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# UNAUTHORIZED USE OF A CELEBRITY'S NAME IN A MOVIE TITLE: SECTION 43(A) OF THE LANHAM ACT AND THE RIGHT OF PUBLICITY

*Rogers v. Grimaldi*<sup>1</sup>

## I. INTRODUCTION

One of the benefits of being a popular celebrity<sup>2</sup> is that manufacturers of goods often pay substantial fees to have a celebrity endorse commercial products and services.<sup>3</sup> There can be no doubt that the use of a celebrity's name, picture, or voice in an advertisement attracts a consumer's attention to the product.<sup>4</sup> Because a celebrity can sell the right to use her name in these advertisements, the celebrity has an economic interest in her personality.<sup>5</sup> The law recognizes this interest and courts often enjoin the unauthorized use of a celebrity's name in advertisements for commercial products and services.<sup>6</sup> This Comment will focus on the issue presented in *Rogers v. Grimaldi*,<sup>7</sup> namely, whether courts also can enjoin the unauthorized use of a celebrity's

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1. 875 F.2d 994 (2d Cir. 1989).

2. A celebrity has been defined as one who has "attained national or international recognition in a particular field of art, science, business or other extraordinary ability." *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 79, 232 A.2d 458, 462 (Ct. Ch. Div. 1967).

3. See Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 642-48 (1973); Note, *The Right of Publicity, Section 43(a) of the Lanham Act and Copyright Preemption: Preventing the Unauthorized Commercial Exploitation of Uncopyrighted Works of Art*, 2 CARDOZO ARTS & ENT. L.J. 265, 266-67 (1983).

4. See Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1242-43 (1986); see also Treece, *supra* note 3, at 644; Note, *supra* note 3, at 266-67.

5. Treece, *supra* note 3, at 643.

6. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (1983), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987) (manufacturer enjoined from naming his portable toilets "Here's Johnny").

7. 875 F.2d 994 (2d Cir. 1989).

name when it has been used in the title of a movie, book, or other "work[] of artistic expression."<sup>8</sup>

## II. *ROGERS V. GRIMALDI*<sup>9</sup>

### A. *The Facts*

Plaintiff, Ginger Rogers, and the late Fred Astaire are one of the most famous dance duos in show business history.<sup>10</sup> Because of their fame, "Rogers and Astaire are among that small elite of the entertainment world whose identities are readily called to mind by just their first names, particularly the pairing 'Ginger and Fred.'"<sup>11</sup> Needless to say, Rogers has reached celebrity status,<sup>12</sup> because the use of Rogers' name in the entertainment world attracts huge audiences.<sup>13</sup> Rogers, like many other celebrities, has permitted a manufacturer once to use her name in advertising a commercial product.<sup>14</sup> Well aware of the commercial value of her name, however, Rogers has been highly selective of the types of commercial enterprises she allows to be associated with her name.<sup>15</sup>

In March of 1986 the defendants Alberto Grimaldi, MGM/UA Entertainment Co., and PEA Produzioni Europee Associate, S.R.L., produced and distributed in the United States a movie entitled "Ginger and Fred."<sup>16</sup> The movie is about the televised reunion of two fictional Italian cabaret dancers named Pippo and Amelia.<sup>17</sup> In their earlier years, Pippo and Amelia made a living by imitating Ginger Rogers and

8. *Id.* at 997. The *Rogers* majority stated that "[m]ovies, plays, books, and songs are all indisputably works of artistic expression." *Id.*

9. 875 F.2d 994 (2d Cir. 1989).

10. *Id.* at 996. Rogers and Fred Astaire co-starred in ten musical films beginning with "Flying Down to Rio" in 1933 and concluding with "The Barkleys of Broadway" in 1949. Rogers and Astaire have been referred to as "the icons of elegant ballroom dancing during Hollywood's Golden Age." Rogers v. Grimaldi, 695 F. Supp. 112, 113 (S.D.N.Y. 1988).

11. *Rogers*, 875 F.2d at 996.

12. See *supra* note 2 for definition of "celebrity." Rogers has been an entertainer for over 50 years; she has played major roles in 73 films and won an Academy Award for her performance in "Kitty Foyle" in 1940. *Rogers*, 695 F. Supp. at 113.

13. *Rogers*, 875 F.2d at 996.

14. *Id.* "In the mid-1970s, [Rogers] licensed J.C. Penney, Inc. to produce a line of GINGER ROGERS lingerie." *Id.*

15. *Rogers*, 695 F. Supp. at 114.

16. *Rogers*, 875 F.2d at 996. The famed Italian film-maker Federico Fellini created and directed the film. *Id.*

17. *Id.* at 996-97.

Fred Astaire and became known in Italy as "Ginger and Fred."<sup>18</sup> The subject of this controversy is the defendant's use of the title "Ginger and Fred" for their fictional movie,<sup>19</sup> a movie which plaintiff Ginger Rogers did not sponsor, endorse, or participate in the making of in any way.<sup>20</sup>

Because Rogers did not permit her name to be used in the title of the movie, she filed suit in the United States District Court for the Southern District of New York seeking injunctive relief and monetary damages.<sup>21</sup> Rogers claimed that the defendants "(1) violated section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), by creating the false impression that the film was about her or that she sponsored, endorsed, or was otherwise involved in the film, [and] (2) violated her common law right of publicity."<sup>22</sup> The defendants moved for summary judgment dismissing Rogers' complaint.<sup>23</sup> In granting the defendant's

18. *Id.* Fellini, the film's director, made the following statement in an affidavit submitted in support of the defendants motion for summary judgment:

The characters of Amelia and Pippo in [the Film] do not in any way resemble Fred Astaire and Ginger Rogers, nor were they ever intended to portray them. Rather, Amelia and Pippo are two aging and retired dancers who were Italian cabaret performers, whose "act" consisted of an imitation of the American legends whose name they borrowed for their routines.

*Rogers*, 695 F. Supp. at 115.

19. *Rogers*, 875 F.2d at 996.

20. *Id.* at 996-97.

21. *Rogers*, 695 F. Supp. at 112. Rogers filed her complaint shortly after distribution of the movie began in the United States. *Rogers*, 875 F.2d at 997.

22. *Rogers*, 875 F.2d at 997. Rogers' complaint also alleged that the defendants "defamed her and violated her right to privacy by depicting her in a false light." *Id.* This claim, however, was not very strong and was disposed of quickly by the majority. *Id.* at 1005.

23. *Id.* at 997. The defendants submitted affidavits in support of their motion for summary judgment. *Rogers*, 695 F. Supp. at 114. A portion of Fellini's affidavit appears *supra* note 18. Rogers submitted a market research survey in support of her in opposition to defendant's motion for summary judgment; the "survey purport[ed] to establish that the title 'Ginger and Fred' misled potential movie viewers as to Rogers' connection with the film." *Rogers*, 875 F.2d at 997. The majority stated in a footnote:

The survey sampled 201 people who said they were likely to go to a movie in the next six months. Half of those surveyed were shown a card with the title "Ginger and Fred" on it; the other half were shown an actual advertisement for the movie. Of these 201, 38% responded "yes" to the question: "Do you think that the actress, Ginger Rogers, had anything to do with this film, or not?" Of these respondents, a third answered yes to the question: "Do you think Ginger Rogers was involved in any way in making this film or not?" In other words, about 14% of the total 201 surveyed found that the

motion, the district court held that "[b]ecause the speech at issue here is not primarily intended to serve a commercial purpose, the prohibitions of the Lanham Act do not apply, and the Film is entitled to the full scope of protection under the first amendment."<sup>24</sup> Similarly, the district judge held that first amendment concerns barred Rogers' right of publicity claim.<sup>25</sup>

### B. *The Holding*

On appeal, Rogers asserted the same claims as she did in the district court.<sup>26</sup> The United States Court of Appeals for the Second Circuit affirmed the district court's grant of summary judgment<sup>27</sup> and held: (1) when the title of a movie which contains a celebrity's name "surpass[es] the appropriately low threshold of minimal artistic relevance"<sup>28</sup> to the underlying movie and is not "explicitly misleading as to [the] source or content"<sup>29</sup> of the movie, there is no violation of section 43(a) of the Lanham Act;<sup>30</sup> and (2) when the same title is not "wholly unrelated"<sup>31</sup> to the movie and is not "simply a disguised commercial advertisement for the sale of goods or services,"<sup>32</sup> the celebrity's right of publicity is not violated.<sup>33</sup>

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title suggested that Rogers was involved in making the film.

