

Case No. 19-55348

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

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DR. SEUSS ENTERPRISES, L.P., a California limited partnership,

*Plaintiff-Appellant,*

v.

COMICMIX LLC, a Connecticut limited liability company; GLENN  
HAUMAN, an individual; DAVID JERROLD FRIEDMAN, an  
individual, AKA David Gerrold; TY TEMPLETON, an individual,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Southern District of California  
No. 3:16-cv-02779-JLS-BGS  
Hon. Judge Janis L. Sammartino

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**BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY LAW  
PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLEES**

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## INTEREST AND IDENTITY OF THE AMICI CURIAE

Amici, identified individually in Appendix A, are law professors who teach and have written extensively on trademark law and related subjects. Amici have no stake in the outcome of this case but have an interest in ensuring that trademark law develops in a clear and consistent way.<sup>1</sup>

## SUMMARY OF ARGUMENT

For nearly two decades, this Court has evaluated claims regarding the use of trademarks in expressive works using a framework derived from *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Applying that framework, the District Court correctly dismissed Appellant Dr. Seuss Enterprises’s (“Dr. Seuss”) claims against Appellees’ book *Oh! The Places You’ll Boldly Go!* (“*Boldly*”). The title, font, and illustration style of Dr. Seuss’s *Oh the Places You’ll Go!* (“*Go!*”) are artistically relevant to Appellees’ “mash-up of two creative worlds,” and nothing in *Boldly* explicitly misleads as to the source or content of the work. *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 256 F. Supp. 3d 1099, 1111 (S.D. Cal. 2017). *Gordon v. Drape* does not change that result. 909 F.3d 257 (9th Cir. 2018). Indeed, this case highlights precisely why

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<sup>1</sup> Pursuant to Rules 29(a)(4)(E) of the Federal Rules of Appellate Procedure, amici certify that no part of this brief was authored by either party’s counsel, neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amici and their counsel—contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

*Rogers*, as consistently applied by this Court prior to *Gordon*, is the appropriate framework for claims involving expressive works. Engaging in the type of analysis urged by Dr. Seuss would turn Lanham Act claims into just the sort of mutant copyright claims the Supreme Court was unwilling to allow in *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

## ARGUMENT

### I. ***Boldly's* Title, Font, and Illustration Style are Protected by the First Amendment**

The District Court's decision dismissing Dr. Seuss's trademark claims is consistent with this Court's longstanding application of *Rogers* to claims of trademark infringement involving expressive works.

"A trademark is a word, phrase or symbol that is used to identify a manufacturer or sponsor of a good or the provider of a service. It's the owner's way of preventing others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner." *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 900 (9th Cir. 2002) (internal citations omitted). But as this Court has routinely recognized, when trademarks are used for their expressive value rather than as source indicators, the public's interest in remaining free from consumer confusion must be balanced with the public's First Amendment interest in free expression. *Twentieth Century Fox TV v. Empire Distribution, Inc.*, 875 F.3d 1192, 1196 (9th Cir. 2017); *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013).

This Court has long balanced those interests by applying a test first developed by the Second Circuit in *Rogers*. *Twentieth Century Fox*, 875 F.3d at 1196; *Brown*, 724 F.3d at 1239; *E.S.S. Ent'mt 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806-07 (9th Cir. 2003); *MCA Records*, 296 F.3d at 900. And *Rogers* is the “only relevant legal framework for balancing the public’s right to be free from consumer confusion . . . and [Appellees’] First Amendment rights” in the context of Lanham Act claims involving expressive works. *Brown*, 724 F.3d at 1242. Under the *Rogers* test, use of a trademark in an expressive work is not actionable unless the use “[1] has no artistic relevance to the underlying work whatsoever, or, [2] if it has some artistic relevance, [use of the mark] explicitly misleads as to the source or the content of the work.” *Gordon*, 909 F.3d at 266 (quoting *Rogers*, 875 F.2d at 999).

Though the Second Circuit developed the *Rogers* test to evaluate use of a mark in the title of a work, this Court has on several occasions applied the same framework to claims involving use of a mark within the content of the defendant’s work. *See E.S.S.*, 547 F.3d at 1099 (noting there is “no principled reason why [*Rogers*] ought not also apply to the use of a trademark in the body of a work”); *Brown*, 724 F.3d at 1241 (“We have consistently employed the *Rogers* test in § 43(a) cases involving expressive works since *MCA*, including where the trademark or other identifying material in question was used in the body of a work rather than in the title.”).

