

A Balancing Act: Fair Use and Creative Content

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Conventional wisdom, in the trademark arena, has been that a party who wishes to use another's trademark must first obtain a license. In recent years, a trend appears to be emerging in the entertainment industry where such use will occur without a party preliminarily seeking express consent. The same is true in the related area of life story rights. This new trend demonstrates that entertainment industry actors are taking a more aggressive approach to using other's intellectual property, putting them potentially at odds with the owners of those rights, whose objectives are to police and protect their brands with the public. The justification upon which industry actors rely is that using these rights falls under the fair use defense, which excuses the lack of express authorization to use an owner's trademarks or life story rights. The owners of these brands or rights, however, may employ their own aggressive measures to combat this trend, to control and protect these rights.

An example of this is illustrated by HBO's use of National Football League (NFL) trademarks and logos in the show *Ballers*, which stars Dwayne Johnson.¹ Many were surprised when news spread that HBO was not paying licensing fees to the NFL for depicting its logo and team uniforms.² The cable series began with Johnson's character, Spencer Strassmore, having flashbacks from his playing days for the Miami Dolphins.³ He was wearing what clearly appeared to be a Dolphin's uniform, with the logo in plain view—and was chasing down the Buffalo Bills quarterback, whose helmet logo was also visible.⁴

Some industry insiders assumed that the NFL would take action against HBO, and that HBO would eventually have to pay the NFL for using the various team logos and uniforms; they were astonished to see a company taking on the NFL in such a way.⁵ Previously, producers who used NFL team logos and uniforms in their vehicles first entered into licensing agreements with the NFL.⁶ This, of course, required paying licensing fees.⁷ HBO responded to the publicity surrounding its actions by stating: "HBO is always mindful of other intellectual property owners, but in this context there is no legal requirement to obtain their consent."⁸ While there have already been analyses of HBO's decision, this article discusses instances (including *Ballers*) where the "fair use" defense could apply to similar conduct, and how arguments are being used in the conflict over clearing—or not—of life story rights.

I. Fair Use and Trademarks

The use of noteworthy brands or trademarks is commonplace in fictional realities, with television, film, advertising, and video games being exemplars. Owners of these "brands," or trademarks, have a bona fide and legally recognized interest in protecting their marks; the

law allows them to stop others from using such marks to prevent the public from being confused about the source of corresponding goods or services. These rights, however, cannot halt non-infringing use of another's trademark; one such subset of permissible conduct is known as fair use. There are two types of "fair use": Descriptive and nominative. Descriptive fair use is a statutory protection, codified in the Lanham Act,⁹ while nominative fair use is a judicially created defense. Either is relevant here, because this is a principal argument upon which filmmakers and producers rely to use these marks without "paying to play."

1. Descriptive Fair Use

Federal trademark law recognizes a defense to trademark infringement where the mark is used "fairly and in good faith...to describe the goods or services of such party, or their geographic origin."¹⁰ Known as the descriptive fair use defense, it "in essence, forbids a trademark registrant to appropriate a descriptive term for his [her or its] exclusive use and so prevent others from accurately describing a characteristics of their goods."¹¹ This defense "is available only in actions involving descriptive terms and only when the term is used in its descriptive sense rather than its trademark sense."¹² For example, in *Zatarains, Inc. v. Oak Grove Smokehouse*, the United States Court of Appeals for the Fifth Circuit found that the term "Fish-Fri" was a descriptive term relating to the preparation and consumption of fried fish and could be used by a competitor as a descriptive term for similar products.¹³

2. Nominative Fair Use

Though not codified in the Lanham Act, the nominative fair use defense was recognized as a judicial carve-out in *New Kids on the Block* and addresses circumstances where no descriptive term may exist:

With many well-known trademarks, such as Jell-O, Scotch tape and Kleenex, there are equally informative non-trademark words describing the products (gelatin, cellophane tape and facial tissue). But sometimes there is no descriptive substitute...when many goods and services are effectively identifiable only by their trademarks. For example, one might refer to "the two-time world champions" or "the professional basketball team from Chicago," but it's far simpler (and more likely to be understood) to refer to the Chicago Bulls. In such cases, use of the trademark does not imply sponsorship or endorsement of the product because the

mark is used only to describe the thing, rather than to identify its source.¹⁴

Circumstances involving nominative fair use generally occur when a defendant has intentionally used the plaintiff's mark to refer to the plaintiff but does not designate the source of the defendant's own products or services.¹⁵ A defendant must satisfy three requirements to use the defense:

