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It's a Partly Cloudy Day in the Rogers Neighborhood: Recent District of Colorado Decision in *Stouffer v. National Geographic* Flips the Script on Film and TV Title Clearance¹

By Jason Vogel

It's no secret that Hollywood is undergoing huge changes. There have been a series of mega mergers in the media space resulting in a new slate of major entertainment companies, both in terms of newly consolidated film and television production companies and new content streaming platforms. These deals are resulting in significant competition for viewer eyeballs. The key to success for these companies and platforms will be content, as fickle viewers demand a steady stream of new shows to watch. As a result, there has been an enormous growth in the number of new films and television projects in production. While the current COVID situation has placed many projects on hold while studios navigate how to safely conduct production during the pandemic, the demand for content has only grown during this time. In the long term the growth trend is likely to continue.

One of the legal challenges facing entertainment companies developing new projects is the selection of titles that do not infringe third party trademark rights. Trademark law is a subset of intellectual property law that protects brand names, company names, product names and similar indicia which enable consumers to identify the source of a product. Consumers rely on these labels as an indication of the source and level of quality of the product. For example, if you buy a handbag bearing a famous luxury brand trademark, you are relying on that mark to indicate that you are getting a high quality handbag manufactured by the designer reflected by the marks on the handbag and not a knockoff. Film and television titles can function in a similar manner in that viewers selecting programs to watch want to know that a program with "Star Wars" in the title, for example, is an officially sanctioned show created by the makers of the *Star Wars* franchise. As a result, the owners of film and television programs can (with certain limitations) assert trademark rights to prevent the distribution of programs with confusingly similar titles.² Companies developing new programs need to be mindful of potential conflict with prior marks—both titles and traditional trademarks.

However, the standards for trademark protection and infringement are different for film and television titles than they are for general consumer products. This is a result of the fact that such programs are creative works, and titles themselves represent expressive content. As such, they are subject to free speech protection under the First Amendment. Such free speech considerations constrain the degree to which titles are protectable as trademarks and the degree to which titles can infringe prior marks.³

Protectability of Titles for Single Creative Works and Series

In order for the title of a single creative work, like a film, to be protectable as a trademark in the enforcement context, it must have achieved secondary meaning through broad consumer protection. In other words, titles of single creative works are treated like descriptive trademarks. So, in clearing new prospective titles, a potentially conflicting prior film title can generally only present a significant bar to the new title if the prior film developed significant popularity. Titles of more obscure films will likely not have

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achieved the requisite level of secondary meaning to develop protectable trademark rights. For example, in *Heirs of Estate of Jenkins v. Paramount Pictures Corp.*, the author of short story entitled *First Contact* sued Paramount for the movie *Star Trek: First Contact*, but lost on the basis that the short story was a single creative work that had not developed secondary meaning.⁴

Titles of series, on the other hand, are considered inherently protectable, and therefore can develop trademark rights without requiring secondary meaning. Series titles can include film series, like *Harry Potter* (which currently consists of eight films), and it can also include television series like *Game of Thrones* or *Hawaii Five-O*.

In terms of registering film and television titles, the US Patent and Trademark Office employs a slightly different rule—series titles are inherently registrable just like in the enforcement context. However, titles of single creative works are never registrable even if they have developed secondary meaning. So, unlike the enforcement context, where titles of single works are treated like descriptive trademarks that may be enforced if they have developed secondary meaning; in the registration context, they are treated like generic marks, which are unregistrable under any circumstances. It should be noted, however, that this restriction only applies to trademark applications covering the works themselves, such as films and downloadable recordings in Class 9 or the provision of online films and television programs in Class 41. With respect to other categories of goods, for example merchandise, a single creative work title is treated like any other consumer product mark and may be registrable for such products.

Infringement in the Context of Titles – The Rogers Test

In a traditional trademark case, a finding of infringement requires that the plaintiff prove there is a likelihood of confusion. The various jurisdictions have established a series of factors for determining whether there is a likelihood of confusion, including the similarity of the marks, the similarity of the goods and services, similarities in the target customers and channels of trade, fame and distinctiveness of the prior mark and presence or absence of actual confusion.⁵ When a title is alleged to infringe a prior trademark, the courts have developed a different test, which balances the trademark likelihood of confusion test with the countervailing free speech issues under the First Amendment. This test was first articulated in the *Rogers v. Grimaldi* case in 1989 and therefore is known as the “Rogers Test.”⁶ Over the last three decades, courts across the country have referred to this case for instruction in determining title clearance.

