

The United States Court of Appeals  
for the Seventh Circuit

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No. 13-2337

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FORTRES GRAND CORP.,  
*Plaintiff-Appellant,*

v.

WARNER BROTHERS ENTERTAINMENT, INC.,  
*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
No. 3:12-cv-00535-PPS-CAN  
The Honorable Philip P. Simon, Chief Judge

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BRIEF OF ELECTRONIC FRONTIER FOUNDATION  
IN SUPPORT OF DEFENDANT-APPELLEE

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**RULE 26.1 DISCLOSURE STATEMENT**

*Amicus Curiae* Electronic Frontier Foundation hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public. *Amicus* has not appeared earlier in this case; in this brief, it is represented only by Prof. Eugene Volokh of the UCLA School of Law.

All parties have consented to the filing of this *amicus* brief.

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## **INTEREST OF *AMICUS CURIAE***

The Electronic Frontier Foundation (“EFF”) is a nonprofit public advocacy organization devoted to preserving civil liberties in the digital realm. Founded in the nascent days of the modern Internet, EFF uses the skills of lawyers, policy analysts, activists, and technologists to promote Internet freedom, primarily through impact litigation in the American legal system.

EFF views the protections provided by the First Amendment as vital to the promotion of a robustly democratic society. This case is of special interest to EFF because incautiously defined intellectual property rights improperly restrict speech that should receive full First Amendment protections. Accordingly, it is important that the Lanham Act not be interpreted in a way that erodes long-standing First Amendment freedoms.<sup>1</sup>

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<sup>1</sup> No party or party’s counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

If ever there was an easy legal issue for this Court, this case is surely it. It is clear that an artistic work, whether a movie, a book, or another creative endeavor, may use terms that also happen to be trademarks without fear of trademark liability. Thus, the legal issue in this case is not complex—but that does not mean the stakes are low.

Artistic works like *The Dark Knight Rises* routinely use the names of trademarked products. Trademarks are ubiquitous in everyday life, and verisimilitude, humor, and vividness often require that product names be included in movies, books, and other media. Janis Joplin sang, “Lord, won’t you buy me a Mercedes Benz”; the law rightly did not require her to sing, “Lord, won’t you buy me a generic expensive car” instead. Wile E. Coyote put misplaced trust in Acme products, even though there were existing companies called Acme. The Terminator was sent back in time by Skynet, archenemy of humanity, though Skynet was a trademarked term.

Sometimes, artistic works deliberately refer to real products to draw the audience’s attention to the products, as in Janis Joplin’s song, in the Monty Python “Spam” sketch, and in the Laugh-In catchphrase, “Look

that up in your Funk & Wagnall's." Sometimes the products are fictitious, though they may share names with existing products, as with Acme, Skynet, and Clean Slate. This is unsurprising, given how many products' names are single words or short phrases.

Trademark decisions have repeatedly reaffirmed artists' rights to use marks in this way, especially in works of fiction. Even with respect to the *titles* of expressive works—which also function as commercial advertising for those works—artists have broad rights to use trademarks, so long as the use is artistically relevant to the work and is not “explicitly misleading as to source or content.” This is what the Second Circuit correctly held as to the film title “Fred & Ginger,” which deliberately referred to Fred Astaire and Ginger Rogers, *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989), and what the Ninth Circuit held as to the song title “Barbie Girl,” which deliberately referenced Barbie, *Mattel, Inc. v. MCA Records*, 296 F.3d 894 (9th Cir. 2002). *A fortiori*, such First Amendment protection is even more clearly applicable to references to product names *within* an expressive work. *See infra* p. 7.

This fits well with broader First Amendment doctrine. With respect to commercial advertising, both trademark law and false advertising



law have broad authority to restrict advertising that is misleading or confusing. But the contents of expressive works—whether statements in a newspaper article, passages in a book, or lines in a movie—cannot be restricted merely because they might “confuse” or “mislead” someone, especially when viewers are well aware that the works are fiction. While outright falsehoods in expressive works may incur liability if they meet the stringent requirements of defamation law, liability for the merely potentially misleading or confusing is unconstitutional.