*Id.* at 1001 n.8.

The majority also stated that "[t]he survey evidence, even if its validity is assumed, indicates at most that some members of the public would draw the incorrect inference that Rogers had some involvement with the film." *Id.* at 1001 (footnote omitted).

24. *Rogers*, 695 F. Supp. at 120-21.

25. *Id.* at 124.

26. *Rogers*, 875 F.2d at 996-97.

27. *Id.* at 1005.

28. *Id.* at 999.

29. *Id.*

30. *Id.* at 1000.

31. *Id.* at 1004 (quoting *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 865, 603 P.2d 454, 457, 160 Cal. Rptr. 352, 355 n.6 (1972) (Bird, C.J., concurring)).

32. *Id.* at 1004 (quoting *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980)).

33. *Id.* at 1004-05.

### III. THE THEORIES OF RECOVERY

A celebrity who seeks to enjoin the unauthorized use of her name, generally, has two separate legal theories available to her.<sup>34</sup> First, the celebrity can allege that the defendant's use of her name constitutes false advertising and thus violates section 43(a) of the Lanham Act.<sup>35</sup> Second, she can claim that the defendants have appropriated the commercial value of her name and, thus, have violated the celebrity's common law right of publicity.<sup>36</sup> These two theories are discussed separately below.

#### A. *Section 43(a) of The Lanham Act*

Section 43(a) of the Lanham Act<sup>37</sup> creates civil liability for sellers

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34. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (1983), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987).

35. Germain, *Unfair Trade Practices Under Section 43(a) of the Lanham Act: You've Come a Long Way, Baby—Too Far Maybe?*, 49 IND. L.J. 84, 85 (1973) ("Section 43(a) is generally viewed as a reaction to the restrictive common law action of false advertising.").

36. Halpern, *supra* note 4, at 1201 ("[t]he right of publicity as currently understood . . . [is] that a celebrity has a right to damages and other relief for the unauthorized commercial appropriation of the celebrity's persona").

37. The full text of section 43(a) of the Lanham Act states:

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982).

However, section 43(a) was amended by the Trademark Law Revision Act of 1988. The amendment of subsection (a), which will take effect after November 16, 1989, states:

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false

of goods or services in interstate commerce who falsely designate origin or falsely describe their goods or services.<sup>38</sup> The primary function of section 43(a) is to "protect consumers from confusion as to the source of goods in the market,"<sup>39</sup> therefore, the focus is on the public's interest in not being deceived about the origin of goods.<sup>40</sup> Thus, section 43(a) focuses on the appropriator's act rather than on the celebrity's interest in the commercial value of her name.<sup>41</sup>

There are five elements of a cause of action<sup>42</sup> for injunctive relief under section 43(a).<sup>43</sup> First, defendant's advertisement must be false or create a false impression about the source of the goods.<sup>44</sup> Second,

or misleading representation of fact, which—

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (Supp. 1989).

The section 43(a) amendment will probably not affect the *Rogers* holding because *Rogers*' section 43(a) claim failed primarily due to first amendment concerns. See *infra* notes 146-178 and accompanying text.

38. See *supra* note 37.

39. *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1193 (S.D.N.Y. 1983); see also *Halpern, supra* note 4, at 1240-42.

40. *Halpern, supra* note 4, at 1241.

41. *Id., supra* note 4, at 1240-41. The right of publicity focuses on the celebrity's interest in the commercial value of her name. See *infra* notes 94-97 and accompanying text.

42. A plaintiff is not required to show that its mark is registered or even registrable in order to receive protection under section 43(a). *Metric & Multistandard Components Corp. v. Metric's, Inc.*, 635 F.2d 710, 714 (8th Cir. 1980); see also, *Mortellito v. Nina of California, Inc.*, 335 F. Supp. 1288, 1294 (S.D.N.Y. 1972) ("Regarding the claim under the Lanham Act, it is not a prerequisite that the mark be registered."); *Denicola, Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 Wis. L. REV. 158, 162.

43. Elements one through three and five are found in *Germain, supra* note 35, at 96; element four is found in section 43(a) itself, 15 U.S.C. § 1125(a) (1982).

44. *Frisch's Restaurants, Inc. v. Elby's Big Boy*, 670 F.2d 642, 647 (6th Cir. 1982); *Geisel v. Poynter Prods., Inc.*, 283 F. Supp. 261, 267 (S.D.N.Y. 1968); see also *Germain, supra* note 35, at 96-97.

the defendant's actions must deceive or have a tendency to deceive the public about the source of goods.<sup>45</sup> Third, the deception created by the defendant must be material to the extent that it will likely effect the consumer's purchasing decision.<sup>46</sup> Fourth, the defendants must have introduced the product into interstate commerce.<sup>47</sup> Finally, the defendant's actions must have caused the plaintiff actual injury or its likelihood.<sup>48</sup>

The standard of proof required in a section 43(a) action for injunctive relief is the showing of a likelihood of consumer confusion about the source of the goods.<sup>49</sup> In *Frisch's Restaurants, Inc. v. Elby's Big Boy*,<sup>50</sup> the court approved a balancing test of eight factors for determining whether a likelihood of confusion exists among consumers of goods.<sup>51</sup> The factors are:

1. strength of the plaintiff's mark;
2. relatedness of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. likely degree of purchaser care;
7. defendant's intent in selecting the mark;
8. likelihood of expansion of the product lines.<sup>52</sup>

The plaintiff must "establish that use of its mark by a competitor constitutes . . . a false designation of origin or false representation and . . . [that] the public is likely to be confused by that use."<sup>53</sup>

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45. *Frisch's Restaurants*, 670 F.2d at 647; *Geisel*, 283 F. Supp. at 268; see also *Germain*, *supra* note 35, at 99.

46. *Germain*, *supra* note 35, at 96, 99-100.

47. 15 U.S.C. § 1125(a) (1982).

48. *Germain*, *supra* note 35, at 96, 100.

49. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (6th Cir. 1983), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987); *Frisch's Restaurants, Inc. v. Elby's Big Boy*, 670 F.2d 642, 647 (6th Cir. 1982); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979); *Geisel v. Poynter Prods., Inc.*, 283 F. Supp. 261, 267 (S.D.N.Y. 1968).

50. 670 F.2d 642 (6th Cir. 1982).

51. *Id.* at 648.

52. *Id.* (quoting *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979)).

53. *Metric & Multistandard Components Corp. v. Metric's, Inc.*, 635 F.2d 710, 714 (8th Cir. 1980); see also *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (6th Cir. 1983) (test for equitable relief under section 43(a) is likelihood of confusion standard); *Geisel v. Poynter Prods., Inc.*, 283 F. Supp. 261, 267-68 (S.D.N.Y. 1968) (plaintiff entitled to injunctive relief upon a showing



Furthermore, the confusion requirement is satisfied if the public believes that the mark's owner sponsored, endorsed, or approved the use of the mark on the product.<sup>54</sup> The public does not have to believe that the owner of the mark actually manufactured and marketed the item.<sup>55</sup>

*Allen v. National Video, Inc.*<sup>56</sup> demonstrates that the unauthorized use of a celebrity's name in an advertisement for a commercial product or service can satisfy the elements of a section 43(a) action and the likelihood of confusion standard discussed above.<sup>57</sup> In *Allen*, the defendant used a lookalike of plaintiff Woody Allen in one of its advertisements.<sup>58</sup> The court noted that "the unauthorized use of a person's name or photograph in a manner that creates the false impression that the party has endorsed a product or service in interstate commerce violates the Lanham Act."<sup>59</sup> The court applied the elements of a section 43(a) cause of action,<sup>60</sup> and also considered six factors (very similar to the eight factors discussed above) in deciding whether there was a likelihood of confusion.<sup>61</sup> The court then held that "[a] review of all these factors leads . . . to the . . . conclusion that defendant's use of [the lookalike's] photograph in [its] advertisement creates a likelihood of consumer confusion over plaintiff's endorsement or involvement."<sup>62</sup>

While *Allen* demonstrates that the unauthorized use of a celebrity's name or picture in an advertisement for a commercial product or service can be enjoined under section 43(a),<sup>63</sup> the general issue presented in *Rogers* is whether the unauthorized use of a celebrity's name in connection with a movie can also be enjoined under section 43(a).<sup>64</sup> Movies, books, and other forms of entertainment are usually considered

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of the likelihood of customer confusion as to the source or originator of the goods).

54. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

55. *Id.* at 204.

56. 610 F. Supp. 612 (S.D.N.Y. 1985).

57. *Id.*

58. *Id.* at 617-18.

59. *Id.* at 626.

60. *Id.* at 625.

61. *Id.* at 627. The six factors the court considered were: "1) the strength of plaintiff's marks and name; 2) the similarity of plaintiff's and defendant's marks; 3) the proximity of plaintiff's and defendant's products; 4) evidence of actual confusion as to source or sponsorship; 5) sophistication of the defendant's audience; and 6) defendant's good or bad faith." *Id.*

62. *Id.* at 628.

63. *Id.*

64. *Rogers*, 875 F.2d at 996.

"works of artistic expression,"<sup>65</sup> or alternatively, forms of "artistic speech."<sup>66</sup> Creators of "artistic speech," unlike creators of commercial advertisements,<sup>67</sup> usually receive a certain amount of first amendment insulation from section 43(a) claims because "[i]n the area of artistic speech, . . . enforcement of trademark rights carries a risk of inhibiting free expression."<sup>68</sup> To avoid inhibiting free expression, courts might not enforce trademark rights when an artistic work infringes the trademark as it did in *Silverman v. CBS Inc.*<sup>69</sup> In *Silverman* the plaintiff (the infringer in this case) sought to have the trademarks of the "Amos 'n' Andy" radio programs declared in the public domain so that he could use them in his Broadway musical.<sup>70</sup> In holding that the trademarks were abandoned,<sup>71</sup> the court stated that the fact that the trademarks were being infringed by an artistic work "add[ed] some weight" to the plaintiff's claims.<sup>72</sup> Therefore, when a celebrity's name is used in connection with an artistic work, rather than an advertisement for a commercial product, the celebrity has a reduced chance of recovery under section 43(a) because of the defendant's first amendment right to freedom of expression.<sup>73</sup>

Nevertheless, "[t]rademark protection is not lost simply because the allegedly infringing use is in connection with a work of artistic expression."<sup>74</sup> Indeed, the government can suppress communication, whether in the form of commercial or artistic speech, if it is more likely to deceive the public than inform it.<sup>75</sup> In *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*,<sup>76</sup> the defendant's first amendment

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65. See *Silverman v. CBS Inc.*, 870 F.2d 40, 48 (2d Cir. 1989) (Broadway musical considered work of artistic expression).

66. *Id.*

67. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); see also *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 276 n.8 (2d Cir. 1981) ("Misleading commercial speech is beyond the protective reach of the First Amendment . . .").

68. *Silverman v. CBS, Inc.*, 870 F.2d 40, 48 (2d Cir. 1989).

69. 870 F.2d 40 (2d Cir. 1989).

70. *Id.* at 43.

71. *Id.* at 49.

72. *Id.* at 48.

73. See *id.*

74. *Id.* at 49.

75. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980); *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979).

76. 604 F.2d 200 (2d Cir. 1979).

defense to trademark infringement failed<sup>77</sup> when defendant's "gross and revolting sex film"<sup>78</sup> depicted the film's star "engag[ing] in various sex acts"<sup>79</sup> while wearing a uniform similar to the Dallas Cowboys Cheerleaders' uniform.<sup>80</sup> In upholding the plaintiff's trademark rights in the uniform,<sup>81</sup> the court stated that while "defendants' movie may convey a barely discernible message[, this] does not entitle them to appropriate plaintiff's trademark in the process of conveying that message."<sup>82</sup> The court reasoned that defendant's first amendment rights were not violated because there were "numerous ways in which defendants [could] comment on 'sexuality in athletics' without infringing plaintiff's trademark."<sup>83</sup> This reasoning is based on the so called "alternative avenues of communication"<sup>84</sup> standard. The court stated that the plaintiff "need not 'yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist[ed]'" for defendant.<sup>85</sup> Thus, *Dallas Cowboys Cheerleaders*, a case in which the plaintiff's trademark rights prevailed over defendant's interest in free expression, illustrates that it is possible for a plaintiff to prevail in a section 43(a) action even when the infringing use is in connection with a movie or artistic work.<sup>86</sup>

In both *Silverman* and *Dallas Cowboys Cheerleaders* the plaintiffs alleged the content of the artistic works were the infringement,<sup>87</sup> whereas the issue in *Rogers* is whether a title alone which contains a celebrity's name violates section 43(a).<sup>88</sup> The only case which can be found in which a plaintiff sought relief under section 43(a) for the unauthorized use of a celebrity's name in a movie title is *Hicks v. Casablanca Records*.<sup>89</sup> The *Hicks* plaintiffs, heirs of the late Agatha

77. *Id.* at 206.

78. *Id.* at 202.

79. *Id.* at 203.

80. *Id.*

81. *Id.* at 204.

82. *Id.* at 206 (footnote omitted).

83. *Id.*

84. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). The alternative avenues of communication standard was developed by the *Lloyd* court. *Id.*

85. *Dallas Cheerleaders*, 604 F.2d at 206 (quoting *Lloyd*, 407 U.S. at 567).

86. Admittedly, *Dallas Cheerleaders* is an extreme example of a case in which plaintiff's trademark rights outweigh the defendant's interest in free expression, i.e., defendant's movie "Debbie Does Dallas," *id.* at 202, probably would not be considered by most people to be an artistic work.

87. See *supra* notes 69-86 and accompanying text.

88. *Rogers*, 875 F.2d at 996-97.

89. 464 F. Supp. 426 (S.D.N.Y. 1978). Plaintiffs also sought relief under the right of publicity. *Id.* at 429; see also *infra* notes 125-29 and accompanying text.

Christie, sought to enjoin the defendant movie producers from distributing a movie entitled "Agatha."<sup>90</sup> The plaintiffs alleged that "defendants' use of the name 'Agatha' . . . would cause confusion in the minds of the public in general, and Agatha Christie readers in particular, to the effect that the movie . . . [was] authorized or even written by Mrs. Christie."<sup>91</sup> The court dismissed plaintiffs' claim reasoning only "that plaintiffs 'can prove no set of facts in support of [this] claim which would entitle [them] to relief."<sup>92</sup> While *Hicks* indicates that a celebrity plaintiff may not be able to recover under section 43(a) for the unauthorized use of her name in a movie title,<sup>93</sup> the court's lack of sufficient reasoning might preclude its opinion from being persuasive to future courts faced with the same issue.

### B. *The Common Law Right of Publicity*

Unlike section 43(a) of the Lanham Act, which protects the public from deception about the origin of goods,<sup>94</sup> the right of publicity<sup>95</sup>

90. *Hicks*, 464 F. Supp. at 428. The movie presents a fictionalized account of the mysterious eleven day disappearance of Agatha Christie in 1926. *Id.* at 429. In a related case, plaintiffs also sought to enjoin a defendant publisher from distributing a book entitled "Agatha." *Id.* at 428.

91. *Id.* at 433.

92. *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

93. *See id.*

94. *See supra* notes 37-41 and accompanying text.

95. The right of publicity was first recognized in *Haelan Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). Halpern, *supra* note 4, at 1201-02. It was developed as a result of the inadequate protection the right of privacy afforded celebrities against the unauthorized exploitation of their names and likenesses. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954). *See generally* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Generally, the right of privacy protects a plaintiff's right "to be let alone," Warren & Brandeis, *supra*, at 193, whereas the right of publicity protects the plaintiff's right to be compensated for the "unauthorized commercial appropriation of the [plaintiff's] persona." Halpern, *supra* note 4, at 1201. The right of publicity has since been approved by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

Before the right of publicity became well recognized, some cases, which were actually right of publicity cases, were decided under the right of privacy. *See, e.g.*, *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (Ct. Ch. Div. 1967). *See also* Comment, *The Right of Publicity-Protection For Public Figures And Celebrities*, 42 BROOKLYN L. REV. 527, 534-41 (1976).

