

# Spotlight or Lawsuit? Strategic Brand Use in Film and Media

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- Trademark, Copyright + Advertising
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## A. Blue Devil in the Details: When Logos Steal the Scene

When *The White Lotus* returned to HBO for its third season, it came with the usual dose of dramatic tension, along with one unexpected intellectual property wrinkle. [WARNING - Potential Plot Spoiler Ahead!] In a particularly intense scene, a character wearing a Duke University T-shirt contemplates suicide. The scene sparked concern at Duke, which issued a statement clarifying that it had not authorized the use of its marks. As a university spokesperson explained, “Duke appreciates artistic expression and creative storytelling, but characters prominently wearing apparel bearing Duke’s federally registered trademarks creates confusion and mistakenly suggests an endorsement or affiliation where none exists.” Yet, as of today, Duke has not filed an action against HBO for trademark infringement.

The scene raises a question increasingly relevant not just for filmmakers, but also for content creators across platforms like YouTube, Instagram, TikTok, and Facebook. Can you use a real brand in your video, skit, short film, or story post? Whether it is a college logo, a soda can, or a smartphone, what are the legal risks when someone else's trademark shows up in your work? The answer lies at the intersection of trademark law (Lanham Act) and the First Amendment. Here, the rules focus less on traditional consumer confusion and more on creative boundaries.

For decades, courts have applied the *Rogers* test, first outlined in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). This test allows the use of a trademark in an expressive work if the use has (1) some artistic relevance to the underlying work and (2) is not explicitly misleading as to source or endorsement. The threshold for relevance is intentionally low. The trademark must add meaning to the story or message, and it cannot falsely suggest that the brand sponsored or approved the content.

That standard generally works in favor of creators. A T-shirt worn by a fictional character, even in a dramatic or negative scene, is unlikely to make viewers believe the brand was involved in or sponsored the production. The same is true for creators filming a comedy sketch in a grocery store or doing a product parody on YouTube. The use is part of the narrative, not a commercial endorsement.

But use of a trademark as an expressive work under the *Rogers* test isn't always allowed. In 2023, the U.S. Supreme Court narrowed the test's reach in *Jack Daniel's Properties, Inc. v. VIP Products LLC*, 599 U.S. 140 (2023), holding that *Rogers* does not apply when someone uses another's trademark as a trademark—that is, to indicate the source of their own goods. The case involved a squeaky dog toy mimicking a bottle of Jack Daniel's. Because the toy's branding functioned as a source identifier for the toy maker (not just a joke or artistic nod), it had to face the usual trademark infringement test based on likelihood of confusion. In short, *Jack Daniel's* reaffirmed that expressive use is protected, but only when the mark isn't being used "as a mark," *i.e.*, to identify the source of the user's own goods. In those cases, First Amendment protections do not override the Lanham Act.

*Jack Daniel's* also limited expressive use permitted under the *Rogers* test to situations where the accused infringer is not using the mark to identify its own products. In general, for both filmmakers and digital creators, most incidental brand appearances—on T-shirts, background signage, or product packaging—are not about source identification for the creators. They are part of telling a story, setting a scene, or adding authenticity. For instance, a university T-shirt may be used to convey the educational background of a character or a designer handbag may be used convey that a character indulges in luxury or seeks to convey their societal status. As long as the content does not suggest affiliation or sponsorship, or amount to defamation, the First Amendment likely protects the use.

That said, a legally defensible position is not always a litigation-free one (see below examples). Brand owners may still object on principle or for public relations reasons. Brand owners may even sue, not necessarily because they will win, but because they

want to send a message or chill future uses. Given the fact-intensive nature of the *Rogers* analysis, cases involving the use of another's brand are not always straightforward. And even a weak claim can impose substantial costs if it leads to discovery or public backlash. Moreover, both brand owners and content creators should consider the effects of product placement to incentivize, or disincentivize, use of trademarks in a particular way.

