Case Nos. 09-16412-AA, 10-10092-A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a public corporation,

Plaintiff-Appellee/Cross-Appellant,

v.

NEW LIFE ART, INC. and DANIEL A. MOORE,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION
CIVIL ACTION NO. CV-05-00585

BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. AND ALABAMA PRESS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES NEW LIFE ART, INC. AND DANIEL A. MOORE FOR REVERSAL ON APPEAL AND AFFIRMANCE ON CROSS-APPEAL

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R.26.1-1, Movants American Society of Media Photographers and the Alabama Press Association provide the following list of persons and entities that have a particular interest in the outcome of the instant appeal, including counsel and trial judges as specified by the Rule:

1. Acker, Jr., The Hon. William M.
2. Alabama Press Association
3. American Society of Media Photographers, Inc.
4. Auburn University
5. Bates, Walter W.
6. Baumgardner, Lorraine R.
7. Berkman, Gordon, Murray & DeVan
8. The Board of Trustees for the University of Alabama
9. Board of Trustees of the University of Illinois acting for and on behalf of the University of Illinois, Urbana-Champaign
10. Boise State University
11. Bradford, Larry R.
12. Bradford & Sears PC

13. Clemson University

14. Coogler, The Hon. R. David

15. Douglas, Gayle

16. Duke University

17. Ezelle, Jay M.

18. Florida State University

19. Ford Bubala

20. Gaston, Finus P.

21. Georgia Institute of Technology

22. Heninger, Erik

23. Heninger Garrison & Davis, LLC

24. Heninger, Stephen D.

25. Henn, Jr., R. Charles

26. Hightower, Susan J.

27. Issues & Answers Network, Inc.

28. Kilpatrick & Stockton, LLP

29. Lamb, Justin B.

30. Louisiana State University

31. Moore, Daniel A.

32. Murray, J. Michael

33. New Life Art, Inc.

34. Novak, III, Tabor R.

35. Perlman, Victor S.

36. Phelps, III, Thomas C.

37. Pirkey Barber LLP

38. Pirkey, Louis T.

39. Proctor, The Hon. R. David

40. Propst, The Hon. Robert B.

41. Randolph, Richard

42. Regents of the University of Minnesota

43. Sears, Shane T.

44. Starnes Davis & Florie, LLP

45. Swann, Jerre B.

46. University of Arkansas

47. University of Cincinnati

48. University of Connecticut

49. University of Florida

50. University of Georgia

51. University of Kansas

52. University of Kentucky

53. University of Mississippi

54. University of Missouri

55. University of North Carolina

56. University of Notre Dame du lac

57. University of Oklahoma

58. University of South Carolina

59. University of Texas

60. University of Utah

61. University of Wisconsin

62. Vanderbilt University

63. West Virginia University

64. Witt, Robert

The American Society of Media Photographers, Inc. is not a subsidiary nor affiliate of a publicly owned corporation nor is it related to any identifiable legal entity.

The Alabama Press Association is affiliated with the Alabama Newspaper Advertising Service, Inc., an Alabama corporation, which is the advertising and sales

affiliate of the Alabama Press Association, and the APA Journalism Foundation, a non-profit 501(c)3 foundation. The Alabama Press Association is not an affiliate nor a subsidiary of a publicly owned corporation.

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STATEMENT OF THE IDENTITY OF THE AMICI CURIAE, THEIR INTEREST IN THE CASE, AND SOURCE OF THEIR AUTHORITY TO FILE

American Society of Media Photographers, Inc. is the leading trade association for photographers who photograph for publication. The ASMP, founded in 1944, is the oldest and largest organization of its kind in the world; it has approximately 7,000 members. Its membership includes all manner of professional photographers who create photographic images for publication including books, magazines, newspapers, web uses, corporate reports, publicity, and advertising. In the course of pursuing their profession, ASMP's members produce photographs that document the range of human experience and interests–including, of course, sporting events–collegiate, professional, as well as others. Freedom of expression undergirds the artistic and professional pursuits of ASMP's members. The First Amendment issues raised by this appeal are of vital interest to ASMP's membership.

Founded in 1871 as the Editors and Publishers Association of Alabama, the Alabama Press Association is the state trade association of daily and weekly newspapers in Alabama. Its active membership includes 24 daily newspapers and 99 non-daily newspapers. Among its members are photojournalists whose work like the members of its fellow amicus document all manner of news–including Alabama football. The outcome of this appeal will affect their ability to publish and reproduce their photographs. The Alabama Press Association, as an active advocate of free expression, adds its voice to urge protection of the First Amendment issues at stake.