In light of the above, the Electronic Frontier Foundation does not submit this brief because we are concerned that Warner Brothers needs help winning this case. EFF is concerned, however, about the many creative artists who do not have the resources to fend off unsound legal claims, no matter how weak those claims may be. For those creators, it is crucial that meritless lawsuits are dismissed as promptly as possible, preferably on a Rule 12(b)(6) motion such as the one involved in this case. Precedents that make this clear can help diminish the chilling effect of trademark law on constitutionally protected expression.

Thus, EFF believes a fair ruling in this case would send two messages: first, that creators need not fear liability if they happen to use a

term that is also a trademark to refer to a fictional product or service; and second, and equally important, that unsound claims such as this one can and will be dismissed quickly, without need for burdensome discovery.

## ARGUMENT

### I. Trademark Law Recognizes Artists' Right to Use Trademarks to Refer to Both Real and Fictional Products

Writers and filmmakers routinely use trademarks. Sometimes this is because the marks—Barbie, Spam, Mercedes, Fred Astaire and Ginger Rogers' names—have become important parts of the world on which the artists are commenting. Sometimes it is because people creating fictional worlds need to populate them with fictional products, and the names that make sense in those worlds also happen to have been used by manufacturers in the real world. Skynet from *Terminator*, Acme from the Roadrunner cartoons, and Clean Slate from *The Dark Knight Rises* are classic examples of this kind of use. The need is especially acute where, as here, the work is a live-action film; audiences expect a rich fictional world in which both the visuals and the dialogue echo the product-filled environment of the real world.

Courts have long recognized the legitimacy of such uses, especially because works of fiction are likely to be perceived as fiction, not as real commentary on actual products. Thus, even uses of trademarks as part of the title of an artistic work—which is not only expression but also commercial advertising for expression—do not violate the Lanham Act so long as they are artistically relevant to the underlying work and are not “explicitly misleading as to source or content.” *Rogers*, 875 F.2d at 999.

In *Rogers*, defendants produced and distributed a movie entitled “Ginger and Fred,” which told a fictional story of two Italian performers who imitated Ginger Rogers and Fred Astaire in their performances and became known in Italy as Ginger and Fred. *Id.* Ginger Rogers sued on the theory that the film’s title gave the false impression that the movie was about her, that she sponsored or endorsed the film, or that she was otherwise involved in the film. *Id.* In rejecting Rogers’ claim, the court noted that the title was artistically relevant to the movie, and that—even if some members of the public might assume that Rogers sponsored or was otherwise involved in the film’s production—the “risk of misunderstanding, not engendered by any overt claim in the title,

[was] so outweighed by the interests in artistic expression as to preclude application of the Lanham Act.” *Id.* Likewise, *Mattel* applied *Rogers* to hold that singers were free to write a song called “Barbie Girl” expressing their views of Barbie and Ken, even if Mattel objected to such a use of its trademarks. *Mattel*, 296 F.3d at 902.

Courts have consistently held that authors have the same artistic freedom when using the name of a product *within* an artistic work, as occurred here. “Although [the *Rogers*] test traditionally applies to uses of a trademark in the title of an artistic work, there is no principled reason why it ought not also apply to the use of a trademark in the body of the work.” *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008); *see also Univ. of Alabama Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1277-78 (11th Cir. 2012) (applying the *Rogers* test to paintings, prints, and calendars) (“we have no hesitation in joining our sister circuits by holding that we should construe the Lanham Act narrowly when deciding whether an artistically expressive work infringes a trademark”); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 926 (6th Cir. 2003) (applying the *Rogers* test to prints) (“[W]here the defendant has articulated a colorable claim that the use of a celebri-

ty's identity is protected by the First Amendment, the likelihood of confusion test is not appropriate because it fails to adequately consider the interests protected by the First Amendment").