## **B. When the Brand Isn't the Star: Unauthorized Use, Product Placement, and Strategic Exposure**

A common theme among cases brought by brand owners is that their product is being depicted in an unflattering manner. After all, brand owners have an obligation to monitor and police the unauthorized use of their marks or risk losing their trademark rights. But, in general, a brand owner will have an uphill battle in trying to prevent others from using their products on video when the user is not attempting to drive sales by leveraging the trademark and is, in fact, treating the brand owner consistently as the source of the product. When used in this manner, consumers are likely to continue to associate the brand with the brand's products, even if the brand owner did not expressly authorize the featuring of its products.

For example, many will instantly recognize Slip 'N Slide as the flexible plastic waterslide of their childhood. Slip 'N Slide is a registered trademark of Wham-O, Inc. and served as the creative backdrop of a gag in the movie *Dickie Roberts: Former Child Star* when Dickie Roberts attempts to reclaim his lost childhood by learning to use the slide. The slide is correctly referred to as a Slip 'N Slide twice in the movie, which was reasonably necessary to identify the popular toy. Anxious to experience the slide, Dickie's first attempt fails as he painfully skids to a halt after failing to add water. His second attempt is a success, and he comes to a halt after the end of the slide. But this spurs him to try again, this time coating the slide with cooking oil, which causes him to slide at full speed beyond the end of the slide and through a neighboring fence. The cooking oil slide gag was featured prominently in the movie's promotional materials.

Wham-O sued Paramount Pictures, claiming that use of the Slip 'N Slide trademark would cause confusion as to whether it was the source of the movie, had endorsed or sponsored the film, or had otherwise approved of the use of its product in this manner. Wham-O also argued that the misuse of the slide, which resulted in injury, may cause consumers to view its mark in a negative light. The Court disagreed. It found that, despite the obvious misuse of the slide, the Slip 'N Slide mark would be no less distinctive as a mark and the mark was not highlighted in a way that exploited its value. As summarized by the Court, the movie "use[d] the marks and product in a specific and unique descriptive sense: to evoke associations with an iconic child's toy."

In a similar instance, Caterpillar sued the Walt Disney Company for violating its trademark rights after the film *George of the Jungle 2* highlighted villains using Caterpillar bulldozers to threaten George's jungle. The bulldozers were Caterpillar products bearing Caterpillar's trademarks, and nothing suggested the products were of shoddy or low quality. The narrator even referred to them as "maniacal machines." Caterpillar

contended that this was unauthorized use of its trademarks and also cast the company in “an unwholesome or unsavory light.” *Caterpillar Inc. v. Walt Disney Co.*, 287 F.Supp.2d 913 (C.D. Ill. 2003). But Caterpillar was unsuccessful in obtaining a temporary restraining order to halt the release of the movie because the court found no evidence that Disney was attempting to use the fame and goodwill of Caterpillar’s trademarks to drive sales of its DVDs. The court further explained that “it appears unlikely ... that any consumer would be more likely to buy or watch *George of the Jungle 2* because of any mistaken belief that Caterpillar sponsored this movie.” Likewise, the court found it unlikely that viewers would hold the bulldozers responsible for the attempted destruction of George’s home, instead noting that they were clearly being operated by the villains. In short, the movie depicted the bulldozers in their unaltered state and consumers would still associate the Caterpillar trademark with the equipment it identifies.

While brand owners are constantly monitoring for unauthorized use of their marks, many are taking a more active approach. In some instances, brands will offer to supply or loan products for use in films so long as filmmakers abide by the brand owner’s guidelines. If filmmakers disregard the brand owner’s guidelines, their access to relevant products for future projects may be cut off. Others go a step further and pay for product placement in movies or social media content to ensure that their products are featured in a positive light. When promoted effectively, these associations can be subtle and pay dividends many times over. For example, according to film, if you want to travel like Tony Stark, drive an Audi; if you want to travel like James Bond, drive an Aston Martin; and if you want to travel to Europe like Spider-Man (without the aid of your webslingers), then fly on United Airlines.