- 1) the plaintiff's product or service in question must be one not readily identifiable without use of the trademark; 2) only so much of the mark or marks may be used as is reasonably necessary to identify the plaintiff's product or service; and 3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.¹⁶

A 2004 Supreme Court decision, *KP Permanent Make-Up, Inc. v. Lasting Impression, Inc.*,¹⁷ cast doubt on the continued availability of nominative fair use as a defense, even though the case involved a descriptive fair use defense, because the ruling "calls into question whether the nominative fair use defendant would have the burden of negating sponsorship or endorsement confusion with the trademark owner."¹⁸ Yet even with that consideration in mind, the concept of nominative fair use allows for the comparative advertising, parody, and noncommercial use of trademarks.¹⁹

II. Trademarks and the First Amendment

At their core, trademarks are considered to be commercial speech.²⁰ As the First Amendment allows for significant regulation of commercial speech, constitutional issues do not typically arise in trademark disputes. However, this analysis changes for creative works, such as plays, television shows/series, films, books, video games, and songs, which are generally sold as commercial products.²¹ When a mark is being employed as a creative use, rather than a descriptive or commercial one, First Amendment considerations become part of the analysis. Creative works are protected as free speech under the First Amendment, and because these types of works in the trademark context contain both artistic expression and commercial promotion, a different analysis applies.²² Accordingly, a balance must be struck between the trademark owner's rights and the First Amendment rights tied to creative works.²³

The leading judicial authority on balancing these interests is *Rogers v. Grimaldi*,²⁴ a case from the United States Court of Appeals for the Second Circuit, which involved a film about cabaret performers.²⁵ The *Rogers* test has two prongs: 1) whether the use of the third-party trademark has artistic relevance; and 2) if there is artist relevance, is the use of the mark deliberately misleading as to the

content or source of the work?²⁶ As this article focuses on television series and movies using third-party trademarks, whether the use of these marks is legal or defensible also raises the tension inherent in First Amendment considerations and trademark protections for owners. In some cases, if litigation is pursued, the *Rogers* test could be an important part of whether the use of this mark by an alleged infringer has constitutional protections.

III. The Use of Professional Sports League Trademarks in Film and Television: A Fair Use?

A prominent example of an entity that resolutely protects its brand is the NFL. As just one illustration of this, during the 2017 Super Bowl, U.S. Immigrations and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and the NFL engaged in "Operation Team Player."²⁷ The ICE newswire stated that "enforcement actions led by Homeland Security Investigations (HSI) resulted in the seizure of over 260,000 counterfeit sports-related items worth an estimated \$20 million, and joint investigative efforts led to 56 arrests with 50 convictions."²⁸ NFL Vice President of Legal Affairs, Delores DiBella, responded to questions about the seizure at a joint press conference by stating that "the NFL is proud to continue its work with ICE, the IPR Center, and law enforcement departments throughout the country to protect fans and consumers who are seeking an authentic NFL experience during the celebration of Super Bowl LI."²⁹

The NFL's brand protection efforts go beyond apparel and merchandise, extending to how the NFL is portrayed in the media. The NFL persuaded ESPN to stop airing *Playmakers*, one of that cable network's most viewed shows. *Playmakers* depicted the lives of the Cougars, a fictional professional football team that was part of a larger organization only referred to as "the League."³⁰ In 2004, *New York Times* reporter Richard Sandomir wrote that then NFL commissioner Paul Tagliabue complained about ESPN's *Playmakers* series to Michael Eisner, chief officer of the Walt Disney Company.³¹ Although the series had both high viewership and strong reviews, *Playmakers* was canceled after just 11 episodes because of pressure from the NFL, which disliked the portrayal of players' lives off the field.³² The NFL made it clear to ESPN that NFL executives and team owners did not want (or appreciate) the negative depiction of players in *Playmakers*. Part of the calculus behind ESPN's decision over whether to challenge the NFL's demand to stop airing *Playmakers* was the fact that the network's most watched show was "Monday Night Football"—and the rights to broadcast those games emanated from the NFL.³³ ESPN's profits, from a pure number standpoint, have declined in the past few years,³⁴ which might have in fact raised the value of the NFL deal (which expires in 2021) and relationship for ESPN.³⁵

HBO, on the other hand, has no such relationship with the NFL. In the episodes of *Ballers*, "NFL players"

are shown going to clubs and struggling with financial problems. The NFL likely would prefer that these sorts of experiences not be aired on a platform as popular as HBO because of the possible negative impact on the NFL brand.³⁶ Additionally, a spokesperson for HBO stated that in the context of the show *Ballers*, “there is no legal requirement to obtain [the NFL’s] consent.”³⁷ What, then, is HBO’s argument to justify its use of the NFL’s logos and trademark without a license? The answer is *fair use*. As set forth earlier, fair use provides an affirmative defense that a defendant can use in a trademark infringement or dilution case. The defense allows the general public to use the protected trademark as long as the primary meaning of the descriptive mark is being used in good faith.³⁸ HBO’s position surely is that it is using the primary meaning of the marks, as *Ballers* depicts the NFL uniforms as they appear, and is acting in good faith and offering realistic portrayals, rather than disparaging or tarnishing the trademark and logos.