In *E.S.S.*, for example, defendants' video game featured a strip club called the "Pig Pen," which was similar in architecture and design to plaintiff's real-life strip club called "The Play Pen Gentlemen's Club," commonly known as the "Play Pen." 547 F.3d at 1097. The "Pig Pen" is located in the fictional city of Los Santos, which is visibly modeled after Los Angeles, where the "Play Pen" is located. *Id.* The court rejected plaintiff's trademark infringement claim, pointing out that "the neighborhood [in which the fictional 'Pig Pen' is located], with all that characterizes it, is relevant to Rock Star's artistic goal, which is to develop a cartoon-style parody of East Los Angeles. Possibly the only way, and certainly a reasonable way, to do that is to recreate a critical mass of the businesses and buildings that constitute it." *Id.* at 1100. The fact that the strip club itself had minimal relevance to the game was unimportant, because the club was still part of the environment defendants sought to replicate.

What is true in video games set in a world parallel to ours must be equally true for films, such as *The Dark Knight Rises*, that are also set in such a world. Thus, for instance, *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913 (C.D. Ill. 2003), concluded that Caterpillar was unlikely to succeed in its a claim that *George of the Jungle 2* infringed Caterpillar's marks by depicting the villain using Caterpillar products to bulldoze the jungle. 287 F. Supp. 2d at 919-20. The court reasoned that "the appearance of products bearing well known trademarks in cinema and television is a common phenomenon," and held that such use of others' marks is not infringing. *Id.* at 919-20.

And rightly so. From McDonald's to Merriam-Webster, trademarked names are an integral part of modern American life. An artistic rendition of the world without such names would be sterile and unconvincing as a reflection of reality. *See Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 869 (Cal. 1979) (Bird, C.J., concurring) ("No author should be forced into creating mythological worlds or characters wholly divorced from reality."). This is true both of the main body of an artistic work and of the many extensions of a work into other media that are often pro-

duced today, from novelizations to videogames, and, as in this case, a web site that continues to develop the fictional world of Gotham City.

Likewise, artists have the right to create their own fictional product names, even when those names happen to coincide with other names. For instance, the producer of a fictional television movie may feature a company called “Starbrite Batteries” selling batteries under the same name without infringing the trademark of a corporation selling cleaners and polishes under the Star Brite name. *Ocean Bio-Chem, Inc. v. Turner Network Television, Inc.*, 741 F. Supp. 1546 (S.D. Fla. 1990). Hundreds of thousands of words and short phrases are trademarked by someone, somewhere, as to some product. The number is likely to be especially high in certain fields, such as computer software, where new products are much easier to introduce than, say, new cars.

And artists are entitled to choose names that make sense for the product within the world that they are creating. It makes sense that the creators of *Terminator* would choose a name such as Skynet to refer to a network of computers in space. Likewise, it makes sense that a screenwriter seeking a name for a fictional program that would wipe clean someone’s criminal record would call the program by the familiar

phrase “Clean Slate.” Names like these—which evoke the function of the fictional item—help viewers and readers follow the action without losing track of the plot.

It is rare for an artist to invent a product name that has never been used. Requiring artists to do so would relegate them to using invented words that often cannot convey descriptive information, double meanings, or insinuations as well as words and terms that are already in circulation. And even names that artists have never heard before are likely to be similar to the trademarked names of real-world products of the same general type as the fictional products, especially when a product’s name—like “Clean Slate”—is related to the product’s function.

Finally, the very fact that the name is used inside a work of fiction should diminish any risk that consumers will believe that the work is making some factual comment about an actual product. “If we see a painting titled ‘Campbell’s Chicken Noodle Soup,’ we are unlikely to believe that Campbell’s has branched into the art business. Nor, upon hearing Janis Joplin croon ‘Oh Lord, won’t you buy me a Mercedes-Benz?,’ would we suspect that she and the carmaker had entered into a joint venture.” *Mattel*, 296 F.3d at 902.