There is some confusion as to whether the right of publicity is any different from the right of privacy. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498

protects a celebrity's right to control and profit from the commercial use

F.2d 821, 825-26 (9th Cir. 1974) ("California . . . courts would . . . afford legal protection to an individual's proprietary interest in his own identity. We need not decide whether they would do so under the rubric of 'privacy,' 'property,' or 'publicity'; we only determine that they would recognize such an interest and protect it."). Dean Prosser stated that:

The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser, *supra*, at 389.

Many courts and commentators have felt that Dean Prosser's fourth type of invasion of privacy is actually the right of publicity. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (1983) ("This fourth type has become known as the 'right of publicity.' Henceforth we will refer to Prosser's last, or fourth, category as the 'right of publicity.'") (citations omitted), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 388-91, 280 N.W.2d 129, 133-34 (1979); *Endejan, The Tort of Misappropriation of Name or Likeness Under Wisconsin's New Privacy Law*, 1978 WIS. L. REV. 1029, 1030 (1978) ("The interest to be protected [by Prosser's fourth type] deals primarily with the individual's 'right of publicity' and not the right to be let alone in the classical sense of privacy."); Halpern, *supra* note 4, at 1205-07, 1206 n.32, 1209-10; Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 461-67 (1981); Comment, *supra*, at 531-33. See generally *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-74 (1977).

There also have been numerous cases and commentaries on whether the right of publicity is descendible. See generally *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983) (the right of publicity is inheritable and devisable); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) (commercial exploitation rights in the Presley persona are not descendible), *cert. denied*, 456 U.S. 927 (1982); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 824, 603 P.2d 425, 431, 160 Cal. Rptr. 323, 329 (1979) ("the right to exploit name and likeness is personal to the artist and must be exercised . . . by him during his lifetime"); Halpern, *supra* note 4, at 1215-37; Sims, *supra*; Note, *supra* note 3, at 277 n.69.

of her name and likeness.<sup>96</sup> Thus, the right of publicity grants a celebrity the exclusive right to prevent others from exploiting the commercial value of her name and likeness without permission.<sup>97</sup>

The court in *Lerman v. Chuckleberry Publishing, Inc.*<sup>98</sup> stated the elements of a successful right of publicity case:

An individual claiming a violation of his right of publicity must show: (1) that his name or likeness has publicity value; (2) that he himself has "exploited" his name or likeness by acting "in such a way as to evidence his . . . own recognition of the extrinsic commercial value of his . . . name or likeness, and manifested that recognition in some overt manner . . .;" and (3) that defendant has appropriated this right of publicity, without consent, for advertising purposes or for the purposes of trade.<sup>99</sup>

The courts have not determined yet the outer limits of what constitutes exploitation of a celebrity's name and likeness.<sup>100</sup> In

96. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) ("The right of publicity . . . is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity."), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987); *Haelan Laboratories v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) ("many prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements"); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (right of publicity "grants a person an exclusive right to control the commercial value of his name and likeness"); *Lerman v. Chuckleberry Pub., Inc.*, 521 F. Supp. 228, 232 (S.D.N.Y. 1981) ("The right of publicity comprises a person's right to own, protect and commercially exploit his own name, likeness and persona."), *aff'd*, 745 F.2d 123 (2d Cir. 1984); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978) ("common law right of publicity . . . recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or 'persona'") (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977)); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 391, 280 N.W.2d 129, 134 (1979) ("the right of publicity [is] the right to control the commercial exploitation of aspects of a person's identity").

97. *Bi-Rite Enters.*, 555 F. Supp. at 1198.

98. 521 F. Supp. 228 (S.D.N.Y. 1981).

99. *Id.* at 232 (quoting *Hicks v. Casablanca Records*, 464 F. Supp. 426, 429 (S.D.N.Y. 1978)) (citations omitted).

100. See Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1590 (1979) ("The language of some courts would suggest that virtually any recognizable attribute would be protected."); Note, *supra* note 3, at 278-79 ("Thus far, recognition has been given to a proprietary interest in a celebrity's name, likeness, nickname, voice, professional act, character portrayal, slogan, and possessions associated with

*Haelan Laboratories v. Topps Chewing Gum*,<sup>101</sup> the court found that a ball-player "has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture."<sup>102</sup> Thus a ball-player, or an "exclusive grantee of a player's 'right of publicity,' has a valid claim against"<sup>103</sup> anyone using the player's photograph without permission.<sup>104</sup> Courts have enjoined the unauthorized use of a professional golfer's name in connection with a golf parlour game,<sup>105</sup> and the unauthorized use of several hundred major league baseball players' names in connection with a baseball table game.<sup>106</sup> Another court held that a professional entertainer had a cause of action against a defendant who used an imitation of the entertainer's voice to advertise its product.<sup>107</sup> A professional racing car driver was granted an injunction against a defendant's unauthorized use of a photograph of the plaintiff's unique racing car in a television commercial advertising the defendant's cigarettes.<sup>108</sup> Although the plaintiff himself was not recognizable in the photograph, the "distinctive decorations appearing on the car . . . were not only peculiar to the plaintiff's cars but they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff."<sup>109</sup>

A celebrity's popular nickname has also found protection under the right of publicity. In *Hirsch v S.C. Johnson & Son, Inc.*,<sup>110</sup> the defendant marketed a shaving gel for women under the name "Crazy-legs."<sup>111</sup> Plaintiff Hirsch, a professional football player known

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him." (footnotes omitted).

101. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

102. *Id.* at 868.

103. *Id.* at 869.

104. *Id.*

105. *Palmer v. Schonhorn Enters., Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (Ct. Ch. Div. 1967). Although the golfer's name appeared inside the game only and was not advertised on the lid of the game, *id.* at 80, 232 A.2d at 462, the court stated that "[t]here is little doubt that a person is entitled to relief when his name has been used without his consent, either to advertise the defendant's product or to enhance the sale of an article." *Id.* at 77, 232 A.2d at 461; *see also* *Treعه*, *supra* note 3, at 665-68.

106. *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *see also* *Halpern*, *supra* note 4, at 1209-10.

107. *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962).

108. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

109. *Id.* at 827.

110. 90 Wis. 2d 379, 280 N.W.2d 129 (1979).

111. *Id.* at 382, 280 N.W.2d at 130.

nationally as "Crazylegs,"<sup>112</sup> brought suit against the defendant for appropriation of a person's name for commercial use.<sup>113</sup> In holding that Hirsch had a valid cause of action,<sup>114</sup> the court stated: "[t]he fact that the name, 'Crazylegs,' . . . was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person."<sup>115</sup>

Protection under the right of publicity has been extended even to a popular phrase which is associated nationally with a celebrity. In *Carson v. Here's Johnny Portable Toilets, Inc.*,<sup>116</sup> defendants "engaged in the business of renting and selling 'Here's Johnny portable toilets."<sup>117</sup> Plaintiff Johnny Carson brought suit alleging that defendant's use of the phrase "Here's Johnny" infringed Carson's right of publicity.<sup>118</sup> In rejecting the defense that Carson's "name or likeness" was not actually used,<sup>119</sup> the court held that defendants violated Carson's right of publicity.<sup>120</sup> The court reasoned that "[i]f the celebrity's *identity* is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."<sup>121</sup>

Each of the cases discussed thus far illustrates a violation of a celebrity's right of publicity when the celebrity's name or likeness is used as the name of a product or in a commercial advertisement for the sale of a product.<sup>122</sup> The issue in *Rogers* is whether the use of a celebrity's name in the title of a movie violates the right of publicity.<sup>123</sup> Several courts have passed on this issue; the celebrity's right of publicity claim failed in each case.<sup>124</sup>

112. *Id.* at 384, 280 N.W.2d at 131.

113. *Id.* at 382, 280 N.W.2d at 130.

114. *Id.* at 383, 280 N.W.2d at 130.

115. *Id.* at 397, 280 N.W.2d at 137.

116. 698 F.2d 831 (1983), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987).

117. *Id.* at 833.

118. *Id.*

119. *Id.* at 835.

120. *Id.* at 836.