Ballers and *Playmakers* both provide examples of where the networks producing the shows did not seek or obtain a license from the NFL before using its logos and trademarks. In the case of *Playmakers*, while the team names were fictional and the overall organization was referred to “the League,” the NFL appears to have viewed it as a thinly veiled version of the actual NFL. In any event, the NFL did not like the way players and the organization were being portrayed and wanted to protect its brand and control the associated rights.

However, in cases where a show or film finds it necessary to use trademarks—and opts to do so without first securing authorization—to tell a story, and the intent of that story is meant to be positive, that could well affect whether the intellectual property rights owner seeks legal action. For example, Sony did not seek permission from the NFL to use its logos or actual footage in the movie *Concussion*.³⁹ That film, which starred Will Smith, concerned a forensic pathologist who fought the NFL’s efforts to suppress his research on chronic traumatic encephalopathy (CTE) brain degeneration suffered by professional football players. If challenged in a legal action, Sony’s argument would almost certainly be that using of the NFL’s trademarks was necessary to tell the story precisely and was protected by the fair use defense.⁴⁰ Additionally, Sony could argue that the movie only used the NFL’s marks to identify the teams for which the main character played, and only used the mark enough for the audience to be able to identify the team or the NFL in the film, thus enhancing authenticity.⁴¹ Lastly, Sony did not make it appear that the NFL endorsed the movie, nor did it “falsely misrepresent” the NFL.⁴² Taken together, these arguments would form a fair use defense for Sony regarding the presence of the NFL’s trademarks in *Concussion*.

An important difference between *Ballers* and *Concussion* is that the intellectual property rights utilized by the latter were meant to have a positive impact by drawing

attention to what many have labeled a serious health and safety issue affecting many professional football players. Additionally, at the time of *Concussion*’s release, the NFL was involved in a class-action lawsuit with former NFL players concerning concussion and head-related injuries. If the NFL chose to sue Sony for trademark and copyright infringement, it might have risked further tarnishing of its brand with the public during a period when the NFL was already experiencing bad publicity from these lawsuits.

The fair use defense may also apply to the unsanctioned use of marks in documentaries. Two relatively recent documentaries relating to the National Hockey League (NHL) are *The Last Gladiators* (2011) and *Ice Guardians* (2016).⁴³ Both focus on the role of “enforcers,” the hockey players whose job it is to fight anyone from an opposing team who tries to hurt one of their teammates. Each documentary uses actual footage from NHL games and portrays NHL logos throughout, and it is not evident that either documentarian had express permission from the NHL to use its logos or footage. In a video interview posted on the NHL’s website, Kelly Chase explains that the creators of *Ice Guardians* were careful in how they portrayed the game and players so as to not antagonize the NHL, strongly suggesting that the people associated with the film did not officially seek the NHL’s permission.⁴⁴ These filmmakers could make a similar argument as that available to Sony for *Concussion*, namely, that they had no obligation to obtain express authorization from the NHL insofar as their use of NHL intellectual property was both necessary to portray the story accurately and not misrepresentative of the NHL. These and like positions would most likely qualify as fair use defenses.

In response to this more aggressive approach of television producers and filmmakers using these materials, many sports leagues have created their own networks and are producing their own movies. If this “trend” continues, leagues such as the NFL and NHL may take more stringent measures to protect their marks and brands and make it more difficult for producers and filmmakers to use their marks.