Amici have filed a motion pursuant to Rules 27 and 29(b), (e) of the Federal Rules of Appellate Procedure and 11th Cir. R.27-1 and 11th Cir.R.29-1 for leave to file this amici curiae brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case presents the issue of whether a claim under the Lanham Act can be constitutionally enforced to suppress artistic expression protected by the First Amendment. Moreover, it raises the question of whether the First Amendment protects objects that have a utilitarian purpose in addition to artistic expressive content from suppression of their expressive component under color of the Lanham Act.

SUMMARY OF ARGUMENT

Daniel Moore's artistic expression does not use the images in which the University claims trademark rights as symbols to identify a source or origin of a product and, therefore, does not constitute infringing activity under the Lanham Act. That said, when a trademark claim is asserted against expression protected by the First Amendment, as Moore's paintings are, courts have adopted a balancing test to resolve the conflicting interests. Under that test, trademark rights must yield to an artist's First Amendment rights when the trademarked images have artistic relevance to the underlying expression and do not explicitly mislead as to the source of the work. Moore's expression at issue here–in all genres–handily passes that test.

ARGUMENT

INTRODUCTION

Degas lived in Paris and painted its dancers. Monet lived in Giverny and painted water lilies. Bruegel lived in Belgium and painted lowland peasants. Audubon roamed North America and painted its birds.

Daniel Moore lives in Alabama; he paints football.

To say football is special in Alabama is to understate the State's passion for and interest in it–not by inches, but by yards. Hundreds–if not thousands–of books and articles chronicle its history, personalities, and events.[1]

We need look no further than Alabama case law (federal as well as state),

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[1] *See e.g.*, E. Gold, *Crimson Nation* (Rutledge Hill Press 2005); C. Walsh, *100 Things Crimson Tide Fans Should Know and Do Before They Die* (Triumph Books 2008); R. Green, *101 Reasons to Love Alabama Football* (Abrams 2009); J. Woodruff, *Historic Photos of the University of Alabama Football* (Turner Publishing 2009); K. McNair, *Game Changers: The Greatest Plays in Alabama Football History (50 Greatest Plays)* (Triumph Books 2009). Entering the words, *Alabama football*, in the search window of the portion of Amazon.com devoted to books yields 446 results. http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Dstripbooks&field-keywords=alabama+football&ih=10_3_2_1_0_0_0_0_0_1.140_186&fsc=9 (last visited July 20, 2010).

Alabama football, of course, has been examined, served up, and digested by newspaper and magazine writers in abundance. *See e.g.* "The Most Powerful Coach in Sports," Forbes (Sept. 1, 2008); "Pride of the Tide," Sports Illustrated, (Nov. 30, 2009); "A Rough Day for the Bear," Sports Illustrated, (Nov. 26, 1962); "Draft Picks Grown Here," Sporting News, (April 9, 2010). It has, in fact, been the subject of scholarly appraisal. *See e.g.*, W. Borucki, "'You're Dixie's Football Pride': American College Football and the Resurgence of Southern Identity," Identities, Vol. 10, Issue 4, (June 2003); A. Doyle, "Bear Bryant: Symbol for an Embattled South," Colby Quarterly, Vol. 32, Issue 1 (March 1996).

however, to glean an appreciation of football's prominent role in that State's zeitgeist:

"Fall means football which no person residing in Alabama can easily ignore." *Auburn University v. Moody*, 2008 WL 4877542 (M.D. Ala. 2008).

"[I]n this State, Alabama football is a secular religion promoting misplaced and false values." *Carroll v. United States,* 415 B.R. 561, 565 (N.D. Ala. 2009).

"[F]ootball is not just a game... 'College athletics, at a major institution such as Auburn University are public matters. The public is encouraged to participate as fans, contributors, sponsors of events or simply as interested citizens. Essentially, there is nothing in our society more public than major college athletics.'" *Birmingham News Company v. Muse,* 669 So. 2d 138, 142 (Ala. 1995) (Maddox, J. dissenting).

This Court, in fact, has described the following that football has in the South, in general, as "near fanatical." *Price v. Time, Inc.*, 416 F.3d 1327,1329(11th Cir. 2005).[2]

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[2] Alabama football has spawned a number of high-profile defamation cases – bearing witness to the proliferation of publications about it as well as the public's apparent fascination with the subject. *Curtis Pub. Co. v. Butts,* 388 U.S. 130 (1967) (involving a newspaper report that Wally Butts, athletic director of the University of Georgia, revealed Georgia's plays to Bear Bryant, prior to their match-up); *Cox Enterprises, Inc. v. Holt,* 678 F.2d 936 (11th Cir. 1982) (involving an article written about a controversial block during a 1961 game between the University of Alabama and Georgia Tech); *Price v. Time, Inc.,* 416 F.3d 1327*modified on denial of rehearing* 425 F.3d 1292 (11th Cir. 2005) (involving a *Sports Illustrated* article reporting on an Alabama football coach's alleged "boorish behavior and sexual misconduct"); *See also, Cottrell v. National Collegiate Athletic Association*, 975 So. 2d 306 (Ala. 2007) (continued...)