The *Rogers v. Grimaldi* case involved a film entitled *Ginger and Fred*, which was written and directed by the famous Italian filmmaker, Federico Fellini. The film tells the story of two fictional cabaret dancers who became known for their imitations of early film stars and famous dance couple, Ginger Rogers and Fred Astaire. Ginger Rogers objected to the use of her name in the title, and brought a lawsuit against the filmmaker with a set of claims, chief among them, a complaint of a violation of Section 43(a) of the Lanham Act, which creates civil liability for “Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . .” Rogers’ claim alleged that the filmmaker created a false impression that the film was about her or that she endorsed, sponsored, or was otherwise involved with the film. She even provided market research that suggested moviegoers were misled to believe that she was connected to the film.

Upon review, the court acknowledged that movie titles have a dual purpose—to serve as a fundamental component of artistic expression and an important means of marketing the film to the public. Consumers have an interest in not being misled as well as an interest in enjoying the embodiment of the filmmakers expression. The court’s position was that artistic expression is paramount and must not be restricted, so

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as long as it is relevant to the overall work, it will outweigh the commercial reservations some may have. As a result, the court held that a title would be an infringement only if it were being used to mislead consumers into thinking that the work is connected to the celebrity.

Taking this into consideration, the court found that the title “Ginger and Fred” was artistically relevant to the film’s subject matter. The couple in the film were nicknamed “Ginger” and “Fred” and these names were chosen because they were integral to the film’s story. They were not chosen as a ploy to take advantage of the notoriety gained by their real life counterparts. There is no indication that Rogers was involved with the film whatsoever. Moreover, although the survey demonstrates that some consumers assumed she was involved with the film, that misunderstanding is outweighed by the interests of artistic expression, halting any application of the Lanham Act.

Lastly, the court found that the title was not misleading. Their reasoning stemmed from the fact that the couple in the film are known as “Ginger and Fred.” While there was a degree of actual confusion among moviegoers, the title was rooted in the filmmaker’s artistic expression. Because the title was artistically relevant to the storyline, the court found that the expression should not be restricted.

The Rogers Test in Application

The test set forth by the Second Circuit in *Rogers v. Grimaldi*, which has become known as the “Rogers Test,” has been widely adopted as the proper method for balancing First Amendment considerations against the public interest in avoiding consumer confusion. The Rogers Test consists of two prongs: (1) does the title have artistic relevance to the underlying work?; and (2) is the use of the title explicitly misleading as to the content or source? Subsequent decisions have put their own spin on this test.

Does the title have artistic relevance to the underlying work?

This prong has generally been interpreted liberally and is easily satisfied if the title makes any reference to the plot, content, tone, style, purpose, or intended appeal of the work. The level of artistic relevance need only be “above zero” to pass this prong.⁷ Some titles are artistically relevant because they make an explicit reference to the prior mark. For example, in *Mattel, Inc. v. MCA Records, Inc.*, the court held that the first prong was satisfied because the contested song title *Barbie Girl* was making a direct reference to the plaintiff’s Barbie branded doll since the song was satirically commenting on Barbie and the materialistic values that the songwriter contends the doll reinforces.⁸ However, it’s not necessary for the title to make an explicit reference to the prior mark. For example, in *Twentieth Century Fox v. Empire Distribution*,⁹ the court rejected plaintiff Empire Distribution’s argument that the television series title *Empire* failed to meet the relevance prong of *Rogers* because the use of the title was not a reference to Empire Distribution. The court instead held that the series title was a reference to the show’s setting in New York, the Empire State, and the subject matter of the show which involved the business empire of the protagonist. Such relevance to the themes and geographic setting of the show was sufficient to satisfy the first prong.

Is the use of the title explicitly misleading as to the content or source?

The general rule is that as long as a title has artistic relevance to the work, it does not matter if the later title is confusingly similar to the earlier mark. Instead the test is whether the use is “explicitly misleading.” In *MCA*, the Ninth Circuit held that the use of “Barbie” in MCA’s song title was not explicitly misleading: “The only indication that Mattel might be associated with the song is the use of Barbie in the title; if this were enough to satisfy this [explicitly misleading prong] of the Rogers Test, it would render *Rogers* a nullity.” *Mattel, Inc. v. MCA Records, Inc.*¹⁰ The court reiterated this point in *E.S.S.*, asserting that “the mere use of a trademark alone cannot suffice to make such use explicitly misleading.” *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*¹¹ There, the court held that using the name “Pig Pen” in a video game did not explicitly mislead consumers into believing that the game was sponsored or