IV. Life Story Rights: Are They Necessary?

The analysis for the life story rights is a similar one, where the issue of not having express authorization for using those rights can implicate a fair use defense. Before delving into what life story rights are, it is important to note the key issue here is the right to publicity.⁴⁵ What this encompasses is an individual’s right to “control and profit from the commercial exploitation of his or her name and likeness, image, or persona.”⁴⁶ This is not a federal right, and each state has its own view of what constitutes “infringement” and “fair use.”⁴⁷ For example, New York classifies using “the name, portrait or picture of any living person” without the person’s or his/her guardian’s written consent as a misdemeanor⁴⁸ and also provides equitable relief.⁴⁹ A violation of a right to someone’s publicity can also involve ancillary individuals if a depiction of

their names or likenesses was not previously recorded in a public manner and the filmmakers did not obtain permission to depict these characters in the film.⁵⁰

The right to publicity comes into play for clearing life story rights. A life story is simply “the things that have happened to someone in life.”⁵¹ Typically, movie studios and producers purchase life story rights so that they can have the legal right to depict the events that happened in a person’s life.⁵² Without this permission, movie studios and authors can be sued for invading the respective individual’s right to privacy.⁵³ In this context, there is a conflict between freedom of artistic expression (important to the movie studios and producers) versus freedom of privacy (important to the private citizen), and a tension within the First Amendment itself. In times past, the right to privacy prevailed, and clearing life story rights was a requirement.⁵⁴ Traditionally, the major studios always played it safe so that their profits would not decrease by paying for litigation.⁵⁵ The difficulty for indie artists—who are not as well-funded as their major studio counterparts—is that obtaining a life story license can be expensive, particularly depending on whose “life” is being purchased.⁵⁶ Furthermore, these agreements are not really about acquiring an underlying right, because the facts of the person’s life are in the public domain, but rather serve to waive certain personal rights.⁵⁷ For these reasons, it is sometimes easier to proceed without obtaining a life story rights agreement.⁵⁸

1. Case Study: Equinox Films and Winnie Mandela

In 2011, Equinox Films made a movie about Winnie Mandela, the wife of Nelson Mandela, starring Jennifer Hudson and Terrence Howard. Equinox Films based the film on the biography, *Winne Mandela: A Life*, by Anne Marie du Preez Bezrob, and obtained the rights to the book. The filmmakers did not, however, obtain Ms. Mandela’s life story rights.⁵⁹ Ms. Mandela openly criticized the movie and filmmakers for not obtaining her permission and “delving only superficially into her life story.”⁶⁰ She stated, “I was not consulted. I am still alive, and I think that it is a total disrespect to come South Africa, make a movie about my struggle, and call that movie some translation of a romantic life of Winnie Mandela.”⁶¹ While there was no litigation, Equinox Films arguably would not have needed to obtain the life story rights because Winne Mandela, as both Nelson Mandela’s wife and a powerful individual in her own right, lived in the public arena. Furthermore, as the filmmakers based the film upon book rights they already had, and unless the film was based on works outside the book or a mischaracterization of Ms. Mandela’s life, Equinox Films would likely have a defense of fair use for the film.

2. Case Study: *Narcos* and Roberto Escobar

As noted above, ancillary characters or subsequent owners of life story rights may also invoke issues with

clearing life story rights. Netflix is currently airing *Narcos*, a series that IMDb describes as “[a] chronicled look at the criminal exploits of Colombian drug lord Pablo Escobar, as well as the many other drug dealers who plagued the country through the years.”⁶² On July 1, 2016, Roberto Escobar, Pablo Escobar’s brother, sent a letter to Netflix requesting a review of the second season of *Narcos*, because he purported that there were “mistakes, lies and inaccuracies from the real story.”⁶³ This letter raised two important issues with respect to life story rights, namely that Roberto Escobar not only had ownership of the successor-in-rights for his brother⁶⁴ and his family name, but he was also a part of the story.⁶⁵ Based on these ownership rights, Roberto Escobar sought \$1 billion for the use of his brother’s name and likeness on the show. Mr. Escobar argued that as one of the few survivors of the Medellín cartel and his brother’s “closest ally,” “nobody else in the world is alive to determine the validity of the materials, but me” regarding the allegations of the mistakes, lies, and discrepancies in season 1 of *Narcos*.⁶⁶ This is an example of a situation where a subsequent owner could try to influence the clearing of life story rights and potentially affect the airing of a show by raising issues of accuracy and the like.

Additionally, Roberto Escobar was both his brother’s accountant in the Medellín cartel and the head of his hitmen; he wrote a book about Pablo Escobar’s drug empire in 2009, entitled *The Accountant’s Story: Inside the Violent World of the Medellín Cartel*.⁶⁷ Yet Roberto Escobar is neither directly depicted in the show—it portrays an accountant who is fired and claims to have been a CIA informant—nor ever appears in the show.⁶⁸ Had Roberto Escobar been portrayed in the series or the details regarding his “portrayed character” were based upon his book, then this would potentially raise issues as to whether Netflix would need to obtain the life story rights or the rights to Roberto’s Escobar’s book before using his name, likeness, and stories on *Narcos*.