Perhaps the most famous example of product placement is Reese’s Pieces. For over 40 years, audiences viewing Steven Spielberg’s *E.T.* have seen Reese’s Pieces, not M&M’s, used to lure E.T. into Elliot’s home. But that was not in the original script. When the production failed to receive permission to use M&M’s, they instead secured a product placement deal for Reese’s Pieces. As a result, Reese’s Pieces saw a tremendous sales bump due to the popularity of the movie.

Product placement need not be direct either. *F1 The Movie* is reported to have secured over \$40 million in brand sponsorship for the fictional racing team APXGP. Many of the brands’ logos are displayed on the racing suits of the main characters, even though the brands’ products themselves never appear on screen. In addition to providing exposure for the brands, this has also caused a secondary effect, where the characters of the movie are featured wearing their branded racing suits while promoting unrelated products. For instance, in a Heineken advertisement, Brad Pitt and Damon Idris can be seen sharing a drink while logos for companies such as Intensify, Geico, EA Sports, and others are prominently displayed on their racing suits. By engaging in product placement and sponsorship, brand owners are able to actively control how their brands are used, and production teams are provided with access to valuable capital for their project.

When possible, brand owners should look for opportunities to promote their brands and actively control how those brands are used. Whether by product placement, creative

borrowing, or visual cues in the background, content featuring real brands is not going anywhere. But the risks and incentives vary depending on the medium and the message. On social media, where sponsored content is ubiquitous, content creators must tread carefully when integrating real-world marks into their work, especially when sponsorships, endorsements, or commercial gain are involved.

### **C. Likes, Lawsuits, and Logos: Trademark Risks in Influencer and Creator Content**

Today, most of the public consumes media through social media platforms like Instagram, TikTok, YouTube, and Facebook. These platforms have created an ecosystem that allows content creators, or “influencers,” to monetize their content through brand ambassadorships or by building their own brand. But content creators, and their employees, must be vigilant when using others’ intellectual property and when protecting their own intellectual property.

Some brands actively embrace influencer marketing. For example, Stanley’s now-iconic tumblers saw a massive surge in popularity thanks to organic and sponsored posts by content creators, turning the 110-year-old brand into a viral hit. But not every company is as welcoming.

For example, in *Petunia Products, Inc. v. Rodan & Fields, LLC and Molly Sims*, a social media blogger posted a sponsored blog entry promoting a Rodan & Fields eyebrow product called “Brow Defining Boost.” However, Petunia Products has a competing product that uses the trademark BROWBOOST®. Petunia Products not only sued Rodan & Fields but also sued the blogger. The United States District Court for the Central District of California declined to dismiss the blogger from the lawsuit because the blogger’s promotion of the product “crossed from protected consumer commentary to commercial use” as a paid advertisement.

To minimize the risk of infringement liability, content creators should be careful when using existing trademarks and consider the context in which the mark is used. If the mark is being used for a commercial purpose, content creators may obscure or blur out trademarks—a practice known as “greeking” that is often seen in reality TV—to avoid any infringement. Greeking may also be an option when seeking to prevent free product placement, thereby encouraging brands to sponsor or pay for future placement. But where greeking is not an option, content creators should perform due diligence before endorsing a brand, and should consider entering into a defense and indemnity agreement with the brand owner before agreeing to post.

### **D. Conclusion**

Trademark law isn’t about shielding brand owners from discomfort. It is about preventing consumer confusion and protecting marks from being used to sell someone else’s goods. In today’s world of content creation, from television to smartphone videos, understanding where the legal lines are, and how far they bend for expressive works, helps creators stay creative without unnecessary legal headaches.

But a good legal argument is not immunity. Brands may still bring claims, especially when reputation is on the line. Knowing the law is step one. Preparing for a challenge, even when you are right, is just as important.

In an era where monetization, sponsorships, and influencer marketing are the norm, the legal risks can scale as fast as your audience. The First Amendment offers strong protection for expressive works, but it is not a free pass. Strategic decisions about trademark use, clearance, and registration can make the difference between a viral moment and a legal one.