endorsed by the strip club owner. *Id.*

Even consumer surveys of confusion do not constitute sufficient evidence that a title is explicitly misleading. *Brown v. Electronic Arts, Inc.*¹² For example, in *ETW*, the Sixth Circuit held that the use of Tiger Woods's name and image in a sports artist's work was not explicitly misleading because there were no explicit indications on the face of the works of Woods's connection with them. *ETW Corp. v. Jireh Publishing, Inc.*¹³ While a survey had been produced which showed that over sixty percent of the participants thought Tiger Woods was affiliated or connected with the work, the court held that "plaintiff's survey evidence, even if its validity is assumed, indicates at most that some members of the public would draw the incorrect inference that Woods had some connection with [the work]. The risk of misunderstanding, not engendered by any explicit indication on the face of the [work], is so outweighed by the interest in artistic expression as to preclude application of the [Lanham] Act." *Id.* In *Rogers* itself, the Second Circuit rejected similar survey data for the same reasons. 875 F.2d at 1001.

The essential question, therefore, was "whether there was an 'explicit indication,' 'overt claim,' or 'explicit misstatement' that caused such consumer confusion." *Brown*, 724 F.3d at 1245 (quoting *Rogers*, 875 F.2d at 1001). The correct type of evidence to prove the "explicitly misleading" prong of the Rogers Test "must relate to the nature of the behavior of the identifying material's user, not the impact of the use." *Brown*, 724 F.3d at 1246. For example, if a party produced evidence of "statements made in materials" accompanying the allegedly infringing work that explicitly mislead consumers, this may be sufficient. *Id.* However, while it is sufficient, it is not necessary that the defendant make an affirmative statement of the plaintiff's sponsorship or endorsement. McCarthy § 10:17.10 (noting that Rogers's second prong does not hinge on the junior user "falsely assert[ing] that there is an affiliation").

A circuit split has developed as to this second prong of the Rogers Test. In the Second Circuit, *Twin Peaks* made it a requirement to examine the standard likelihood of confusion factors as part of the second prong.¹⁴ In order for the confusion to override the First Amendment interest, the likelihood of confusion must be "particularly compelling," according to *Twin Peaks*. Conversely, in the Ninth Circuit, courts simply ask if there has been an "overt misrepresentation."¹⁵ Instead of comparing the two marks, this test examines what has been done to suggest or disclaim a connection between the two works. Until 2018, this has been a very low bar, because most creators claim their works rather than suggest they were created by someone else.

In 2018, the Ninth Circuit, in *Gordon v. Drape Creative, Inc.*,¹⁶ further clarified the "explicitly misleading" prong, identifying two new considerations: 1. the degree to which the junior user uses the mark in the same way as the senior user; and 2. the extent to which the junior user has added his or her own expressive content to the work beyond the mark itself." *Id.* at 270. According to the *Gordon* court, if the junior user uses the mark as only one component of his or her larger expressive creation, such that the use of the mark at most implicitly suggests that the product is associated with the mark's owner, this is generally acceptable. *Id.* at 270-71. If the junior user uses the mark as the centerpiece of an expressive work itself, however, unadorned with any artistic contribution, this may reflect nothing more than an effort to create consumer confusion or impair the distinctiveness of the competitor's mark. *Id.* at 271.

The District of Colorado's Reformulation of The Rogers Test in *Stouffer v. National Geographic I*

As outlined above, prior to mid-2019, the cases following *Rogers* established a fairly defendant-favorable regime, which made clearing and defending film and television titles comparatively easy compared to other types of marks. As long as the later title had some artistic relevance to the subject matter, and the producer of the later work was not crossing the line into explicitly or intentionally misleading consumers

into thinking there was a connection with the earlier work, the later title was generally defensible, and many cases in this area were decided on Summary Judgement in favor of the defendant.

However, in a mid-2019 decision out of the District of Colorado, the court broke significantly from 30 years of *Rogers* jurisprudence and issued an initial decision that was much more plaintiff favorable, *Stouffer v. Nat'l Geographic Partners, LLC (Stouffer I)*.¹⁷ In the 1980s, Stouffer produced a nature documentary series titled *Wild America*, which had a successful run as “PBS’s most watched show” for several years. Stouffer also obtained a 1998 trademark registration for WILD AMERICA covering a continuing television series depicting animals and their habitat.¹⁸ Prior to its 2012 release of the *Untamed Americas* series, National Geographic and Stouffer had discussed licensing or purchasing options for Stouffer’s film library, but National Geographic ultimately declined. National Geographic then asked Stouffer’s permission to title a subsequent series “Wild Americas” or “Wildest Americas.” Stouffer declined. Then in 2013, National Geographic released its *America the Wild* television series, which Stouffer claimed, “replicat[es] the most minute details of Wild America in its production.” *Id.* (internal quotations omitted). Aside from similarity of the respective titles and general theme, Stouffer claimed *America the Wild* replicated the a number of elements from his own *Wild America* series, including host-grizzly bear interactions; interactions with rams; images of big horn sheep head-butting; episode structure, including following a specific animal throughout an episode; animal point of view shots, among other camera positioning similarities; similarities between show hosts; and similarities in DVD packaging. *Id.* at 1166-68.