3. Case Study: Chuck Wepner and *Rocky*

Even where years have passed since the alleged unsanctioned use of life story rights, the subject of another’s creative efforts may still be able to interpose a cause of action for violating one’s right to publicity. This is precisely what Charles “Chuck” Wepner did. Known as the “Bayonne Bleeder,”⁶⁹ Mr. Wepner was the heavyweight boxer who purportedly served as the inspiration for the iconic Rocky Balboa movie character.

Chuck Wepner fought some of boxing’s biggest heavyweight names during his career, including Sonny Liston and George Foreman.⁷⁰ The Bleeder’s most noteworthy fight was his 1975 title shot against Muhammad Ali, which a young Sylvester Stallone admittedly watched on television.⁷¹ Don King, the fight promoter, had offered Mr. Wepner \$100,000 to challenge Muhammad Ali for the heavyweight title; Wepner noted that “Ali said he need an easy fight after [George] Foreman...and figured he would

cut me up[.]...But I had a shot to win a title against the most famous man in the world."⁷²

The fight was neither quick nor easy for Ali, shocking him and the sporting world. In the ninth round, Wepner unexpectedly knocked "The Champ" down⁷³ and, despite retaliatory pummeling from a roused Ali, made it to the fifteenth and final round before losing by a technical knockout with 19 seconds left.⁷⁴

Rocky debuted the next year. Sylvester Stallone wrote, directed, and starred in the film, which spawned a seven-movie franchise⁷⁵ and achieved celluloid immortality by winning three Oscars, including Best Picture (it was also the highest grossing film of 1976).⁷⁶ After the movie's release, word seeped out that Mr. Wepner had supposedly been the inspiration for Rocky Balboa. In fact, Wepner himself admitted lying to others that he had been paid for life rights because he "was upset about [not being compensated] and had a lot of pride."⁷⁷ While Mr. Stallone offered Mr. Wepner a role in the sequel, Wepner admits that he was having personal issues, including heavy partying and drug issues, that precluded his involvement.⁷⁸

After apparently ruminating for many years, in 2003 Mr. Wepner sued Mr. Stallone, alleging a continuous and ongoing violation of the former's rights of publicity—or life story rights.⁷⁹ The Complaint contended that Mr. Stallone had called Mr. Wepner several months after the Ali fight to inform him of a script that Mr. Stallone had written three days after being "inspired" by that fight.⁸⁰ The Complaint further alleged that Mr. Stallone had used Mr. Wepner's name to promote the *Rocky* movies and associated products.⁸¹ Though Mr. Wepner sought \$45 million in damages, the suit settled in 2006 for an undisclosed sum.⁸²

The time gap between the initial act that purportedly formed the basis for the injury and the eventual suit was abnormally long here, occasioned in part by the decades-long success of the *Rocky* franchise. That notwithstanding, Mr. Wepner's story provides yet another example of how troublesome the failure to clear life story rights can be to the entertainment vehicle's maker.

V. Conclusion

Studios are increasingly relying on the fair use doctrine in connection with use of content in film to portray a story accurately, and are less inclined to seek licenses or consent to use trademarks in films, television series, or documentaries. This trend may force owners of intellectual property to be more creative in protecting their respective rights and brands. One solution may be for an affected entity, such as the NFL, to reach out and work directly with filmmakers to control the process of how its brand is used or depicted. This approach may also be applicable in the life story rights context, as having a source that can aid in correctly portraying a character will almost certainly provide a more powerful and "endorsed" mes-

sage from the person upon whom the character is based or the successive owner of the life story rights.

It is also important to note what effect publicity could have on the film. If the production is portraying a message that is positive to a significant part of the viewing audience, arguably what the movie *Concussion* sought by highlighting a health and safety issue for professional football players, then the trademark owner may be reluctant to assert its rights and potentially draw more attention to the artistic vehicle. Yet in a different context, not having appropriate clearance can result in negative publicity. For example, Winnie Mandela's public criticisms about the film and its makers for not obtaining her permission and for "delving only superficially into her life story"⁸³ were less than optimal from the filmmaker's perspective and may well have kept away patrons who might have purchased tickets at the box office but for her recriminations.

Although HBO is not the subject of a lawsuit from the NFL for not securing authorization for *Ballers*, its failure to obtain consent and licensing from the NFL carries some level of risk—which still exists as of the publication of this article. Even though obtaining express authorization to use trademarks, logos, and life story rights is not always necessary, it is likely a more pragmatic approach that may shield content creators from future complication and expense, allowing them to focus on what drove them in the first place—their creative endeavors.