121. *Id.* at 835 (emphasis added).

122. Among the products were toilets, cigarettes, baseball cards and shaving gel. See *supra* notes 101-21 and accompanying text.

123. *Rogers v. Grimaldi*, 875 F.2d 994, 996-97 (2d Cir. 1989). Thus, the issue is the same as was presented under section 43(a) of the Lanham Act, *supra* notes 63-73 and accompanying text, namely, the defendant may be insulated from right of publicity claims because her use of the celebrity's name is in connection with an artistic work rather than a commercial product.

124. See *infra* notes 125-42 and accompanying text.



In the *Hicks v. Casablanca Records*<sup>125</sup> case, the plaintiffs, in addition to the section 43(a) claim, alleged that the defendant movie producer's distribution of the movie entitled "Agatha" violated Agatha Christie's right of publicity.<sup>126</sup> Dismissing plaintiff's complaints,<sup>127</sup> the court held that "the right of publicity does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious."<sup>128</sup> The court reasoned that "the first amendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess."<sup>129</sup>

In *Frosch v. Grosset & Dunlap, Inc.*,<sup>130</sup> plaintiff, Executor of the Estate of Marilyn Monroe,<sup>131</sup> alleged that defendant's publication of a book entitled "Marilyn" violated Monroe's right of publicity.<sup>132</sup> The court in *Frosch* also dismissed plaintiff's complaint,<sup>133</sup> and stated that "it does not matter whether the book is properly described as a biography, a fictional biography, or any other kind of literary work. . . . It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services."<sup>134</sup> The court reasoned that "[t]he right of free expression is so important that we should not extend any right of publicity . . . to give rise to a cause of action against the publication of a literary work about a deceased person."<sup>135</sup>

In *Guglielmi v. Spelling-Goldberg Productions*,<sup>136</sup> the plaintiff, a nephew of the deceased actor Rudolph Valentino,<sup>137</sup> alleged that defendant's television broadcast of a film entitled "Legend of Valentino: A Romantic Fiction" violated Rudolph Valentino's right of publicity.<sup>138</sup>

125. 464 F. Supp. 426 (S.D.N.Y. 1978).

126. *Id.* at 429.

127. *Id.* at 433.

128. *Id.*

129. *Id.*

130. 75 A.D.2d 768, 427 N.Y.S.2d 828 (1980).

131. *Id.* at 768, 427 N.Y.S.2d at 828.

132. *Id.*

133. *Id.* at 769, 427 N.Y.S.2d at 829.

134. *Id.*

135. *Id.*

136. 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (Bird, C.J., concurring).

137. *Id.* at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353.

138. *Id.* at 861-63, 603 P.2d at 455-56, 160 Cal. Rptr. at 353-54.

Although the majority dismissed the plaintiff's claim for other reasons,<sup>139</sup> the concurring judge stated:

While few courts have addressed the question of the parameters of the right of publicity in the context of expressive activities, their response has been consistent. Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression.<sup>140</sup>

The concurring judge stated in a footnote that the right of publicity did not apply to plaintiff's case because defendant's use of the title was not "wholly unrelated" to Valentino, and "this [was] not a case in which a celebrity's name [was] used to promote or endorse a collateral commercial product."<sup>141</sup>

*Hicks, Frosch, and Guglielmi* all indicate that a celebrity's attempt to have enjoined the unauthorized use of her name in a movie title via the right of publicity will probably fail due to the defendant's right of free expression under the first amendment.<sup>142</sup> The right of free expression arises because movies are works of artistic expression.<sup>143</sup>

139. The majority found that the right of publicity is "not descendible and expires upon the death of the person so protected." *Id.* at 861, 603 P.2d at 455, 160 Cal. Rptr. at 353.

140. *Id.* at 871-72, 603 P.2d at 461-62, 160 Cal. Rptr. at 359-60 (footnotes omitted).

141. *Id.* at 865, 603 P.2d at 457, 160 Cal. Rptr. at 355 n.6.

142. See *supra* notes 125-41 and accompanying text. *But cf.* *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314 (Pa. C.P. Phila. Co. 1957) (professional golfer recovered from defendant who used golfer's name and picture on the jacket and in the text of a book in a manner which gave the impression that the golfer participated in writing the book).

143. See *supra* notes 65-68 and accompanying text. The first amendment right which is at issue here is the right of free expression and *not* the right to publish matters which are newsworthy or of public interest; the right to publish newsworthy matters concerning celebrities has received mixed results from the courts and commentators. See *generally* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977) ("the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent"); *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 884 (S.D.N.Y. 1973) ("[T]he First Amendment does not absolve movie companies-or publishers-from the obligation of paying their help. They are entitled to photograph newsworthy events, but they are not entitled to convert unsuspecting citizens into unpaid professional actors."); *Paulsen v. Personality Posters, Inc.*, 59 Misc.2d 444, 448, 299 N.Y.S.2d 501, 506 (1968) ("The scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in most liberal and far reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far

One might argue that the right of free expression should not apply to a movie producer because the producer's sole purpose in putting a celebrity's name in the title of a movie is a commercial one, namely, to attract consumer attention to the movie in order to increase profits.<sup>144</sup> This argument fails, however, for the Supreme Court has stated:

That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures. . . . [W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.<sup>145</sup>

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beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general."); Treece, *supra* note 3, at 660-64; Comment, *supra* note 95, at 549-57; Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 702-08 (1986).

In *Rosemont Enters., Inc., v. Irving*, 49 A.D.2d 445, 375 N.Y.S.2d 864 (1975), the plaintiff's motion for an order restraining the defendant from publishing a manuscript purporting to be an authentic autobiography of Howard Hughes was denied. *Id.* at 447, 375 N.Y.S.2d at 866. The court reasoned that:

Howard Hughes is very much a public figure. As such he obviously is not and cannot be immune from public discussion or public writings. . . . The right of privacy under the law was never contemplated to exclude or limit, within reasonable bounds, the right to speak and write concerning a public figure. Prior restraint of publication or censorship in advance of publication is generally forbidden and may be unconstitutional unless the existence of certain conditions necessitate such action for the public safety, public welfare, or the preservation of the social order. Those elements are not presented here.

*Id.* at 449, 375 N.Y.S.2d at 868 (citations omitted).

144. This argument draws an analogy between a movie title and a commercial advertisement for the sale of goods or services. See *supra* note 122 and accompanying text.

145. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (footnote omitted).

## IV. THE ROGERS COURT'S ANALYSIS

A. *The Majority's Section 43(a) Lanham' Act Analysis*

The court in *Rogers v. Grimaldi*<sup>146</sup> first discussed Rogers' section 43(a) Lanham Act claim.<sup>147</sup> The majority began its discussion by rejecting the district court's ruling that "the Lanham Act cannot apply to the title of a motion picture where the title is 'within the realm of artistic expression,' and is not 'primarily intended to serve a commercial purpose."<sup>148</sup> That ruling "would create a nearly absolute privilege for movie titles," the majority stated.<sup>149</sup> The majority believed the district court's ruling would in effect place movie titles outside the scope of the Lanham Act as long as the movie is an artistic work.<sup>150</sup> Reasoning that consumers have rights with respect to deceptive titles, the majority held that movie titles, like advertisements, are within the scope of the Lanham Act.<sup>151</sup>

According to the majority, authors have an interest in freedom of artistic expression which is shared by their audience;<sup>152</sup> therefore, this interest requires more first amendment protection for titles of movies than for advertisements of commercial products or services.<sup>153</sup> The majority found that the "no alternative avenues of communication"<sup>154</sup> standard developed in *Lloyd Corp. v. Tanner*<sup>155</sup> "does not sufficiently accommodate the public's interest in free expression."<sup>156</sup> Thus, because movie makers have an interest in free expression<sup>157</sup> but that interest clearly warrants some government regulation by section 43(a),<sup>158</sup> the majority held that the Lanham Act should "apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."<sup>159</sup>

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146. 875 F.2d 994 (2d Cir. 1989).

147. *Id.* at 997-1002.

148. *Id.* at 997 (quoting *Rogers v. Grimaldi*, 695 F. Supp. 112, 120-21) (citations omitted)).

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.* at 998.

153. *Id.*

154. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566-67 (1972).

