

**“Insert Court Approved Title Here”:
*Rosa Parks v. LaFace Records***

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*Ah ha, hush that fuss
Everybody move to the back of the bus
Do you wanna bump slump with us
We the type of people make the club get crunk*²

In September 1998, the Atlanta-based musical group OutKast³ released a song titled *Rosa Parks* which contained the above lyrics in the chorus. In *Parks v. LaFace Records*, the Court of Appeals for the Sixth Circuit recently found itself in the precarious position of deciphering those cryptic lyrics.⁴ To accomplish this task the court actually relied on a translation of the lyrics “derived from various electronic ‘dictionaries’ of the ‘rap’ vernacular.”⁵ The chorus was translated to mean:

*Be quiet and stop the commotion. OutKast is back out [with new music] so all other MCs [mic checkers, rappers, Master of Ceremonies] step aside. Do you want to ride and hang out with us? OutKast is the type of group to make the clubs get hyped-up/excited.*⁶

At stake in the case was Rosa Parks’ right to protect her celebrated name and OutKast’s right to use her name as the title to its song;⁷ but in a larger sense, the expressive rights of all artists

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² OutKast, *Rosa Parks*, on AQUEMINI (LaFace Records 1998).

³ OutKast is a rap group comprised of recording artists Andre “Dre” Benjamin and Antwan “Big Boi” Patton.

⁴ See *Parks v. LaFace Records*, 329 F.3d 437, 442–43 (6th Cir. 2003), *reh’g, en banc, denied*, 2003 U.S. App. LEXIS 14050 (6th Cir July 2, 2003), *cert. denied*, 124 S. Ct. 924 (2003).

⁵ *Id.* at 452.

⁶ *Id.* (alterations in original).

⁷ *Parks v. LaFace Records*, 76 F. Supp. 2d 775, 777–78 (E.D. Mich. 1999).

were at stake. The First Amendment of the United States Constitution⁸ protects this artistic expression, and the judicial system should act to enforce this right of artistic freedom.⁹ However, the outcome of this case and other recent legislation show that the judicial system is not only failing to enforce this right, but is stifling artistic expression.

I. Background

Rosa Parks is the well-known historical figure who gained distinction during the civil rights movement of the 1950s and 1960s.¹⁰ Parks' refusal to give her seat on a bus to a white passenger ultimately sparked organized boycotts, sit-ins, and demonstrations and led to court rulings desegregating public transportation nationwide.¹¹ The "hook" or chorus of OutKast's song titled *Rosa Parks* contains the lyrics "[e]verybody move to the back of the bus."¹² The song is about the entertainment industry and its lyrics do not refer to the plaintiff by name.¹³ Parks originally brought suit against LaFace Records¹⁴ and OutKast in Michigan on numerous grounds.¹⁵ Among other things, the plaintiff claimed that the use of her name constitutes false advertising under § 43(a) of the Lanham Act¹⁶ and that the title intrudes on her common law right of publicity under Michigan state law. The district court granted summary judgment for the defendants, LaFace Records and OutKast,¹⁷ and Parks appealed to

⁸ U.S. CONST. amend. I.

⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁰ *See, e.g., Parks*, 329 F.3d at 442.

¹¹ *Id.*

¹² OutKast, *Rosa Parks*, on *AQUEMINI* (LaFace Records 1998) ("Ah ha, hush that fuss/Everybody move to the back of the bus/Do you wanna bump and slump with us/We the type of people make the club get crunk").

¹³ *Parks*, 329 F.3d at 452.

¹⁴ LaFace Records produced *AQUEMINI*.

¹⁵ *Parks v. LaFace Records*, 76 F. Supp. 2d 775 (E.D. Mich. 1999). Parks brought the action in Michigan state court, and the defendants subsequently removed to the United States District Court for the Eastern District of Michigan.

¹⁶ Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2003).

¹⁷ *Parks*, 76 F. Supp. 2d at 788.

the United States Court of Appeals for the Sixth Circuit.¹⁸ On May 12, 2003, the court of appeals reversed the Michigan decision and remanded for further proceedings.¹⁹ By reversing the summary judgment for the defendants, the court of appeals displayed the legal system's propensity to wrongfully intervene with creative expression. This intervention offended artists' First Amendment rights²⁰ and diminished the public domain at the expense of artistic freedom.

This Recent Development first examines the plaintiff's two causes of action—the violation of § 43(a) of the Lanham Act and the violation of her right of publicity—and discusses the court of appeals' analysis of these claims. Next, this Recent Development scrutinizes three areas in which the judicial system is treading on the right of artistic expression: the broadening of § 43(a) of the Lanham Act, the expansion of a celebrity's right of publicity, and the diminution of the public domain. Finally, this Recent Development provides the judicial system with feasible alternatives that serve to reinforce the rights of artists while still acknowledging certain rights of celebrities in their personas.

II. Parks' Causes of Action

A. Lanham Act Violation

Plaintiffs often invoke § 43(a) of the Lanham Act to protect their rights in trademarks of a brand name for goods or services.²¹

¹⁸ *Parks*, 329 F.3d at 437.