Endnotes

1. Dwayne Johnson's rise to fame began in the professional wrestling world, where he was known as "The Rock." He leveraged that to work in big-budget films, including *The Scorpion King*, *Hercules*, and *The Fast and the Furious* franchise. Johnson played football at the University of Miami until a back injury cost him a spot playing professionally in the NFL. Dwayne Johnson, <http://www.biography.com/people/dwayne-johnson-11818916> (last visited on Apr. 28, 2017).
2. Mike Florio, *New HBO series uses NFL team names, logos without NFL consent*, NBC SPORTS: PRO FOOTBALL TALK (June 7, 2015, 9:51 PM), available at <http://profootballtalk.nbcsports.com/2015/06/07/new-hbo-series-uses-nfl-team-names-logos-without-nfl-consent/>.
3. Jason Guerrasio, *Here's why The Rock's new HBO show, 'Ballers,' can legally use NFL logos without the league's consent*, BUSINESS INSIDER (June 19, 2015, 11:44 AM), available at <http://www.businessinsider.com/why-the-rocks-ballers-can-use-nfl-logos-without-consent-2015-6>.
4. *Id.*
5. *Id.*
6. Aaron Gordon, *PLAYMAKERS, THE SHOW THE NFL KILLED FOR BEING TOO REAL*, VICE SPORTS (April 22, 2015), available at https://sports.vice.com/en_us/article/playmakers-the-show-the-nfl-killed-for-being-too-real.
7. *Id.*
8. Oliver Herzfeld and Tal Benschar, *HBO's Ballers: Touchdown or Legal Fumble?*, FORBES (June 17, 2015, 9:56 AM), available at <https://www.forbes.com/sites/oliverherzfeld/2015/06/17/hbos-ballers-touchdown-or-legal-fumble/#1b9e4ca45340>.