Against this background, it is not surprising that Moore, a talented artist who is a University of Alabama alumnus living in Birmingham, married to a University of Alabama alumnus, and the father of three University of Alabama alumni, fills his canvasses with images of the grit and drama of football as it is played at the University of Alabama, the grace and symmetry of its players, and the spoils of battles hard fought. In the tradition of visual artists throughout time–from the cave paintings of Altamira to the photography of Annie Lebovitz–Moore "comment[s] on his world" using the "tools of his culture." W. Gordon, *A Property Right in Self-Expression*, 102 Yale Law J. 1533, 1570, 1576 (1993).

His art communicates ideas, feelings, messages, concepts, and meanings, *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003); *Bery v. City of New York*, 97 F.3d 689, 695 (2nd Cir.1996), and is fully protected by the First Amendment. *Kaplan v. California*, 413 U.S. 115, 119, 93 S.Ct. 2680, 2684 (1973).

Appellee's lawsuit seeking to enforce federal law to suppress Moore's work thus triggers the full weight of First Amendment precedent. *New York Times v.*

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[2](...continued)
(involving statements made about former University of Alabama's assistant football coaches in the course of investigating alleged violations of NCAA rules).

It even prompted a supporter to bribe a Tennessee high school coach $150,000.00 to encourage one of his school's star athletes to play for the University of Alabama. *U.S. v. Young*, 2005 WL 3879034 (W.D.Tenn. 2005).

Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718 (1964); *Bell v. Maryland*, 378 U.S. 308, 84 S.Ct. 1814 (1964); *BMW v. Gore*, 517 U.S. 559, 572 n.17, 116 S.Ct. 1589, 1597 n. 17 (1996).[3]

The First Amendment's role in protecting the type of expression at stake here is acute:

> [A]rt establishes the basic human truth which must serve as the touchstone of our judgment. The artist, however faithful to his personal vision of reality, becomes the last champion of the individual and sensibility against an intrusive society and an officious state....If art is to nourish the roots of our culture, society must set the artist free to follow his vision wherever it takes him. We must never forget that art is not a form of propaganda; it is a form of truth.

President John F. Kennedy: Remarks at Amherst College, October 26, 1963, posthumously honoring Robert Frost. http://arts.endow.gov/about/Kennedy.html. It protects expression produced with a paintbrush or a camera just as vigorously as it protects that of poets, authors, journalists, politicians, and commentators.

Appellee's trademark claim against Mr. Moore must, therefore, be evaluated in

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[3] In this regard, Appellee's lawsuit presents no small irony. The University of Alabama–whose stated mission "is to advance the intellectual and social condition of the people of the State," http://www.ua.edu/history.html–has filed suit seeking to suppress artistic expression in service of its football team's brand. It serves as a hearty rebuttal to the theory advanced by Professor Paul Horwitz, a member of its law school's faculty, that universities are "special creatures of the First Amendment" that should be "granted significant presumptive autonomy to act," and substantial deference by the courts. P. Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*," 54 U.C.L.A. Law Rev. 1497 (August 2007).

this context.

I. MR. MOORE'S EXPRESSION DOES NOT CONSTITUTE INFRINGING ACTIVITY UNDER THE LANHAM ACT.

As a preliminary matter, Appellee's trademark claim itself rests on wobbly legs, for the simple reason that Moore has not used any of the images in which Appellee claims trademark rights, as a symbol to identify a source or origin of a product. He, therefore, has not engaged in any infringing activity.

Decades of case law establish that it is the ***use*** to which a design or symbol is put that defines it as a trademark. Judge Learned Hand explained:

> [A] trademark is not property in the ordinary sense, but only a word or symbol indicating the origin of a commercial product. The owner of the mark acquires the right to prevent the goods to which the mark is applied from being confused with those of others and to prevent his own trademark from being diverted to competitors through their use of misleading marks. There are no rights in trademark beyond these.

Industrial Rayon Corp. v. Dutchess Underwear Corp., 92 F.2d 33, 35 (2d Cir. 1937) *cert denied*, 303 U.S. 640, 58 S.Ct. 610 (1938).

Moore's paintings are not beer cans, *University of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1536 (11th 1985), taxi cabs, *Transportation, Inc. v. Mayflower Services, Inc.*, 769 F.2d 952 (4th Cir. 1985), or dry cleaning equipment. *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 115 S.Ct. 1300 (1995). They are artistic expression sold on the basis of their intrinsic value as pieces of art. The basic ingredient of infringing activity–use of the mark as a product identifier–is absent.