155. 407 U.S. 551 (1972); *see also supra* notes 84-85 and accompanying text.

156. *Rogers*, 875 F.2d at 999.

157. *See id.* at 998.

158. *See id.* at 997.

159. *Id.* at 999.

In applying this broad holding to allegedly misleading titles that utilize a celebrity's name, the majority developed three rules.<sup>160</sup> First, titles that have no artistic relevance to the underlying work violate the Lanham Act because they are not justified by a free expression interest.<sup>161</sup> Second, titles that have some artistic relevance to the underlying work but are "explicitly mislead[ing] as to the source or the content of the work"<sup>162</sup> violate the Lanham Act because the interest in avoiding consumer deception outweighs the interest in free expression.<sup>163</sup> Lastly, titles that have "surpassed the appropriately low threshold of minimal artistic relevance"<sup>164</sup> and are "ambiguous or only implicitly misleading"<sup>165</sup> do not violate the Lanham Act because the free expression interest outweighs the interest in consumer deception.<sup>166</sup>

The majority then applied these rules to Rogers' claims<sup>167</sup> that the defendant's film title gave the false impression that "(1) [she] produced, endorsed, sponsored, or approved the film, and (2) the film is about Rogers and Astaire."<sup>168</sup> In beginning its analysis, the majority first accepted the district court's conclusion that the title "Ginger and Fred" is sufficiently artistically relevant to the film itself.<sup>169</sup> The majority reasoned that the main characters in the film are nicknamed "Ginger" and "Fred" which demonstrates "genuine relevance to the film's story."<sup>170</sup>

Rogers submitted survey evidence to substantiate her claim that the title gives the false impression that she endorsed the film. After

160. *See id.*

161. *Id.*

162. *Id.*

163. *Id.* The majority stated that the titles "Nimmer on Copyright" and "Jane Fonda's Workout Book" were examples of titles which might reach the "threshold of minimal artistic relevance" but could be "explicitly misleading" if they were false as applied to the underlying work. *Id.*

164. *Id.*

165. *Id.* at 1000.

166. *Id.* The majority stated that the title of the hit song "Bette Davis Eyes" and the title of the film "Come Back to the Five and Dime, Jimmy Dean, Jimmy Dean" were examples of titles which reached the "threshold of minimal artistic relevance," *id.* at 999, and were "ambiguous or only implicitly misleading." *Id.* at 1000.

167. *Id.* at 1000-02.

168. *Id.* at 1001.

169. *Id.* In other words, the title "Ginger and Fred" surpasses the "threshold of minimal artistic relevance." *See also supra* note 164 and accompanying text.

170. *Rogers*, 875 F.2d at 1001.

reviewing the evidence,<sup>171</sup> the majority concluded that some members of the public would get the false impression that Rogers endorsed the film.<sup>172</sup> Nevertheless, the majority believed that the "risk of misunderstanding, not engendered by any overt claim in the title, is so outweighed by the interests in artistic expression as to preclude application of the Lanham Act."<sup>173</sup> The court then held that defendants were entitled to summary judgment on Roger's sponsorship and endorsement.<sup>174</sup>

Disposing of Rogers' claim that the title gives the false impression that the film is about her and Astaire, the majority stated that, although the title may lead some to believe the film is about Rogers,<sup>175</sup> the title is "entirely truthful as to its content in referring to the film's fictional protagonists who are known to their Italian audience as 'Ginger and Fred.'"<sup>176</sup> Again the court believed the risk that the title would mislead some consumers into thinking the film is about Rogers is "outweighed by the danger that suppressing an artistically relevant though ambiguous title will unduly restrict expression."<sup>177</sup> The defendants were granted summary judgment on this aspect of Rogers' section 43(a) claim as well.<sup>178</sup>

### B. *The Majority's Right of Publicity Analysis*

The court next discussed Rogers' right of publicity claim.<sup>179</sup> It first stated that:

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171. *Id.*; see *supra* note 23.

172. *Rogers*, 875 F.2d at 1001.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1001-02.

179. *Id.* at 1002-05. Because the right of publicity is a state law claim, the majority determined which state's law applied, a determination the district court did not make. *Id.* at 1002. Finding that Oregon law controls because that is Rogers' domicile and that Oregon has little law concerning the right of publicity, the majority stated that "[w]e are therefore obliged to engage in the uncertain task of predicting what the New York courts would predict the Oregon courts would rule as to the contours of a right of publicity under Oregon law." *Id.* The conclusion reached was that "New York courts would . . . presume that the unsettled common law of another state would resemble New York's but that they would examine the law of the other jurisdiction . . . in making an ultimate determination as to the likely future content of the other jurisdiction's law." *Id.* at 1003.

Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act. Perhaps for that reason, courts delineating the right of publicity, more frequently than in applying the Lanham Act, have recognized the need to limit the right to accommodate First Amendment concerns.<sup>180</sup>

To satisfy these first amendment concerns, the majority relied on two previous cases<sup>181</sup> where the concern for free expression precluded application of the right of publicity to bar the use of a celebrity's name in the title of an artistic work.<sup>182</sup> In the first case,<sup>183</sup> a concurring Justice stated that the celebrity's right of publicity was not violated as long as the title was not "wholly unrelated" to the movie.<sup>184</sup> The second case<sup>185</sup> held that the celebrity's right of publicity was not violated as long as the title was not "simply a disguised commercial advertisement for the sale of goods or services."<sup>186</sup> The court granted defendant's summary judgment motion on Roger's right and publicity claim because "the title 'Ginger and Fred' is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product."<sup>187</sup>

### C. *The Concurring Opinion*

District Judge Griesa, sitting by designation,<sup>188</sup> submitted a concurring opinion in the *Rogers* case.<sup>189</sup> Regarding the section 43(a) Lanham Act claim, Judge Griesa disagreed with the majority's opinion

180. *Id.* at 1004 (citations omitted).

181. These two cases were discussed *supra* notes 131-42 and accompanying text.

182. *Rogers*, 875 F.2d at 1004.

183. The majority discussed the concurring opinion in *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979) (Bird, C.J., concurring). See also *supra* notes 136-41 and accompanying text.

184. *Rogers*, 875 F.2d at 1004 (quoting *Guglielmi*, 25 Cal.3d at 865, 603 P.2d at 457, 160 Cal. Rptr. at 355 n.6).

185. The second case the majority discussed was *Frosch v. Grosset & Dunlop, Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828 (N.Y. App. Div. 1980). See also *supra* notes 130-35 and accompanying text.

186. *Rogers*, 875 F.2d at 1004 (quoting *Frosch*, 75 A.D.2d at 769, 427 N.Y.S.2d at 829).

187. *Rogers*, 875 F.2d at 1004-05.

188. *Id.* at 996.

189. *Id.* at 1005-07. Judge Griesa clarified that the only issues that Rogers raised on appeal were the film's title and the advertising, not the film itself as stated in the original complaint filed in the district court. *Id.* at 1005.

that the district court's ruling would place artistically relevant movie titles outside the scope of the Lanham Act.<sup>190</sup> Judge Griesa reasoned that the district court's "discussion of First Amendment protection for artistic expression was his basis for deciding *this case*,"<sup>191</sup> and that the district court "did not purport to write the law covering all possible situations[]" as the majority in this case tried to do.<sup>192</sup>

While Judge Griesa agreed with the majority that the title "Ginger and Fred" does not violate the Lanham Act,<sup>193</sup> he felt that this case was not an appropriate case to "attempt to establish a rule based on the asserted difference between explicitly misleading titles and those which are ambiguous or only implicitly misleading," as the majority had done.<sup>194</sup> Judge Griesa believed the issue of whether there are exceptions to the first amendment protection that artistically relevant titles receive should be left to future courts<sup>195</sup> because "when and if an actual case arises, it may not fit within either of the categories posited by the majority."<sup>196</sup>

## V. THE IMPACT OF THE *ROGERS* DECISION

### A. *The Slowdown in the Expansion of Section 43(a)*

In the last few decades courts have substantially expanded the applicability and scope of section 43(a) of the Lanham Act.<sup>197</sup> Some commentators have felt that section 43(a) has been extended too far and applied in too many new areas.<sup>198</sup> In general, *Rogers* seems to

190. *Id.* at 1006; see also *supra* notes 148-49 and accompanying text.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* Judge Griesa discussed the example titles used by the majority to illustrate titles that are "artistically relevant but explicitly misleading," *supra* note 163, and those titles which are "artistically relevant and only implicitly misleading," *supra* note 166. Judge Griesa concluded that "the illustrations have nothing whatever to do with the kind of problem under discussion here." *Rogers*, 875 F.2d at 1007.