9. The Lanham Act, also known as the Trademark Act of 1946, is the federal statute governing trademarks, service marks, and unfair competition. Congress passed it on July 5, 1946, and President Harry Truman signed it into law.
10. 15 U.S.C. § 1115(b)(4) (2012).
11. *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (internal quotations and citation omitted).
12. *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983), *overruled in part by KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004).
13. *Id.*
14. *New Kids on the Block*, 971 F.2d at 306.
15. J. David Mayberry, *Trademark Nominative Fair Use: Toward a Uniform Standard*, 102 THE TRADEMARK REP. 820, 820 (May-Jun. 2012).
16. Tamera H. Bennett, *Is That Fair (Use)? Third Party Trademarks in Film, Print, Video Games and other Media*, CREATE PROJECT BLOG (Jan. 12, 2015), available at <http://www.tbennettlaw.com/createprotect/2015/1/5/is-that-fair-use-third-party-trademarks-in-film-print-video-games-and-other-media> (citing E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 444 F. Supp.2d 1012, 1029 (C.D. Cal. 2006)).
17. 543 U.S. 111 (2004).
18. Mayberry, *supra* note 15, at 820-21.
19. Bennett, *supra* note 16.
20. David M. Kelly and Lynn M. Jordan, *Twenty Years of Rogers v. Grimaldi: Balancing the Lanham Act with the First Amendments Rights of Creators of Artistic Works*, 99 THE TRADEMARK REP. 1360, 1360 (Nov.-Dec. 2009).
21. *Id.* at 1360-61.
22. *Id.* at 1361; *see also* Bennett, *supra* note 16.
23. *See, e.g.*, Kelly and Jordan, *supra* note 20, at 1361.
24. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).
25. Screen legend Ginger Rogers sued Alberto Grimaldi and MGM for producing and distributing Federico Fellini's film *Ginger and Fred*, which was about two Italian cabaret performers whose dance routine was modeled on the work of Fred Astaire and Ginger Rogers. Ms. Rogers alleged that the film infringed her Lanham Act rights, right of publicity, and was a "false light" defamation. *See generally Rogers*, 875 F.2d 994.
26. Bennett, *supra* note 16.
27. U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT, 'OPERATION TEAM PLAYER' NETS \$20 MILLION IN FAKE SPORTS MERCHANDISE, (Feb. 2, 2017), available at <https://www.ice.gov/news/releases/operation-team-player-nets-20-million-fake-sports-merchandise#wcm-survey-target-id>.
28. *Id.*
29. *Id.*
30. Richard Sandomir, *PRO FOOTBALL; Citing N.F.L., ESPN Cancels 'Playmakers'*, N.Y. TIMES, (Feb. 5, 2004), available at http://www.nytimes.com/2004/02/05/sports/pro-football-citing-nfl-espn-cancels-playmakers.html?_r=0.
31. *Id.* Mr. Sandomir also reported: "Jeffrey Lurie, the owner of the Philadelphia Eagles, told The Philadelphia Inquirer last year, 'How would they like it if Minnie Mouse were portrayed as Pablo Escobar and the Magic Kingdom as a drug cartel?'" *Id.*
32. *Id.*
33. Gordon, *supra* note 6.
34. *See* Christopher Palmeri, *Disney Sales Fall as ESPN Troubles Drag Down Cable TV Profit*, BLOOMBERG, (Feb. 7, 2017, 4:36 PM), available at <https://www.bloomberg.com/news/articles/2017-02-07/disney-sales-fall-as-espn-drags-down-cable-tv-profit> ("A decline in profit at ESPN, which had fewer college bowl games and lower viewership, dragged down results in cable TV—which is by far Disney's largest business. With the highest subscriber rates in pay TV, Disney's sports network is especially at risk of losing revenue as cable audiences cancel subscriptions for online services or sign up for so-called skinny bundles that don't play up sports programming.").
35. Sandomir, *supra* note 30.
36. Mark Wahlberg, a well-known actor (e.g., *Lone Survivor*, *Boogie Nights*, *The Fighter*), is also an executive producer for *Ballers*. Wahlberg stated on a sports radio show that he had received complaints about the HBO series in calls from NFL Commissioner Roger Goodell and team owners. NFL Senior Vice President of Communications Natalie Ravitz has denied those allegations on Twitter. Interestingly, many NFL players have appeared on the show in celebrity cameos. Aurelie Corinthios, *Mark Wahlberg Claims the NFL and Various Team Owners Have Complained About HBO's Ballers*, PEOPLE—TV WATCH (Jul. 18, 2016, 1:05 PM), available at <http://people.com/tv/mark-wahlberg-claims-nfl-complained-about-hbos-ballers/>.
37. Herzfeld and Benschar, *supra* note 8.
38. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004). (The Supreme Court also noted that the risk of consumer confusion does not prevent the fair use defense from being used, as there will always be some degree of confusion. What is relevant is the extent of consumer confusion in assessing whether a defendant's use of the trademark is objectively fair.).
39. Will Brinson, *Sony didn't bother asking NFL for rights to use footage in 'Concussion'*, CBS SPORTS (Dec. 23, 2015), available at <http://www.cbssports.com/nfl/news/sony-didnt-bother-asking-nfl-for-rights-to-use-footage-in-concussion/>; *see also* Travis Stegemoller, *No I.P. Challenge Flag for "Concussion" Movie*, THE GUTWEIN BLOG, [HTTP://INFO.GUTWEINLAW.COM/BLOG/IP-AND-CONCUSSION-MOVIE](http://info.gutweinlaw.com/blog/ip-and-concussion-movie) (noting that Sony President, Tom Rothman, confirmed in a series of interviews on sports talk radio that Sony did not have express authorization from the NFL to use its marks).
40. Stegemoller, *supra* note 39.
41. *Id.*
42. *Id.*
43. Farran Smith Nehme, *'The Last Gladiators' review*, NEW YORK POST (Feb. 1, 2013, 5:00 AM), available at <http://nypost.com/2013/02/01/the-last-gladiators-review/>; Kevin Crust, *Documentary 'Ice Guardians' makes the case for hockey's enforcers*, LOS ANGELES TIMES (Nov. 10, 2016, 5:00 AM), available at <http://www.latimes.com/entertainment/movies/la-et-mn-ice-guardians-review-20161107-story.html>.
44. NATIONAL HOCKEY LEAGUE (NFL), *Chase on Ice Guardians* (Oct. 31, 2016), available at <https://www.nhl.com/video/chase-on-ice-guardians/t-277350912/c-45866403>.
45. Diane Krausz, *Whose Life Is It Anyway? Clearance of Life Story Rights in Film*, NYSBA: THE ENTERTAINMENT, ARTS AND SPORTS LAW BLOG (Sept. 8, 2012, 3:32 PM), available at http://nysbar.com/blogs/EASL/2010/09/whose_life_is_it_anyway_cleara.html.
46. *Id.*
47. *Id.*
48. N.Y. CIV. RIGHTS LAW § 50 (LexisNexis 2017).
49. N.Y. CIV. RIGHTS LAW § 51 (LexisNexis 2017).
50. Krausz, *supra* note 45.
51. *Life Story*, MERRIAM-WEBSTER (online), available at <https://www.merriam-webster.com/dictionary/life%20story>.
52. Lisa Califf, *To Acquire or Not to Acquire Life Rights for a Movie*, LAW360 (Jun. 22, 2015, 10:28 AM), available at <https://www.law360.com/articles/665781/to-acquire-or-not-to-acquire-life-rights-for-a-movie>.
53. Krausz, *supra* note 45.