To be sure, purchasers of Moore's works are drawn to his paintings because of their interest in Alabama football, just as readers buy books because of their interest in the subject matter. That does not mean, however, that consumers believe that the University of Alabama is the source or sponsor of Daniel Moore's art or that they purchase his works for that reason. In other words, Daniel Moore paints Alabama football because it is a matter of interest to him as well as to the public. But the images he depicts do not serve to identify the University as the source or sponsor of the painting.

The Sixth Circuit in assessing a claim that a photographer's print of the Rock and Roll Hall of Fame and Museum infringed the Rock Hall's trademark in the image of its building concluded that when it viewed the photograph, it did not view the Rock Hall's image as an indicator of source or sponsorship. *The Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 134 F.3d 749, 754 (6th Cir. 1998). The court explained: "Stated somewhat differently, in Gentile's poster, the Museum's building strikes us not as a separate and distinct mark *on the good*, but rather as the good itself." *Id.* (Emphasis in the original). *See also, Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 71 F. Supp. 2d 755, 764 (N.D. Ohio 1999) (on remand).

This Court similarly found, in a case presenting the flip-side of the issue, that an artistic photograph of the Bird Girl statue in Savannah's Bonaventure Cemetery did

not constitute a trademark, giving rise to a protectable trademark interest, but rather constituted "the good itself." *Leigh v. Warner Brothers, Inc.*, 212 F.3d 1210, 1218 (11th Cir. 2000)[4]; *See also, Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1325 (11th Cir. 2006) (rejecting Plaintiff's claim under state statute that Internet bookseller appropriated her photographic image appearing on a book cover displayed on its website, finding that bookseller did not use the image for "trade, commercial or advertising purposes.")

II. MR. MOORE'S EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT FROM CENSORSHIP THREATENED BY ENFORCEMENT OF TRADEMARK RIGHTS.

Appellee begins its discussion of the First Amendment issues by erecting a straw man: it argues that the Lanham Act satisfies the constitutional test that applies to laws regulating speech without reference to its content; ergo, Appellee concludes, a claim advanced under the Lanham Act does not offend the First Amendment. *Brief of Appellee* at 45-49. Appellee's argument proves too much, however.

The Lanham Act targets false and misleading commercial speech–a category of expression that falls outside First Amendment protection altogether. *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 2350 (1980); *This That and Other Gift and Tobacco, Inc. v. Cobb County*,

[4] Jack Leigh's photograph of the Bird Girl statuary graced the cover of the best seller, *Midnight in the Garden of Good and Evil. Leigh*, 212 F.3d at 1212.

Ga., 285 F.3d 1319, 1323-24 (11th Cir. 2002). Robert Denicola explained in *Trademarks as Speech*, 1982 Wisconsin Law Rev. 158, 160:

> The law of trademarks and unfair competition has its roots in the common law action of deceit. The gravamen of the complaint was that the defendant had fraudulently marketed goods by utilizing an imitation of plaintiff's trademark. Injury to the aggrieved trademark owner was direct: diversion of trade through a misrepresentation of the source of defendant's merchandise. Purchasers who by whim or design had chosen to patronize the trademark owner were duped into dealing with an imposter.

(Citations omitted).

The fact that the Lanham Act, on its face, may survive scrutiny under the First Amendment as a regulation aimed at unprotected commercial speech does not mean that every claim brought under the Act will.[5] In fact, a substantial body of case law holds otherwise. *Silverman v. CBS, Inc.*, '870 F.2d 40, 48 (2d Cir. 1989) ("Ordinarily, the use of a trademark to identify a commodity or a business 'is a form of commercial speech and nothing more.'... Requiring a commercial speaker to choose words and labels that do not confuse or deceive protects the public and does not impair expression....In the area of artistic speech, however, enforcement of trademark rights carries a risk of inhibiting free expression."); *L.L. Bean, Inc. v. Drake Publishers, Inc.*,

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[5] Following Appellee's line of analysis, claims brought under the Lanham Act most certainly are not content-neutral; they are content-based, for they are keenly and specifically focused on whether the content of the defendant's expression includes an infringing depiction of the plaintiff's mark. That is surely not a content-neutral determination.

811 F.2d 26, 29, 33 (1st Cir. 1987) ("Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view....The Constitution does not...permit the range of the anti-dilution statute to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context."); *Rogers v. Grimaldi,* 875 F.2d 994, 999 (2d Cir.1989); *Cliff Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989); *Parks v. LaFace Records,* 329 F.3d 437, 451-52 (6th Cir.2003)*; ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir.2002)*; Sugar Busters LLC v. Brennan,* 177 F.3d 258, 269 & n. 7 (5th Cir.1999); *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008); *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 423-25 (1st Cir. 2007); *Cf. Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1015-16 (3rd Cir. 2008).