195. *Rogers*, 875 F.2d at 1007.

196. *Id.* As to *Rogers*' right of publicity claim, Judge Griesa believed that there was sufficient Oregon law on the right of publicity to come to the conclusion that this law was no different than that of New York or California. *Id.* Accordingly, Judge Griesa stated that the district court "sensibly avoided a lengthy excursion into the subject of choice of law." *Id.* Judge Griesa did not disagree with any other aspects of the majority's decision on *Rogers*' right of publicity claim. See *id.*

197. Germain, *supra* note 35, at 84-85.

198. *Id.* at 85, 106-116.



indicate that the applicability of section 43(a) has limits and that the expansion of section 43(a) is possibly slowing down.<sup>199</sup> In cases involving the unauthorized use of a celebrity's name in a movie title, *Rogers* indicates that the applicability of section 43(a) has definite limits.<sup>200</sup>

Had the first amendment not been a concern, *Rogers* section 43(a) claim probably would have been successful, for the title "Ginger and Fred" seems to satisfy the elements of a successful section 43(a) action.<sup>201</sup> After *Rogers*, in order for a celebrity to recover for the unauthorized use of her name in a movie title, she not only must prove the usual elements of a successful section 43(a) action, but she must also prove that the maintenance of the action will not violate the defendant's first amendment rights.<sup>202</sup> This required showing that first amendment rights are not violated will substantially reduce the chances of success for the celebrity; thus the expansion of section 43(a) into the factual situation presented by *Rogers* has been substantially impeded by the first amendment.

Admittedly, other celebrities have not recovered under section 43(a) when their names or likenesses were exploited without permission. For example, Johnny Carson was unable to recover under section 43(a) in *Carson v. Here's Johnny Portable Toilets, Inc.*<sup>203</sup> There, however, the court affirmed the district court's finding that defendant's "use of the phrase 'Here's Johnny' did not present a likelihood of confusion, mistake, or deception."<sup>204</sup> Unlike *Rogers*, Carson simply did not satisfy the basic elements of a successful section 43(a) case,<sup>205</sup> therefore, *Carson* was not a case in which the scope of section 43(a)

199. See *infra* notes 201-07 and accompanying text.

200. See *Rogers*, 875 F.2d at 999; see also *supra* notes 146-78 and accompanying text.

201. See *Rogers*, 875 F.2d at 998-99; see also *supra* notes 171-78 and 42-48 and accompanying text. The title "Ginger and Fred" (1) gave some people the false impression that Ginger Rogers either sponsored the film or was in it, see *supra* note 23, (2) deceived the some of the public into thinking Rogers was connected with the film, see *supra* note 23, (3) created material deception in that some people probably saw the film because they thought Rogers was connected with it, (4) the film did play in the United States and thus was introduced into interstate commerce, and (5) the showing of the film caused a likelihood of injury to Rogers.

202. See *Rogers*, 875 F.2d at 998-99; see also *supra* notes 157-66 and accompanying text.

203. 698 F.2d 831 (6th Cir. 1983), *aff'd on rehearing*, 810 F.2d 104 (6th Cir. 1987).

204. *Id.* at 834.

205. See *id.*

needed restriction by the first amendment because a successful section 43(a) case was never established.<sup>206</sup>

*Rogers* is a case in which enforcement of section 43(a) will infringe constitutional rights. Because these first amendment concerns precluded application of section 43(a) in *Rogers*, the expansion of section 43(a) is slowing down.

### B. *The Relationship Between the First Amendment and the Right of Publicity*

First amendment concerns for free expression caused *Rogers*' right of publicity claim to fail.<sup>207</sup> Although the first amendment often defines the right of publicity's boundaries,<sup>208</sup> the right of publicity was developed without incorporating a logical first amendment analysis into that development.<sup>209</sup> Thus, right of publicity actions in which the first amendment is a concern will remain unpredictable until the courts clarify the relationship between the first amendment and the right of publicity.<sup>210</sup>

The *Rogers* majority stated that the first amendment should be applied more frequently to defeat right of publicity claims than to defeat section 43(a) Lanham Act claims.<sup>211</sup> Indeed, under the "wholly unrelated" test<sup>212</sup> adopted by the majority a movie producer will receive so much first amendment protection that she will not be liable to a celebrity under the right of publicity unless the title has absolutely

206. *See id.*

207. *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989); *see also supra* notes 179-87 and accompanying text.

208. *See supra* notes 125-45 and accompanying text; *see also* Felcher & Rubin, *supra* note 100, at 1590.

209. Felcher & Rubin, *supra* note 100, at 1579, 1590-1591.

210. *Id.*

211. *Rogers*, 875 F.2d at 1004; *see also supra* notes 179-80 and accompanying text.

212. *Rogers*, 875 F.2d at 1004. Recall that the "wholly unrelated" test states that the unauthorized use of a celebrity's name in a movie title will not violate the celebrity's right of publicity unless the title is "wholly unrelated" to the movie. *Id.* (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 865, 603 P.2d 454, 457, 160 Cal. Rptr. 352, 355 n.6 (1972) (Bird, C.J., concurring)); *see also supra* notes 183-84 and accompanying text. Part of the test adopted by the majority also stated that the right of publicity would be violated if the title was "simply a disguised commercial advertisement for the sale of goods or services." *Rogers*, 875 F.2d at 1004 (quoting *Frosch v. Grosset & Dunlop, Inc.*, 75 A.D.2d 768, 769, 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980)); *see also supra* notes 185-86 and accompanying text. However, this section of this note will focus on the "wholly unrelated" test.

nothing to do with the movie.<sup>213</sup> Presumably, a movie producer can escape liability simply by creating just one scene in the movie which is only sparsely related to the title.<sup>214</sup> The *Rogers* majority has given movie producers a tremendous amount of first amendment protection by adopting the "wholly unrelated" test.

In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>215</sup> however, the United States Supreme Court seemed to suggest that a defendant appropriator of a celebrity's name or likeness will receive less first amendment insulation from right of publicity claims than claims under other theories of recovery, such as the right of privacy.<sup>216</sup> The court's reasoning is based on the theory behind the right of publicity; namely, a celebrity enforces her right of publicity not to withhold the material in controversy, but rather to be compensated for it.<sup>217</sup> Enforcing the right to be compensated does not deprive the public of any information and would not seem to violate the first amendment.<sup>218</sup> Although *Zacchini* involved the broadcast of an alleged newsworthy event,<sup>219</sup> rather than the broadcast of a work of artistic expression as in *Rogers*,<sup>220</sup> the *Zacchini* Court's reasoning would apply to both cases because the purpose of suing under the right of publicity is the same, namely, for the celebrity to receive compensation. Therefore, the *Rogers* holding is not entirely consistent with the *Zacchini* holding in that the *Rogers* majority gave defendants more first amendment protection than the *Zacchini* court would have given.<sup>221</sup>

Rather than developing their own analytical framework for incorporating first amendment concerns into the right of publicity analysis, the *Rogers* majority adopted the "wholly unrelated" test from

213. Whether the words "absolutely nothing to do with" are equivalent to "wholly unrelated" is arguable; however, the absence of a concrete definition of "wholly unrelated" in the *Rogers* majority's opinion allows one to speculate on its meaning.

214. If at least one scene is related to the title, then the title is not "wholly unrelated" to the movie. See *id.*

215. 433 U.S. 562 (1977).

216. *Id.* at 578.

217. *Id.*; see also *supra* notes 94-97 and accompanying text.

218. *Zacchini*, 433 U.S. at 578.

219. *Id.* at 563-65.

220. *Rogers*, 875 F.2d at 997.