Stouffer brought an action in the Federal District Court of Colorado against National Geographic for federal trademark infringement and a number of other federal and state claims. National Geographic moved to dismiss Stouffer’s case based on First Amendment considerations as laid out in *Rogers*. *See Stouffer I*, 400 F. Supp. 3d at 1169.

Because neither the District of Colorado nor the Tenth Circuit had ever decided a case addressing the Second Circuit’s widely accepted *Rogers* analysis,¹⁹ the court elected to re-vamp the standard for trademark infringement in the title context. *See Stouffer I*, 400 F. Supp. 3d at 1173. While it agreed the Lanham Act should be limited to account for First Amendment rights, and that there must be some mechanism for relief without the need for a full likelihood of confusion analysis at trial,²⁰ the court found the two-pronged *Rogers* Test insufficient, particularly in situations where demonstrable artistic relevance might be difficult to discern. *Id.* at 1177-78 (discussing *Parks v. LaFace Records*, 329 F.3d 437, 452-53 (6th Cir. 2003) (finding that a reasonable person “could conclude that there is no relationship of any kind between Rosa Parks’ name and the content of the song” in question). The court also addressed the Ninth Circuit’s decision in *Gordon*, paying respect to its questioning of “[a]rtistic motives where the junior user uses the mark in the same channels, and in basically the same way, as the senior user.” *Stouffer I*, 400 F. Supp. 3d at 1179 (quoting *Gordon*, 909 F.3d at 270-71) (internal quotations omitted).

With a view toward improving upon the *Rogers* Test, the court went on to devise its own test that took artistic relevance into consideration, but largely expanded on the explicitly misleading inquiry. This so-called “Genuine Artistic Motive Test” asks: “[d]id the junior user have a genuine artistic motive for using the senior user’s mark or other Lanham Act-protected property right?” *Stouffer I*, 400 F. Supp. 3d at 1179. The court proffered several points to consider in answering this motive-centric query:

- “Do the senior and junior users use the mark to identify the same kind, or a similar kind, of goods or services?”
- To what extent has the junior user added his or her own expressive content to the work beyond the mark itself.
- Does the timing of the junior user’s use in any way suggest a motive to capitalize on popularity of

the senior user's mark?

- In what way is the mark artistically related to the underlying work, service, or product?
- Has the junior user made any statement to the public, or engaged in any conduct known to the public, that suggests a non-artistic motive? This would include 'explicitly misleading' statements...;
- Has the junior user made any statements *in private*, or engaged in any conduct *in private*, that suggests a non-artistic motive?"

Id. at 1179 (internal quotations omitted).

The court did not shy away from clarifying its lack of focus on artistic relevance, and noted that for its purposes, artistic relevance "is only a factor . . . not a threshold inquiry." *Id.* This shift in focus, from artistic relevance between title and work, to "objective" measures of a creator's "artistic motive," was rooted in concern with potentially abstract or *seemingly* random artistic elements in a work—the artistic relevance of which could be interpreted various ways. *Id.* at 1179-80 (emphasis added).

Ultimately, the court denied National Geographic's motion to dismiss the trademark claims,²¹ giving Stouffer leave to amend his complaint under the new standard, and National Geographic leave to once again move to dismiss based on such amended complaint.

This decision caused significant concern in the film and television field because many of the Genuine Artistic Motive factors look to the subjective intent of the later creator, which is often difficult to establish in early stages of litigation. As such, it seemed that going forward, these cases would be much less likely to resolve at the Motion to Dismiss stage.