Amici here urge this Court to affirm that portion of the decision of the court below finding that the First Amendment protects expression from censorship by enforcement of a claim under the Lanham Act and to adopt the reasoning of each of those circuits that have considered the issue and ruled likewise . *L.L. Bean, Inc.*, 811 F.2d at 29 (1st Circuit); *Rogers*, 875 F.2d at 999 (2nd Circuit); *Facenda*, 542 F3d at 1015 (3rd Circuit); *Sugar Busters*, 177 F.3d at 269 (5th Circuit); *ETW Corp.*, 332 F.3d at 928 (6th Circuit); *Mattel, Inc.*, 296 F.3d at 902 (9th Circuit). *Cf. Anheuser-Busch,*

Inc. v. Balducci Publications, 28 F.3d 769, 776 (8th Cir. 1994).

ETW Corp.[6], which the district court found to be persuasive authority, closely approximates the circumstances of this case and serves as sound guidance for the resolution of the issues here. That case involved prints of a painting by Rick Rush, a sports artist like Moore, that depicted scenes of Tiger Woods at the 1997 Masters Tournament. Woods sued Rush for infringement of his trademark rights under the Lanham Act as well as violation of his right to publicity under state law.

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[6] Appellee attempts to marginalize the importance of *ETW Corp.* and *Rogers*, two seminal cases on which the district court relied. It contends that *ETW* and *Rogers* "are distinguishable from the case at hand because they involved rights of publicity and ***not trademark rights***." *Appellee's Brief* at 50. (Emphasis added). Appellee, therefore, insists that both cases are of limited value since they "involved...claimed breach[es] of the right of publicity" which Appellee states "are 'less compelling than those that justify rights in trademarks'"–citing *ETW*, 332 F.3d at 930, as support for that premise.

Appellee is mistaken, however, in asserting that the analysis in *ETW* was confined to consideration of Woods's right of publicity claim. While the Sixth Circuit Court of Appeals determined that Woods did not have a trademark right in all iterations of his image, it fully addressed and discussed Woods's related trademark claims for unfair competition and false endorsement under the Lanham Act as well as the First Amendment defense to them. *See*, 332 F.3d at 919-28, 937. This Court recently made clear that it makes no distinction between a claim for false endorsement under the Lanham Act and one for trademark infringement. *Tana v. Dantanna's*, Case No. 09-15123 (11th Cir. July 15, 2010) 2010 WL 2773447. Thus, the distinction Appellee attempts to draw fails of its own weight.

ETW serves as thoughtful and compelling authority in this case. The same is true of *Rogers*. 875 F.2d at 997-1002.

The court in *ETW* began by finding that Rush's prints were "entitled to the full protection of the First Amendment." 332 F.2d at 925. The question it was thus called upon to answer was: "whether Woods's intellectual property rights must yield to Rush's First Amendment rights." *Id.*

The court began by rejecting the notion advanced by Appellee here that the likelihood of confusion test under the Lanham Act adequately assures protection to First Amendment interests. *See Appellee's Brief* at 39; 332 F.3d at 926. Reviewing the decision of its sister circuits[7] addressing the clash between intellectual property rights and expression protected by the First Amendment, the court in *ETW* determined that the balancing test set forth by the Second Circuit in *Rogers* provided the proper analysis.[8] The *Rogers* test is premised on the determination that "the Lanham Act should be applied to artistic works only where the public interest in avoiding confusion outweighs the public interest in free expression." *Id.* at 928. Under the *Rogers* test, "the public interest in free expression" prevails if the use of the trademarked image has artistic relevance–provided it is not used in such a way to "explicitly mislead[] as to the source of the work." *Id.*

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[7] Specifically, the court reviewed the rationale of the decisions in *Cliff Notes, Inc.*, 886 F.2d 490 and *Mattel*, 296 F.3d 894 in support of the *Rogers* balancing test.

[8] In *Parks*, 329 F.3d at 450 (6th Cir. 2003), the Sixth Circuit adopted the *Rogers* balancing test in evaluating Rosa Parks's claims against OutKast and its producer in connection with the use of her name in one of the music duo's song titles.

Applying the test to Rush's paintings and prints, the court determined that Woods's image had "artistic relevance to the underlying work and it [did] not explicitly mislead as to the source of the work." *Id.* at 937. The same conclusion obtains here with regard to Moore's paintings. Clearly, the uniform worn by University of Alabama's football players and the color of that uniform has artistic relevance to a painting depicting historical plays and moments in Alabama football. Nor can there be any serious suggestion that a painting that depicts uniformed athletes engaged in play misleads anyone about the source of the work simply because the painting faithfully and accurately depicts the uniforms' appearance, including their colors. Appellee's claims for trademark infringement fail when balanced against the public interest in free expression.