As the District Court properly determined, Dr. Seuss's claims must be dismissed under *Rogers*. There can be no doubt that *Boldly*'s title, font, and illustration styles are artistically relevant.<sup>2</sup> *Boldly* is, as the District Court found, "a mash-up of two creative worlds, and *Go!*'s title, font, and illustration style must be employed to evoke *Go!* and the other Dr. Seuss works here at issue." *Dr. Seuss Enters.*, 256 F. Supp. 3d. at 1111. Use of Dr. Seuss's claimed trademarks therefore easily exceeds this Court's standard for artistic relevance, which "merely must be above zero." *E.S.S.*, 547 F.3d at 1100; *see also Brown*, 724 F.3d at 1243, 1245 ("even the slightest artistic relevance" is sufficient, and courts should not have to engage in extensive "artistic analysis").

And there is no reasonable argument that *Boldly* is explicitly misleading. Dr. Seuss alleges no "explicit indication," "overt claim," or "explicit misstatement" that causes confusion. *Brown*, 724 F.3d at 1245. Indeed, as the District Court noted, *Boldly* "explicitly announces on its cover that it is authored not by Dr. Seuss but instead by David Gerrodl & Ty Templeton." *Dr. Seuss Enters.*, 256 F. Supp. 3d. at 1111. "And *Boldly*'s copyright page even includes an explicit disclaimer that 'this is

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<sup>2</sup> Amici assume for the sake of argument here that *Go!*'s font and illustration style are capable of being considered trademarks. There are good reasons to doubt that conclusion, particularly with respect to "style," and that is a question this Court would have to confront if it were to apply *Rogers* in the way Dr. Seuss has suggested. That is yet another virtue of applying *Rogers* faithfully, as this Court has done for nearly two decades.



a work of parody, and is not associated with or endorsed by CBS Studios or Dr. Seuss Enterprises, L.P.” *Id.*

Dr. Seuss nonetheless argues that this Court should find *Boldly* explicitly misleading based on use of the purported marks alone. But this Court has repeatedly rejected parties’ attempts to read the word “explicitly” out of the standard. “It is well established that the use of a mark alone is not enough to satisfy [the explicitly misleading] prong of the *Rogers* test.” *Brown*, 724 F.3d at 1245. Indeed, “if the use of a mark alone were sufficient ‘it would render *Rogers* a nullity.’” *Id.* (quoting *MCA*, 296 F.3d at 902); *see also E.S.S.*, 547 F.3d at 1100 (“[T]he mere use of a trademark alone cannot suffice to make such use explicitly misleading”).

Whether the defendant’s use of the mark is explicitly misleading is also not a function of the amount of possible confusion. In *Brown*, the plaintiff argued that survey evidence demonstrating that a majority of consumers were mistaken about his affiliation with a video game based only on the use of his likeness raised a triable issue of fact on *Rogers* second prong. *Brown*, 724 F.3d at 1245. This Court squarely rejected that contention. “The [*Rogers*] test requires that the use be explicitly misleading to consumers. To be relevant, evidence must relate to the nature of the behavior of the identifying material’s user, not the impact of the use.” *Id.* at 1245-46. That conclusion was not based on some misunderstanding of *Rogers*, but on a fundamental recognition of the speech issues at stake. “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.” *Brown*, 724 F.3d at 1246 (quoting *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 937 (6th Cir. 2003)); see also William McGeeveran & Mark P. McKenna, *Confusion Isn’t Everything*, 89 NOTRE DAME L. REV. 253, 305-06 (2013) (emphasizing the need for a categorical rule protecting use of a mark within expressive works, particularly to avoid the chilling effects of speech-detering lawsuits). The standard is *explicitly* misleading, and nothing in *Boldly* meets that standard. See *Twentieth Century Fox*, 875 F.3d at 1199 (“To fail the second prong of the *Rogers* test, it is key that the creator must *explicitly* mislead consumers. We must ask not only about the likelihood of consumer confusion but also whether there was an explicit indication, overt claim, or explicit misstatement that caused such consumer confusion.” (internal quotation marks and citations omitted)).

## II. *Gordon v. Drape* Does Not Change the Result

*Gordon*’s suggestion that “[i]n some instances, the use of a mark alone may explicitly mislead consumers about a product’s source if consumers would ordinarily identify the source by the mark itself” was inconsistent with settled Ninth Circuit precedent and should not be expanded beyond that case. 909 F.3d at 270. As previously noted, this Court has repeatedly held that use of a mark alone cannot be

explicitly misleading. That holding has never been limited to cases involving titles. *See Brown*, 724 F.3d at 1245-46. Explicitness is a critical principle of *Rogers*, and weakening it would “render *Rogers* a nullity,” *id.* at 1245, since *every* mark owner argues that use of its mark is likely to cause confusion.<sup>3</sup>

This case highlights precisely why *Gordon* should be interpreted narrowly. Dr. Seuss claims as trademarks the title, font, and illustration style of its own expressive works, and it alleges that Appellees’ title, font, and illustration style infringe those “trademarks.” Evaluating that claim would require comparison of the respective expressive works—just the sort of comparison copyright requires. Unsurprisingly, Dr. Seuss’s copyright claims refer to copying of exactly the same elements.