Application of the Genuine Artistic Motive Test in *Stouffer v. National Geographic II*

Following the *Stouffer v. National Geographic I* decision, Stouffer filed an amended complaint, and National Geographic filed a new motion to dismiss. In this second proceeding, National Geographic asserted that the court's reformulation of the Rogers Test was significantly at odds with the rule established in other Circuits and would amount to an "unwarranted chilling of free expression" particularly for works with a nationwide audience like film and television titles. *Stouffer v. Nat'l Geographic Partners, LLC (Stouffer II)*.²² However, in a decision issued in May 2020, the court declined to move away from its new conceptualization, stating "that the Rogers Test . . . is needlessly rigid and fails to account for the realities of each situation." It analyzed the facts as alleged under the new Genuine Artistic Motive Test and ultimately sided with National Geographic, dismissing Stouffer's complaint with prejudice. *Id.* at *9. A number of the factors supported Stouffer's position, including that the services were similar, the expressive content had a similar appearance, and National Geographic's request for consent could be seen as an acknowledgement of the similarity. However, the court held that other factors, including the gap in time between the two shows, and the descriptiveness of the titles and resulting lack of viable alternative titles for programs concerning wild animals in America, supported a conclusion that National Geographic had not selected the title based on a motivation to trade off the goodwill of Stouffer's show.

Ultimately, this case reached the same outcome that it likely would have had under the Rogers Test. As a result, concerns about the decisions significantly tilting the scale towards owners of prior titles may have been overblown. Nevertheless, the decision is more favorable to prior titles than the *Rogers* decisions in other jurisdictions. So, film and television producers should be mindful of the new test, particularly those that are subject to jurisdiction in the Tenth Circuit.

Conclusion

Clearing film and television titles is subject to different standards than clearing most trademarks. It is important to bear in mind the rules relating to protection and registrability of single titles as opposed to series titles. In jurisdictions applying the Rogers Test, it is generally easier to clear titles provided that minimal artistic relevance can be shown and the title is not explicitly misleading. Under the new Genuine Artistic Motive Test in the Tenth Circuit, however, practitioners must consider whether the objective circumstances surrounding selection of a title create the appearance that the creator chose the title for purely artistic purposes or in order to capitalize on the popularity of the prior title. If there could be an implication that the title was chosen for purposes of capitalizing on a prior title, there may be an increased risk of infringement in an action brought in the Tenth Circuit.

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Endnotes

1. The author would like to acknowledge and thank Paymaneh Parhami, Kendrick Coq, and Gianna Cresto for their contributions to this article.

2. Copyright is a subset of intellectual property law which provides protection for creative works of authorship such as books, screenplays and audiovisual works such as films and television shows. But copyright does not protect titles, because titles and similar short phrases are deemed to contain an insufficient amount of authorship for protection.

3. This article primarily addresses trademark law as it relates to film and television titles, but the principles discussed in the article have been applied in an analogous way in the context of other types of expressive works, like the titles of songs, books, videogames, and the like.

4. 90 F. Supp. 2d 706 (E.D. Va. 2000).

5. See e.g., *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

6. 875 F.2d 994 (2d Cir. 1989).

7. See, e.g., *E.S.S. Entertainment 200, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008).

8. 296 F.3d 894, 900 (9th Cir. 2002).

9. 875 F.3d 1192 (9th Cir. 2017).

10. 296 F.3d 894, 902 (9th Cir. 2002).

11. 547 F.3d 1095, 1100 (9th Cir. 2008).

12. 724 F.3d 1235, 1246 (9th Cir. 2013).

13. 332 F.3d 915, 937 (6th Cir. 2003).

14. *Twin Peaks Productions, Inc. v. Publications International*, 996 F.2d 1366 (2nd Cir. 1993).

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

16. 909 F.3d 257 (9th Cir. 2018).

17. 400 F. Supp. 3d 1161, 1165 (D. Colo. 2019) (*Stouffer I*).

18. United States Trademark Registration No. 2,194,557.

19. *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 664–65 (5th Cir. 2000) (“Polo” clothing v. “Polo” lifestyle magazine); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 920 (6th Cir. 2003) (Tiger Woods v. painter of Woods’ 1997 Masters victory scene); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901–02 (9th Cir. 2002) (“Barbie” the doll v. Aqua’s “Barbie Girl” song); *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278

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(11th Cir. 2012) (famous college football uniforms v. painter of football player scenes).

20. Without this relief, the court noted the time for trial may “unduly chill expression,” or incentivize a senior user to bring a SLAPP (strategic lawsuit against public participation) suit. *Stouffer I* at 1178.

21. The court denied National Geographic’s motion to dismiss with respect to the trademark claims, but granted it with respect to the trade dress and copyright claims.

22. No. 18-CV-3127-WJM-SKC, 2020 WL 2306854, at *5 (D. Colo. May 8, 2020) (“*Stouffer II*”).