Appellee does not offer much of an argument against this conclusion, *Appellee's Brief* at 39,[9] but instead advocates replacing the *Rogers* test with a test of its own devise–admitting that it has borrowed aspects from various courts' evaluations of a celebrity's claimed right of publicity (which in the next breath, Appellee tells us is markedly different from a trademark claim). Its test asks a court to examine: (1) the

[9] Appellee, in one brief sentence, pronounces that Moore's paintings fail "the First Amendment balancing test" because his "products do not use the infringing elements to create any new meaning or message." *Appellee Brief* at 39. First, Appellee has not properly stated or applied the balancing test articulated in *Rogers*, and secondly, it is wrong when it dismisses Moore's paintings as bereft of "new meaning or message."

strength of the intellectual property at issue; (2) the type of speech at issue; (3) whether the infringing work is transformative; and (4) the likelihood of confusion in the market. *Appellee's Brief* at 50.

But no court has ever applied the elements for evaluating the First Amendment's interface with a celebrity's right of publicity claim to a trademark claim. For good reason. Rights of publicity involve people and their likenesses, not commercial institutions and product identifiers. Right of publicity claims prompt an evaluation of "the substantiality and market effect of the use of the celebrity's image" and are "analyzed in light of the informational and creative content." *ETW*, 332 F.3d at 937; *see also, Rogers,* 875 F.2d at 1004 (noting the right of publicity is "potentially more expansive than the Lanham Act"). The inquiry into whether the expression is transformative, therefore, makes sense in this analysis; it plays no role, however, in evaluating whether the presence of trademark images in a piece of art serve as product identifiers that might confuse a viewer about the source of the work.

In this regard, it is important to remember that the court in *ETW* analyzed Woods's claims separately: reviewing his Lanham Act claims using the *Rogers* test, 332 F.3d at 936-37, and his right of publicity claim using some of the elements that Appellee incorporates into the test it advances here. *Id.* at 937-38. (finding that Rush's work had "substantial transformative elements").

The novel test advocated by Appellee in evaluating trademark claims arising

from images in paintings or photographs fails to accord sufficient breathing room to protected expression.

Consider the artist who wishes to paint or photograph a woman carrying a Coach handbag, a child wearing Nike tennis shoes or a construction worker pausing to drink out of a can of Coke. Under the *Rogers* test, he can be assured that his expression will be protected as long as the trademarked product has relevance to the visual depiction he wishes to create and he does not use it to mislead the viewer that the owner of the trademark is the source of his portraits. Within these boundaries, he can paint and photograph his world.

Under the test proposed by the Appellee, that same artist, before snapping a shot or raising his brush to the canvas, must first ask himself: Is the mark strong? In each of the above examples, the answer is "yes." That may be enough for him to refrain from creating his expression, or at the very least, give him pause.

Those who are not so faint of heart must next ask: what type of speech is at issue? The answer, of course, would be a drawing, painting or photograph. Appellee tells us, however, that simply because the portrait has "an expressive purpose" does not necessarily imbue it with protection; rather to really be protected, it must be "of a political nature," *Appellee's Brief* at 54– a premise so at odds with First Amendment precedent that it should be rejected for that reason alone. *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1591 (2010) ("Even ' "[w]holly neutral futilities...come

under the protection of free speech as fully as do Keats' poems or Donne's sermons." ' *Cohen v. California,* 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528, 68 S.Ct. 665, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting) (alteration in original).") Under Appellee's test, the artist will have yet another reason to put down his brush or camera.

Next, Appellee has the artist ask himself whether the work is transformative. Appellee explains that "in order to be transformative, the work must add some 'significant expression' to the infringing elements." *Appellee's Brief* at 56. One would think that creating a painting or taking an artistic photograph would "add some 'significant expression'" to the subject. But no, Appellee tells us. Because Moore, whose talent is indisputable, painstakingly creates realistic paintings, he flunks this component as well. Abstract figures wearing impressionistic uniforms might fare better under Appellee's analysis, but not the realistic portrayals by Moore. As for photographs, there appears to be little chance that Appellee will consider them "transformative." Not only does Appellee's test put the artist or photographer in the position of trying to figure out what he needs to do–beyond creating a depiction of the subject before him–that will satisfy a court that his painting or photograph "adds 'significant expression'" to the image that he sees before him, but it puts the court in a position of being a pseudo art critic who must evaluate whether the artist has added "significant expression" to the subject he depicts.

And lastly, the artist must ask himself if taking the photo of the woman with the Coach handbag, the child in the Nikes or the Coke-drinking construction worker will "cause confusion in the market." Appellee does not explain how this factor is to be analyzed–perhaps because it flouts reason to suggest that simply because a piece of art depicts a trademark, logo or design, a viewer is bound to conclude that the trademark owner is the source of the painting or photograph. Rather, it cuts right to its conclusion that consumers bought Moore's artwork primarily because they thought it was licensed by the University of Alabama. *Appellee's Brief* at 57. By that logic, Appellee would have us conclude that our hypothetical works of art depicting a Coach handbag, Nike tennis shoes or can of Coke would be purchased because consumers would conclude that they were licensed by Coach, Nike or Coke, respectively–not because of their artistry or composition.

