPA’s argument that *Rogers should* apply to artistic works, but *should not* apply to consumer products. As MPA’s amicus brief explains, First Amendment coverage is typically extended to a given medium of expression without scrutinizing whether, in any individual case, a particular message or idea is subject to protection. Artistic works are *categorically* protected, and the *Rogers* test should hence apply when they are accused of trademark infringement. By contrast, consumer products, even when “expressive” in some way, are not entitled to the same type of categorical protection. MPA Br. 29–30.

The extreme positions taken by both parties threaten to distort the longtime trademark ecosystem and chill filmmakers’ creative freedom absent a critical participant. The Court should allow MPA ten minutes of argument time to ensure that the unique position of a crucial stakeholder is adequately aired.

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Respectfully submitted,

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