¹⁹ *Id.* at 463. The defendants appealed to the United States Supreme Court, however, the Court denied certiorari on December 8, 2003. *LaFace Records v. Parks*, 124 S. Ct. 925 (2003).

²⁰ *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (paintings, music, and poetry are "unquestionably shielded" by the First Amendment); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

²¹ *See, e.g., A. & H. Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 206 (3d Cir. 2000) (involving the manufacturer of "Miraclesuit Swimwear" bringing an action against manufacturer of "Miracle Bra" swimwear); *Platinum*

Section 43(a) also permits celebrities to protect their property rights in their identities against misleading commercial use by others.²² As seen in *Parks*,²³ the Lanham Act extends to protect a celebrity's economic interest in her identity, since that identity has commercial value similar to that of a traditional trademark.²⁴ For example, Vanna White sued Samsung Electronics under § 43(a) of the Lanham Act.²⁵ The violation was based on an advertisement for videocassette recorders in which Samsung "attempted to capitalize on White's fame to enhance their fortune."²⁶ The advertisement depicted a robot standing in front of a game board "dressed in a wig, gown, and jewelry . . . selected to resemble White's hair and dress."²⁷ The court stated that "a jury could reasonably conclude that beneath the surface humor . . . lay an intent to persuade consumers that celebrity Vanna White . . . was endorsing Samsung products."²⁸

In this case, *Parks* argued that in using her name for its song title, OutKast falsely advertised in violation of § 43(a) of the Lanham Act.²⁹ *Parks* contended that the title "misleads consumers into believing that the song is about her or that she is affiliated with the Defendants, or has sponsored or approved the *Rosa Parks* song and the *Aquemini* album."³⁰

OutKast responded to the allegation with two defenses. First, they contended that they had not made a "trademark use" of Rosa Parks' name, arguing that such a use was required to make

Home Mortgage Corp. v. Platinum Fin. Group, Inc., 149 F.3d 722, 725 (7th Cir. 1998) (regarding two mortgage services using the "Platinum" mark).

²² See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1107 (9th Cir. 1992) (involving the unauthorized use of a celebrity's distinctive voice in a snack manufacturer's commercial).

²³ *Parks*, 329 F.3d at 445.

²⁴ See *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996); *Waits*, 978 F.2d at 1106; *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 625 (S.D.N.Y. 1985).

²⁵ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1401.

²⁹ *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003).

³⁰ *Id.* at 446.

out a claim under the Lanham Act.³¹ Second, OutKast contended that even if the use of Parks' name in the title did create some consumer confusion, their First Amendment right to free speech outweighed the risk.³² The Sixth Circuit Court of Appeals rejected both defenses.

First, the court stated that "[i]t is not necessary for [the defendants] to make a 'trademark' use of Rosa Parks' name in order for her to have a cause of action for false advertising under § 43(a) of the Lanham Act."³³ The court further found that although Parks' name might not be eligible for registration as a trademark, a viable cause of action exists under § 43(a) if consumers could be falsely led to believe Parks sponsored, approved, or was affiliated with the song.³⁴

Next, the Sixth Circuit used the two-pronged *Rogers v. Grimaldi*³⁵ test to reject OutKast's First Amendment defense. The court found it to be the "most appropriate" test to balance the public interest in avoiding consumer confusion with the public interest in free expression.³⁶ The first prong determines whether the title of the piece has any "artistic relevance" to the underlying work.³⁷ The court held that "the mere fact that the phrase 'move to the back of the bus' is an apt description of OutKast's attitude toward entertainers they regard as lesser human beings is not, in our view, a justification, as a matter of law, for appropriating the name of Rosa Parks."³⁸

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.* at 447.

³⁵ 875 F.2d 994 (2d Cir. 1989) (affirming summary judgment against dancer and film star Ginger Rogers, who sued the maker of a fictional movie titled *Ginger and Fred*). The movie portrayed two fictional cabaret dancers who became known to their fans as Fred and Ginger since they impersonated Fred Astaire and Ginger Rogers in their acts. Rogers' complaint alleged a violation of the Lanham Act and also alleged that the title infringed on her right of publicity.

³⁶ *Parks*, 329 F.3d at 450.

³⁷ *Rogers*, 875 F.2d at 999.

³⁸ *Parks*, 329 F.3d at 456. The court relied in part on a "translation" of the song's chorus submitted by the plaintiff-appellant which had been derived from several electronic dictionaries of rap vernacular. The refrain was interpreted to mean: "Be quiet and stop the commotion. OutKast is coming back out [with

The second prong of the test requires that the “title explicitly mislead as to the source or the content of the work” in order for there to be a violation of the Lanham Act.³⁹ Although the first prong of the test was not met, the court did admit in OutKast’s favor that the title “makes no explicit statement that the work is about that person in any direct sense.”⁴⁰

B. Right of Publicity Violation

The right of publicity is a common law right governed by state law.⁴¹ This cause of action differs from that of false advertising under the Lanham Act because the right of publicity claim does not require any evidence that a consumer is likely to be confused.⁴² This right is based on the theory that a “celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”⁴³ The Sixth Circuit has held that “[t]he famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality.”⁴⁴ However, expressive works are protected by the First Amendment, and celebrities are not authorized to restrict the use of their names in such works.⁴⁵ The

new music] so all other MCs [mic checkers, rappers, Master of Ceremonies] step aside. Do you want to ride and hang out with us? OutKast is the type of group to make the clubs get hyped-up/excited.” *Id.* at 452 (alterations in original).