54. Califf, *supra* note 52.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. David Smith, *Winnie Madikizela-Mandela 'insulted' by movie about her life*, THE GUARDIAN (Jun. 14, 2011, 4:05 PM), available at <https://www.theguardian.com/world/2011/jun/14/winnie-movie-insult-madikizela-mandela/>. The producers of the film noted that Ms. Madikizela-Mandela's lawyers had written to them threatening legal action to stop the production, but the producers insisted they would continue with the film. *Id.* In contrast, Ms. Madikizela-Mandela did give "her blessing" to an opera based on her life, *Winnie the Opera*, in Pretoria. *Id.*
62. IMDB, *Narcos* (TV Series 2015), available at http://www.imdb.com/title/tt2707408/?ref=fn_al_tt_1 (last visited Apr. 28, 2017).
63. Tufayel Ahmed, 'Narcos': Pablo Escobar's Brother Wants \$1 Billion From Netflix, Slams Actor Wagner Moura, NEWSWEEK (Jul. 7, 2016, 11:52 AM), available at <http://www.newsweek.com/narcos-pablo-escobars-brother-wants-1-billion-netflix-slams-actor-wagner-moura-478451>.
64. In 2015, Mr. Escobar registered for successor-in-rights for his brother and his family name in California, prior to the release of the first season of *Narcos*.
65. Ahmed, *supra* note 63.
66. *Id.*; see also Jamil Mustafa, *Pablo Escobar's son criticizes Netflix series Narcos for 'insulting the history of a whole nation'*, THE TELEGRAPH (Sept. 9, 2016, 5:25 PM), available at <http://www.telegraph.co.uk/news/2016/09/09/pablo-escobar-son-criticises-netflix-series-narcos-for-insultin/> (Sebastián Marroquín, Pablo Escobar's son, posted on Facebook 28 points identifying what he alleged as "outright lies" regarding his father. The makers of the show said that while the series is based on Colombia's drug wars, some of the events and characters in the series have been fictionalized for dramatic purposes. This is a second example of where another member of the Escobar family took issue with the characterization of Pablo Escobar in *Narcos*).
67. Ahmed, *supra* note 63.
68. *Id.*
69. Mr. Wepner earned this moniker after his blood splattered on a reporter sitting ringside during a fight. Michael Kaplan, *He went toe-to-toe with Muhammad Ali—and inspired 'Rocky,'* NY POST (Apr. 29, 2017, 4:00 PM), available at <http://nypost.com/2017/04/29/he-went-toe-to-toe-with-muhammad-ali-and-inspired-rocky/>.
70. *Id.*
71. *Id.*
72. *Id.*
73. In his storied career, Muhammad Ali had 61 professional fights and 56 wins, but was knocked down only four times. The first three—by Sonny Banks, Henry Cooper, and Joe Frazier—were when Ali was a contender. However, the only man to put Ali on the canvas when he held the title was Chuck Wepner.
74. *Id.* Ali himself later said, "There's not another human being that can go 15 rounds like that." *Id.* Complaint, *Wepner v. Stallone* (N.J. Super. Ct. Civ. Div. Nov. 11, 2003), available at <https://www.mandilaw.com/files/complaint.pdf>. The Complaint states that leading up to the fight "sportswriters and odds-makers . . . all predicted that Ali would win decisively. In fact, some odds-makers named Ali as a 30-1 favorite to win the bout in less than three rounds." *Id.* at ¶ 11.
75. The last film in the series (thus far) was 2015's *Creed*, starring Stallone and Michael B. Jordan as Apollo Creed's son. *Creed* is the only other *Rocky* film to earn an Oscar nomination, that time for Sylvester Stallone as Best Supporting Actor (he did not win). See IMDB, *Creed* (2015), available at <http://www.imdb.com/title/tt3076658/>.
76. Kaplan, *supra* note 69.
77. *Id.*
78. *Id.*
79. See Complaint, *supra* note 74. The Complaint also included causes of action for unjust enrichment and detrimental reliance. The case was originally filed in state court and removed to the U.S. District Court for the District of New Jersey for the remainder of the proceedings. The federal court docket number was No. 2:03-cv-06166.
80. *Id.* at ¶ 16.
81. *Id.* at ¶¶ 1-4.
82. Kaplan, *supra* note 69.
83. Califf, *supra* note 52.

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The authors would like to thank Philip George, a law clerk at Haug Partners LLP, for his assistance in the preparation of this article.

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