## II. Protection for References to Trademarked Products in Fiction Is Dictated by Broader First Amendment Principles

The *Rogers v. Grimaldi* rule that artistically relevant use of trademarks is not infringing unless it “explicitly misleads as to source or content,” *Rogers*, 875 F.2d at 999, is also dictated by broader First Amendment principles.

Commercial advertising, which is usually labeled “commercial speech” in First Amendment cases, may indeed be restricted when it is unduly confusing or misleading. Thus, consumer protection authorities may prohibit advertisements that mislead some customers about product features, and trademark owners may sue over advertisements that confuse some customers as to the origin of products. The use of a trademark to identify a commodity is usually “a form of commercial speech and nothing more.” *Silverman v. CBS Inc.*, 870 F.2d 40, 48 (2d Cir. 1989) (quoting *Friedman v. Rogers*, 440 U.S. 1, 11 (1979)).

But creative expression is not “commercial speech”; rather, it is fully protected speech, even when it is sold in commerce. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1980) (plurality opinion); *Smith v. California*, 361 U.S. 147 (1959). And courts may not block or penalize fully protected speech on the grounds that it might

possibly mislead or confuse someone. *See, e.g., In re Chmura*, 608 N.W.2d 31, 42 (Mich. 2000) (distinguishing commercial speech, which can be restricted on the grounds that it is merely “misleading,” from “core First Amendment speech,” which cannot be so restricted); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (holding that restriction on misleading non-commercial-speech statements was unconstitutional); *Butler v. Alabama Judicial Inquiry Comm’n*, 802 So. 2d 207, 218 (Ala. 2001) (likewise); *In re Miller*, 759 A.2d 455, 468 (Pa. Ct. Jud. Disc. 2000) (likewise).

Of course, even fully protected speech might lead to liability if it contains outright falsehoods, the defendant had a culpable *mens rea*, and the falsehoods are reasonably perceived to convey a defamatory factual assertion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). And in the rare cases where fictional works are understood to convey a false factual assertion, a defamation lawsuit might actually prevail. *See, e.g., Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924-27 (7th Cir. 2006).<sup>2</sup>

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<sup>2</sup> There may be cases in which an expressive work’s tendency to briefly mislead an audience is central to its artistic, critical, or humorous

But the mere possibility of confusion is not enough. “[The] likelihood-of-confusion test generally strikes a comfortable balance between the trademark owner’s property rights and the public’s expressive interests. But when a trademark owner asserts a right to control how we express ourselves[,] . . . applying the traditional test fails to account for the full weight of the public’s interest in free expression.” *Mattel, Inc.*, 296 F.3d at 900-01; *see also Rogers*, 875 F.2d at 1001 (taking a similar view).

Likewise, under defamation law, a plaintiff cannot prevail against, say, a newspaper, a documentary filmmaker, or an author on the grounds that the contents of a work are merely potentially misleading, or possibly confusing to some part of the audience. Rather, courts determine whether a reasonable person would interpret the work as making factual claims about the plaintiff that turn out to be false and defamatory. *See, e.g., Madison v. Frazier*, 539 F.3d 646, 654-55 (7th Cir.

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effect; *see, e.g.,* Stuart Elliott, *Pranksters Lampoon Chevron Ad Campaign*, N.Y. TIMES MEDIA DECODER (Oct. 28, 2010, 3:38 PM), <http://mediadecoder.blogs.nytimes.com/2010/10/18/pranksters-lampoon-chevron-ad-campaign> (describing a spoof ad campaign drawing attention to the “environmental issues in which Chevron is embroiled, including a dispute in Ecuador over oil pollution”). In a case involving such a work, a court would have to consider the First Amendment value of the commentary produced by this artistic device. But that is not this case.