221. This conclusion is reasonable, based on the large amount of first amendment protection the *Rogers* court has given the defendants under the "wholly unrelated" test, *supra* notes 179-84 and accompanying text, and the *Zacchini* court's suggestion that enforcing the right of publicity does not necessarily infringe first amendment rights.

a previously decided case.<sup>222</sup> A concrete definition of "wholly unrelated," however, is not found in the majority's opinion.<sup>223</sup> Instead the majority discusses the examples used by Chief Justice Bird in the concurring opinion in *Guglielmi*.<sup>224</sup> Chief Justice Bird discussed two examples: (1) the title "Legend of Valentino: A Romantic Fiction" does not violate the right of publicity,<sup>225</sup> and (2) the title "Rudolph Valentino's Cookbook" on a book containing recipes and menus not related to Valentino probably does violate the right of publicity.<sup>226</sup> Yet, these two titles do not seem to illustrate the issue in *Rogers* because both titles contain not only Valentino's name, but additional words which seem to describe the underlying work, namely, "A Romantic Fiction" and "Cookbook."<sup>227</sup> In *Rogers*, the title "Ginger and Fred" contained *only* Rogers' and Astaire's names;<sup>228</sup> therefore, the *Rogers* majority should have discussed whether the right of publicity would bar a title such as "Rudolf Valentino."<sup>229</sup> This discussion is needed in order to clarify whether the title "Ginger and Fred," which does not contain any other words that describe the underlying work, is "wholly unrelated" to the underlying artistic work. The majority's reliance on these examples is the extent of their first amendment analysis of Rogers' right of publicity claim.

Because the *Rogers* adoption of the "wholly unrelated" test possibly conflicts with suggestions by the Supreme Court in *Zacchini*,<sup>230</sup> the relationship between the first amendment and the right of publicity remains unclear. By relying on previous cases<sup>231</sup> which did not

222. *Rogers*, 875 F.2d at 1004. The majority adopted the test from the concurring opinion of *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 865, 603 P.2d 454, 457, 160 Cal. Rptr. 352, 355 n.6 (1972) (Bird, C.J., concurring). See also *supra* notes 180-84 and accompanying text.

223. See *Rogers*, 875 F.2d at 1004.

224. *Id.*

225. *Guglielmi*, 25 Cal. 3d at 862, 603 P.2d at 455, 160 Cal. Rptr. at 353.

226. *Id.* at 865, 603 P.2d at 457, 160 Cal. Rptr. at 355 n.6.

227. The title "Legend of Valentino: A Romantic Fiction" indicates that the underlying artistic work is a fictional performance related to Valentino, and the title "Rudolf Valentino's Cookbook" indicates that the underlying artistic work is a cookbook.

228. *Rogers*, 875 F.2d at 996-97.

229. The title "Ginger and Fred" does not give any indication of the nature of the underlying artistic work; it could be a biography about Ginger Rogers and Fred Astaire, a fictional movie about Ginger Rogers and Fred Astaire, or maybe even a cookbook. Likewise, the title "Rudolf Valentino" does not indicate the nature of the underlying work; therefore, this example title would seem more appropriate for the *Rogers* majority to analyze.

230. See *supra* notes 215-21 and accompanying text.

231. *Rogers*, 875 F.2d at 1004.

adequately define the relationship between the first amendment and the right of publicity,<sup>232</sup> the majority did not seize the opportunity to develop a much needed logical analysis.

### *C. Section 43(a) Versus the Right of Publicity*

Although the *Rogers* majority placed strong first amendment restrictions on the applicability of section 43(a)<sup>233</sup> and the right of publicity<sup>234</sup> in cases involving the unauthorized use of a celebrity's name in a movie title, recovery under these two theories is still possible.<sup>235</sup> Because of the availability of two theories of recovery, an analysis of which one will more likely be successful for the celebrity is in order.

Assume for the moment that a defendant receives the same amount of first amendment protection from both section 43(a) claims and right of publicity claims. To recover under section 43(a), the celebrity must prove a likelihood of confusion,<sup>236</sup> an element not required under the right of publicity.<sup>237</sup> Therefore, it seems that recovery will be more difficult under section 43(a).<sup>238</sup>

The *Rogers* majority stated, however, that the defendants should be given stronger first amendment protection from right of publicity claims than from section 43(a) Lanham Act claims.<sup>239</sup> The "wholly unrelated" test adopted by the majority seems to give the defendants this stronger first amendment protection from right of publicity claims.<sup>240</sup> To recover under the right of publicity the celebrity must show that the

232. See *supra* notes 222-29 and accompanying text.

233. *Rogers*, 875 F.2d at 998-99; see also *supra* notes 157-66 and accompanying text.

234. *Rogers*, 875 F.2d at 1004-05; see also *supra* notes 179-87 and accompanying text.

235. Clearly, a celebrity can still prevail on a section 43(a) action if the celebrity can prove that the title has fallen below a "threshold of minimal artistic relevance." *Rogers*, 875 F.2d at 999; see also *supra* notes 151, 164-66 and accompanying text. Likewise, a celebrity can recover under the right of publicity if the celebrity prove the title is "wholly unrelated" to the movie. *Rogers*, 875 F.2d at 1004-05; see also *supra* notes 183-84 and accompanying text.

236. See *supra* notes 49-55 and accompanying text.

237. See *supra* notes 98-99 and accompanying text.

238. The additional required showing of a likelihood of confusion would seem to make recovery more difficult under section 43(a).

239. *Rogers*, 875 F.2d at 1004; see also *supra* note 180 and accompanying text.

240. See *supra* notes 212-14 and accompanying text.

title is "wholly unrelated" to the movie;<sup>241</sup> that the title has absolutely nothing to do with the movie.<sup>242</sup> To recover under section 43(a), the celebrity must show that the title falls below a "threshold of minimal artistic relevance,"<sup>243</sup> that the title falls below a minimal level of artistic relevance, not just a minimal level of relevance.<sup>244</sup> Common sense dictates that it will be more difficult for the celebrity to prove that a title is "wholly unrelated" to a movie than to prove that the title has simply fallen below a "threshold of minimal artistic relevance" to the movie. For it is possible that a title that has not reached a minimal level of artistic relevance to a movie can still be related to the movie. Thus, the right of publicity "wholly unrelated" test is more difficult for the celebrity to prove than the section 43(a) "threshold of minimal artistic relevance" test.

Recovery under section 43(a) is usually more difficult than under the right of publicity because one must prove a likelihood of confusion.<sup>245</sup> Under the rules adopted by the *Rogers* majority, however, recovery for the unauthorized use of a celebrity's name in a movie title will be more difficult under the right of publicity because of the stronger first amendment protection afforded the defendants by the "wholly unrelated" test.<sup>246</sup>

## VI. CONCLUSION

A celebrity whose name is used in the title of a movie without the celebrity's permission will find it very difficult to get an injunction.<sup>247</sup> While section 43(a) of the Lanham Act is applicable to this situation,<sup>248</sup> the celebrity must prove, in addition to the normal elements of a section 43(a) action,<sup>249</sup> that the title falls below the "threshold of minimal artistic relevance," or that the title is explicitly misleading as to the source and content of the work.<sup>250</sup> These additional require-

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241. *Rogers*, 875 F.2d at 1004; see also *supra* notes 183-84 and accompanying text.

242. See *supra* note 213.

243. *Rogers*, 875 F.2d at 999; see also *supra* notes 164-66 and accompanying text.

244. See *id.*

245. See *supra* notes 236-38 and accompanying text.

246. See *supra* notes 239-44 and accompanying text.

247. See *supra* notes 160-66, 183-87 and accompanying text.

248. See *supra* note 151 and accompanying text.

249. See *supra* notes 42-55 and accompanying text.

250. See *supra* notes 160-66 and accompanying text.

ments are required first amendment concerns and indicate that the expansion of section 43(a) is slowing down.<sup>251</sup>

To recover under the right of publicity, the celebrity must show that the title is "wholly unrelated" to the movie, or that the title is actually a "disguised commercial advertisement for the sale of goods or services."<sup>252</sup> The strong first amendment protection given to the defendants by the "wholly unrelated" test may make recovery under the right of publicity more difficult than under section 43(a) of the Lanham Act.<sup>253</sup>

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251. See *supra* notes 197-206 and accompanying text.

252. See *supra* notes 183-86 and accompanying text.

253. See *supra* notes 233-46 and accompanying text.