Rethinking Use of Trademarks in Art

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The creative industries have long assumed that most uses of trademark in visual and performing arts receive First Amendment protection under the *Rogers* test. Trademarks are often licensed as a matter of risk aversion and clearance. Other uses of trademarks in creative works presented opportunities for paid product and brand placements. Nonetheless, the common understanding was that trademark clearance was done in an abundance of caution, similar to life story rights, rather than being strictly required. At the same time, entertainment companies increasingly began filing for trademark registration for various creative elements within their creative products. By holding that the *Rogers* test does not apply when the challenged use is source identifying, the Supreme Court's recent holding in *Jack Daniels* upended the way that the use of trademarks in creative works has long been assumed to be protected by the First Amendment via the *Rogers* test. First of all, it is unclear what it means for something to be source identifying when used in a traditional creative work, rather than a product like was the case in *Jack Daniels*. Furthermore, a number of the justices suggested skepticism of the *Rogers* case altogether. This project seeks to reconsider the *Rogers* doctrine when using trademarks in creative works. It explores what it might mean for a trademark in creative works to be source identifying, and explores alternatives to the *Rogers* test that might better weigh and balance the relevant trademark and free speech considerations at issue.