2008); *Netzer v. Continuity Graphic Assocs., Inc.*, 963 F. Supp. 1308, 1325 (S.D.N.Y. 1997) (“Here, the use of [names that relate to plaintiff] in Crazyman No. 3 is not susceptible of a defamatory meaning, because no reasonable reader could understand the comic book as describing actual facts about Netzer or actual events in which he participated. Crazyman is patently a work of fantasy, involving outlandish plot scenarios and characters with impossible powers.”). The *Rogers* “expressly misleading” test seems to be aimed at capturing this distinction. The mere possibility that some part of the audience might be misled cannot suffice to make the use of a trademark actionable, absent something expressly aimed at deceiving people about a trademark owner’s connection to the product.

Thus, even if some viewers might incorrectly infer—with no express assertion or even deliberate suggestion on Warner Brothers’ part—that there is some sort of product placement relationship between Warner Brothers and Fortres Grand, or might unsoundly assume that the Fortres Grand product shares some features with the one depicted in *The Dark Knight Rises*, that cannot be enough to incur liability. Most newspaper articles and documentaries are pregnant with some possibility

that someone might misperceive something about the subjects. (Indeed, such misperception is *less* likely when it comes to works that everyone understands to be fiction.) But any such residual level of possible and unintended consumer confusion cannot justify a restriction on fully protected speech.

### **III. Dismissing the Case on a Rule 12(b)(6) Motion Will Prevent Unnecessary Chilling of Speech**

Cases, such as this one, that allege claims based on the use of a mark in a fictional work, should be dismissed at the earliest possible stage of litigation. *See Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 634-36 (S.D.N.Y. 2008) (dismissing claim on motion to dismiss); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 972-74 (C.D. Cal. 2007) (same). Warner Brothers is fighting this lawsuit, but many artists—and even many smaller media businesses—cannot afford to fight. Faced with the uncertainty and expense of litigation, authors, filmmakers, cartoonists, songwriters, and other creators will self-censor instead.

This chilling effect is exacerbated when baseless lawsuits are allowed to go forward to discovery. As this Court is doubtless aware, discovery is an expensive and time-consuming endeavor in trademark litigation.

Experts must be hired. Often, large consumer surveys aimed at showing absence of consumer confusion must be commissioned. And of course lawyers must be paid. These expenses quickly add up to eye-popping amounts. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, No. CV99-85432RSWL, 2004 WL 1454100, at \*4 (C.D. Cal. June 21, 2004) (awarding defendant \$1,584,089 in legal fees and \$241,797 in costs). While Warner Brothers may be able to afford the defense of claims related to its blockbuster movies, most other content creators lack such resources.

Allowing cases like this one to survive a Rule 12(b)(6) motion would therefore impose a grave burden on budding artists and digital media startups, and stifle creativity and innovation. Some artists will choose to play it safe by changing the content of their works, or not creating certain artistic works at all, because they cannot afford to litigate over their First Amendment rights. And even if an artist is willing to take a risk, the artist's distributors and funders might be more risk-averse.

On the other hand, dismissing trademark cases like this one under Rule 12(b)(6) will lessen the burden on creators while still giving plaintiffs with legitimate claims ample opportunity to show that their cases are plausible. If plaintiff sues a rival computer company that sells soft-

ware with a name confusingly similar to plaintiff's, the rival's Rule 12(b)(6) motion might well fail. But when the plaintiff's argument is simply that the fully First-Amendment-protected content of an artistic work mentions an obviously fictional product that happens also to be a trademark, the matter can and should be dismissed as promptly as possible.

### CONCLUSION

For these reasons the district court's decision should be affirmed.

Respectfully Submitted,

s/ Eugene Volokh  
Attorney for *Amicus Curiae*  
Electronic Frontier Foundation

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Word 2007 in 14-point Century Schoolbook.

s/ Eugene Volokh  
Attorney for *Amicus Curiae*  
Electronic Frontier Foundation



**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on Nov. 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully Submitted,  
s/ Eugene Volokh  
Attorney for *Amicus Curiae*  
Electronic Frontier Foundation

Dated: Nov. 4, 2013