By the time we reach the end of Appellee's proposed test, it is clear that under it, nearly any visual expression that includes an image that is trademarked–or might become trademarked–is at risk of being snuffed out by a trademark claim. Warhol's Campbell's soup cans and Coca-cola bottles–that depict strong trademarks, are not expression "of a political nature," and are realistic renderings of recognizable trademarks–would be at risk under Appellee's test.

The First Amendment does not tolerate such a parsimonious view of its

protections.[10]

Notwithstanding the ill-fit of Appellee's test, its trademark claims fail under even that test. The strength of the intellectual property at issue is questionable. Even though Appellee insists the use of the crimson and white projects a strong identity, it admits, as it must, that the colors have the primary purpose of distinguishing its players from the other team on the field. In fact, fifteen other football teams in NCAA, Division I, alone, use some form of red (variously known as crimson, scarlet, vermilion, cardinal red, or red) and white to distinguish their men on the field of play.[11] (The very idea that trademark protection for colors might prevent painters, photographers and other artists from incorporating those colors in their works would

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[10] It is no answer to say that an artist is free to produce his expression because he need only obtain the agreement of the trademark owner. Separate and apart from the fact that such arrangement confers on the trademark owner, in this instance, a State University the power of the censor, but, as Appellant points out, in some circumstances the owner itself may be prohibited by other circumstances of conferring such permission. For example, NCAA rules prohibit Appellee from negotiating licensing agreements in connection with certain of its athletes. Moreover, obtaining a license from Appellee does not resolve the issue when the artist, as Moore does, creates a painting that depicts players from Appellee's opponents-who likewise claim trademark rights in their colors and uniforms.

[11] They are: Arkansas-cardinal red and white; Florida Atlantic-red, white and blue; Houston-red and albino white; Indiana-cream and crimson; Louisiana Lafayette-vermilion and white; Maryland-red white, black and gold; Miami University-red and white; Mississippi State-maroon and white; Oklahoma-crimson and cream; Stanford-cardinal red and white; Temple-cherry and white; Texas A&M-maroon and white; Utah-crimson and white; Western Kentucky-red and white; Wisconsin-cardinal and white.

have staggering effects on free speech.)

Under the second element of Appellee's test, the speech at issue is artistic expression entitled to the full and robust protection of the First Amendment.

As for the transformative requirement, Moore's paintings are not mere imitations or syntheses of raw material. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406, 396 (2001). They are, in fact, like the painting at issue in *ETW* that the Sixth Circuit found was transformative as expression, describing "in artistic form...a historic event in sports history." *ETW*, 332 F.3d at 938.

Finally, as discussed above, there is little likelihood that a viewer will be confused about the source of Moore's paintings. His signature is prominently displayed on his work. The fact that it depicts a historic moment in Alabama football does not justify the conclusion that Alabama must be the source of the artwork.

III. MOORE'S EXPRESSION, BEYOND HIS PAINTINGS, IS PROTECTED BY THE FIRST AMENDMENT.

While the district court properly determined that Moore's paintings were constitutionally protected against suppression by Appellee's trademark claims, it stopped too short when it determined that the First Amendment did not extend its protection to calendars with Moore's artwork or other items depicting his artwork that the district court characterized as "mundane." The district court apparently reasoned that when artwork is produced on an object that also has another, mundane purpose,

the First Amendment no longer protects it. Under the district court's analysis, Michelangelo's paintings in the Sistine Chapel would be disqualified from protection since they appear on a "mundane" article that has a common utilitarian purpose–namely, a ceiling.

"Pictures, films, paintings, drawings, and engravings" are all forms of expression protected by the First Amendment. *Kaplan*, 413 U.S. at 119-20. So too are prints of paintings and photographs, *ETW*, 332 F.3d at 924-25–whether reproduced in full scale or silk-screened on a tee-shirt.[12] *Saderup, Inc.*, 25 Cal. 4th at 396.

The Second Circuit faced the issue of determining "when a product should be said to serve predominantly expressive purposes, and in turn, when its sale or dissemination is protected under the First Amendment" in evaluating the constitutionality of a municipal ordinance licensing the sale of non-food goods and services. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 92 (2d Cir. 2006). In *Mastrovincenzo*, the court specifically examined whether the plaintiffs' graffiti-painted clothing and hats contained expressive content triggering the First Amendment or whether they were merely commercial goods that did not. *Id.* at 93. In doing so, the court expressly rejected the tack followed by the court below–noting

[12] Judge Posner observed that tee shirts " are to [the seller] what the *New York Times* is to the Sulzbergers and the Ochs-the vehicle of her ideas and opinions." *Ayres v. City of Chicago* 125 F.3d 1010, 1017 (7th Cir. 1997).