This Court’s longstanding application of *Rogers* avoids a potential conflict with copyright by making comparison of the content of the work unnecessary when, as here, the defendant’s work makes no explicitly misleading claim. Extending *Gordon* here would have just the opposite effect—it would turn Dr. Seuss’s trademark claims

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<sup>3</sup> Ninth Circuit rules make clear that a panel cannot overrule a previous panel, and as a result, any inconsistency between *Gordon* and this Court’s previous applications of *Rogers* must be resolved in favor of the rules adopted by multiple panels prior to *Gordon*. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011) (“One three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.” (quoting *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992)); *Duckor Spradling & Metzger v. Baum Tr. (In re P.R.T.C., Inc.)*, 177 F.3d 774, 782 n.8 (9th Cir. 1999) (“A three-judge panel . . . lacks authority to overrule the decision of another panel.”)).

into mutant copyright claims by requiring consideration of “the degree to which the junior user uses the mark in the same way as the senior user” and the “extent to which the junior user has added his or her own expressive content to the work beyond the mark itself.” *Gordon*, 909 F.3d at 270.<sup>4</sup> Neither of those considerations have precedent in this Circuit’s (or any other circuit’s) *Rogers* caselaw. But they are, not coincidentally, remarkably similar to the copyright fair use concepts of “purpose and character of the use” and “transformativeness.” *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012). That similarity should be a red flag regarding the appropriateness of those concepts in evaluating a trademark claim.

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<sup>4</sup> The panel in *Gordon* apparently believed the defendant’s greeting cards had little expressive content beyond use of the plaintiff’s mark itself—as if they were analogous to a poster with only the McDonald’s logo against a blank white background, containing nothing else by which a separate source might be indicated. There are good reasons to reject *Gordon*’s approach even in such a case—it makes the question of whether explicit misleadingness can be established by use of the mark alone turn on the court’s determination of the amount of expressive content in the defendant’s work. That would, for example, raise the prospect that explicit misleadingness is a question of fact with respect to Andy Warhol’s famous Campbell’s Soup Cans. But certainly *Gordon* should not be extended to cases, like this one, where the defendant’s work contains substantial expressive content and the authors and publishers are clearly identified.

### III. Applying *Rogers* Avoids the *Dastar* Problem

Faithful application of *Rogers* has another significant benefit in this case—it avoids the need to engage the Supreme Court’s decision in *Dastar*. Dr. Seuss’s fundamental complaint is that consumers will believe *Boldly* is an authorized Dr. Seuss book. Specifically, Dr. Seuss complains that, because *Boldly* uses a title, font, and illustration style that evoke *Go!*, consumers will believe that Dr. Seuss is the origin of the content of the book. Opening Br. of Plaintiff-Appellant Dr. Seuss Enterprises, L.P. 14. (“Appellant Br.”). That claim is clearly barred by *Dastar*, which unambiguously holds that only misrepresentations of the origin of physical goods are actionable under the Lanham Act. 539 U.S. at 37. Other sorts of misrepresentations, including but not limited to misrepresentations of the origin of creative content, are not actionable. *Id.* (holding that “origin of goods” as used in the Lanham Act refers only to “the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods”); *see also Slep-Tone Entm’t Corp. v. Wired for Sound Karaoke and DJ Services, LLC*, 845 F.3d 1246, 1250 (9th Cir. 2017) (per curiam) (“When the claim is more accurately conceived of as attacking unauthorized copying, *Dastar* requires us to avoid recognizing a ‘species of mutant copyright law’ by making such claims

cognizable under the Lanham Act.” (quoting *Dastar*, 539 U.S. at 34)).<sup>5</sup>

As this Court recognized in *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008), the legitimacy of a party’s use of content is an issue for copyright law, not for the Lanham Act.<sup>6</sup> That’s an important reminder here, because Dr. Seuss has asserted a copyright claim with respect to which there is a genuine fair use issue. That issue should be resolved as a matter of copyright law, not evaded by Dr. Seuss by means of an inappropriate trademark claim.<sup>7</sup>

*Dastar* was decided in 2003, after this Court began applying *Rogers* in the context of expressive works. But all of the cases this Court has resolved under the *Rogers*

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<sup>5</sup> While the Court in *Dastar* was interpreting the language of § 43(a) specifically, 15 U.S.C. § 1125(a)(1)(A), the same rule applies in cases of infringement of registered marks under § 32 despite that section’s slightly less specific language. 15 U.S.C. § 1114; see *Slep-Tone Entm’t*, 845 F.3d at 1249 (noting that “although the Supreme Court [in *Dastar*] was interpreting the unfair competition provision in section 43 of the Lanham Act, the same standard applies to both registered and unregistered trademarks.”).