"[t]he fact that an object serves some utilitarian purpose does not ... automatically render it non-expressive." *Id.* at 95.

The Second Circuit followed a two-step inquiry. The first step of the inquiry asked whether an item possesses both expressive elements and "a common non-expressive purpose or utility." *Id.* at 95. If the answer was "yes," to both questions, then the court moved on to the next step which required it to determine "whether the expressive elements...may fairly be characterized as dominant." *Id.* This latter inquiry was to be done on a case-by-case basis. *Id.*

The court proceeded to analyze the clothing created by the artists there at issue.[13] It first determined that the plaintiffs' clothing "could be objectively understood to have expressive or communicative elements" and also had "several clear non-expressive purposes." *Id.* at 96. The court then examined the text, logos, designs, and representational scenes on the clothing and determined that the plaintiffs' clothing had a predominantly expressive purpose that triggered the protection of the First Amendment. *Id.*

Under the analysis used by the court in *Mastrovincenzo*, the articles bearing Moore's art qualify for protection under the First Amendment and therefore are

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[13] The clothing and hats created by the plaintiffs had "highly stylized typography, iconography, and pictorial representation" with "varying combinations of oil paints, spray paints, markers, and permanent paint pens." *Mastrovincenzo*, 435 F.3d at 86.

subject to the *Rogers* balancing test.

Calendars, small prints and other articles bearing Moore's art have "expressive elements." Calendars are frequently forms of art themselves, with the months and days of the week being secondary to the images illustrating the progression of the year. *See,* K. Jain, *Gods in the Bazaar,* (Duke University Press 2007) (exploring Indian calendar art); R. & C. Martin, *Vintage Illustration: Discovering America's Calendar Artists 1900-1960*, (Collectors Press, Inc. 1997) (exploring American calendar art). A trip to almost any art museum will reveal the artistic images appearing on crockery, chalices, vases, or other vessels. *See,* http://www.metmuseum.org/toah/hd/vase/hd_vase.htm. Indeed, a number of them depict the athletic competitions of their day. *See,* http://www.metmuseum.org/toah/works-of-art/16.71; http://www.metmuseum.org/toah/works-of-art/07.286.79. Coffee mugs bearing Moore's artistic renderings of Alabama football are no different than these pieces of art from earlier ages. While they serve a utilitarian purpose, their artistic message is predominant. Thus, the same balancing test used to evaluate Moore's paintings must be applied to these other genres bearing his artwork.

The uniforms, symbols and icons captured in Moore's paintings of University of Alabama football appearing in his artwork depicted in calendars, in his prints of various sizes, and on mugs have artistic relevance. As for misleading the consumer about their source, the calendars prominently feature Daniel Moore's signature in

large, bold print on the face of the calendar. His signature likewise prominently appears in the left hand corner of each painting and the print of each painting. The likelihood that a consumer will view them as anything other than the work of the artist whose signature appears on them is nil.

The various reproductions of Moore's work are protected by the First Amendment and cannot be suppressed by enforcement of Appellee's trademark claims.

CONCLUSION

Amici Curiae the American Society of Media Photographers, Inc. and the Alabama Press Association urge this Court to affirm the district court's determination that Moore's expression is protected by the First Amendment and does not violate the Lanham Act and to reverse its finding that Moore's expression displayed in other formats is not so protected and is vulnerable to the University's trademark claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and 11th Cir. R. 29-2 and 28-1(m) the undersigned certifies this brief complies with the typed-volume limitation of Fed. R. App. P. 32(a)(7)(B) as follows:

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amici Curiae American Society of Media Photographers, Inc. and Alabama Press Association In Support of Defendants-Appellants/Cross-Appellees New Life Art, Inc. and Daniel A. Moore for Reversal on Appeal and Affirmance on Cross-Appeal was served upon Stephen D. Heninger, Erik S. Heninger, and Gayle L. Douglas, attorneys for Appellants/Cross-Appellees, Heninger, Garrison & Davis, LLC, 2224 First Avenue North, Birmingham, Alabama 35203; Walter William Bates, Jay M. Ezelle, Tabor R. Novak, III, Starnes Davis Florie LLP Seventh Floor, 100 Brookwood Place P.O.Box 598512, Birmingham, Alabama 35209 and Jerre B.Swann, R.Charles Henn, Jr., Kilpatrick Stockton LLP, 110 Peachtree Street, Suite 2800, Atlanta, Georgia 30309, attorneys for Appellee/Cross-Appellant, and Louis T. Pirkey, Susan J. Hightower, attorneys for Amici Curiae University of Arkansas, *et al.,* Pirkey Barber LLP, 600 Congress Avenue, Suite 2120, Austin, Texas 78701, via Federal Express, this _____ day of July, 2010.

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