<sup>6</sup> *Sybersound* is a false advertising case, but its logic applies to false designation of origin cases as well; indeed, even more strongly given *Dastar*’s recognition that false advertising is a broader cause of action than false designation of origin. See *Dastar*, 539 U.S. at 38 (suggesting that the producer of a video that substantially copied the Crusade series but which, in advertising or promotion, gave purchasers the impression that the video was quite different from the series might have a false advertising claim); *A.H. Lundberg Associates, Inc. v. TSI, Inc.*, No. C14–1160, 2014 WL 5365514 (W.D. Wash. Oct. 21, 2014) (origin of intangible elements of goods cannot be proper subject of false designation of origin claim under *Dastar*).

<sup>7</sup> This Court should be particularly concerned about the appropriateness of Dr. Seuss’s trademark claims in light of the company’s documented efforts to use trademark law to circumvent copyright’s limitations. See Philip Nel, *The Disneyfication of Dr. Seuss: Faithful to Profit, One Hundred Percent?*, 17 CULTURAL STUDIES 579, 587-91 (2003).

framework also implicate *Dastar* in that they all involved allegations that consumers would be confused about the origin of creative content. *See, e.g., Twentieth Century Fox*, 875 F.3d at 1195; *Brown*, 724 F.3d at 1240; *MCA Records*, 296 F.3d at 901. The same is true here. If this case is not dismissed under *Rogers*—because *Boldly*'s title, font, and illustration style are artistically relevant and Appellees have done nothing explicitly misleading—then *Dastar* will apply.

Dr. Seuss's claim would not be saved under *Dastar* by a superficial re-framing of the allegations to refer to the origin of physical copies of *Go!*. As this and other courts have recognized, *Dastar* precludes claims that use of the plaintiff's mark suggests that the plaintiff created or authorized a particular physical (or digital) copy, if the evidence of misrepresentation is based solely on the content of the copy. *See Slep-Tone Entm't.*, 845 F.3d at 1250 (alleged confusion caused by the content of copyrighted music files was not actionable under *Dastar*); *Phx. Entm't Partners v. Rumsey*, 829 F.3d 817, 828 (7th Cir. 2016) (same).

If it were otherwise, Disney could prevent others from selling copies of *Steamboat Willie* even after its copyright expired by arguing that, because Mickey Mouse is in the movie and is Disney's trademark, consumers will be confused about the source of physical copies of the movie. That claim could be argued to survive *Dastar* because it is nominally focused on the source of physical goods, but in truth it hinges on an assertion that consumers will think Disney authorized the

reproduction of the content. That interpretation would make *Dastar* a dead letter, since it would allow any plaintiff to plead around the holding, creating precisely the sort of “mutant copyright law” the Supreme Court rejected. *Dastar*, 539 U.S. at 34; *cf. Bretford Mfg. v. Smith Sys. Mfg. Corp.*, 419 F.3d 576, 580-81 (7th Cir. 2005) (noting that consumers might see marks embedded in other products, and holding that *Dastar* bars claims based solely on that embedding).

*Dastar* also compels rejection of Dr. Seuss’s argument, derived from a footnote in *Rogers*, that *Go!* can be considered explicitly misleading because its title is confusingly similar to *Boldly*’s title. Appellant Br. 59 (quoting *Gordon*, 909 F.3d at 270, which quotes *Rogers*, 875 F.2d at 999 n.5, for the proposition that “misleading titles that are confusingly similar to other titles can be explicitly misleading, regardless of artistic relevance”). Insofar as a confusingly similar title misleads by causing confusion about authorship of the defendant’s work, that form of confusion is irrelevant under *Dastar*, which post-dates *Rogers* and controls on that point.



## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 11, 2019

Respectfully submitted,

s/ Phillip R. Malone

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## CERTIFICATE OF COMPLIANCE

**1. This BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY  
LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLEES**

complies with the type volume limitation contained in Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1(a), because it contains 3185 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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Dated: October 11, 2019

## APPENDIX A

Amici curiae are the law professors listed below. Affiliation is provided for identification purposes only; all signatories are participating in their individual capacity and not on behalf of their institutions.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2019, I electronically filed the foregoing **BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLEES** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/ Phillip R. Malone  
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Dated: October 11, 2019