³⁹ *Rogers*, 875 F.2d at 999.

⁴⁰ *Parks*, 329 F.3d at 459.

⁴¹ *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622 (6th Cir. 2000) (affirming summary judgment against an actor who sued a toy company for creating an action figure named after one of his movie characters).

⁴² *See Herman Miller, Inc. v. Crowley, Milner & Co.*, 270 F.3d 298, 319–20 (6th Cir. 2001) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995)).

⁴³ *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

⁴⁴ *Memphis Dev. Found. v. Factors Etc., Inc.* 616 F.2d 956, 957 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

⁴⁵ *See J. THOMAS MCCARTHY*, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28.05 (4th ed. 1999); *see also Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461–62 (Cal. 1979) (holding that no right of publicity

Supreme Court has held that entertainment works, such as songs, enjoy the same constitutional protection as news reports and parodies.⁴⁶

OutKast contended that its use of Rosa Parks' name was not solely for commercial reasons; rather, the use of her name in the title was artistic, and the First Amendment served as a complete defense.⁴⁷ Similar to the disposition of the Lanham Act violation, the court again relied on *Rogers* for guidance to resolve this issue. In *Rogers*, the Second Circuit held that a movie title is protected unless the title is "wholly unrelated" to the content of the work or was "simply a disguised commercial advertisement for the sale of goods or services."⁴⁸ Ultimately, the court of appeals held that Parks' right of publicity claim presented an issue of material fact as to whether the title is or is not "wholly unrelated" to the content of the song and therefore reversed the summary judgment for the defendants.⁴⁹ The court stated that "a reasonable finder of fact . . . could find the title to be a 'disguised commercial advertisement' or adopted 'solely to attract attention' to the work."⁵⁰

III. Discussion

By reversing summary judgment for the defendants, the court of appeals wrongfully tampered with creative expression. Furthermore, by restricting artistic freedom, the judicial system essentially diminishes the public domain. There are three main areas in which recent judicial intervention has negatively affected artistic expression: (1) broadening of the Lanham Act, (2) expansion of the common law right of publicity, and (3) diminution of the public domain from which artists draw for

claim exists when a celebrity's name is used in advertisements for a work protected by the First Amendment).

⁴⁶ See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right.").

⁴⁷ *Parks v. LaFace Records*, 329 F.3d 437, 460 (6th Cir. 2003).

⁴⁸ *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

⁴⁹ *Parks*, 329 F.3d at 461.

⁵⁰ *Id.* (citing *Rogers*, 875 F.2d at 1004–05).

creative expression.

A. Broadening § 43(a) of the Lanham Act

Section 43(a) of the Lanham Act states:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.⁵¹

Parks can be distinguished from most false advertising suits based on § 43(a) since the “product” being advertised in this case is a song, which as an artistic work is inherently different from a purely commercial product.⁵² The main difference between the songs and other commercially advertised products is that songs are used as a means of expression for the artists. Not only are the lyrics expressive in nature, but the title of the song is another form of expression in which the artist attempts to define or label the work, sometimes metaphorically.⁵³ Alternately, a product’s name or trademark is usually chosen solely for commercial, as opposed

⁵¹ 15 U.S.C. § 1125(a)(1) (Supp. 2001).

⁵² See *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430 (S.D.N.Y. 1978) (“[M]ore so than posters, bubble gum cards, or some other such ‘merchandise’, books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections not generally accorded ‘merchandise.’”).

⁵³ *Parks*, 329 F.3d at 452 (highlighting that OutKast describes the use of Rosa Parks’ name for the title of the song as “metaphorical” or “symbolic”).

to artistic, reasons. Attaching a celebrity's name to a product without proper authorization is different than attaching a celebrity's name to a song without authorization. Namely, the underlying work of the latter is artistic in nature.

The court of appeals in *Parks* did acknowledge that free expression should be protected.⁵⁴ It stated that the *Rogers* test "balance[s] the public interest in avoiding consumer confusion with the public interest in free expression."⁵⁵ Although the court alluded to the interests of the artists, the test itself limits artistic expression in requiring the trier of fact to determine the "artistic relevance" of the title to the underlying work.⁵⁶ Thus, the test limits the First Amendment protection of expression in order to reduce consumer confusion of celebrity endorsement. However, consumer confusion is not likely with a song title since consumers are aware that titles serve an expressive function.

The court of appeals states that "[t]he purchaser of a song titled *Rosa Parks* has a right not to be misled regarding the content of that song," similar to a consumer's right not to be misled about the contents of a "can of peas."⁵⁷ The court failed to recognize that songs and canned goods should not be treated the same since a consumer's expectation when buying a song is different from the expectation when buying a can of peas. When buying a song, the consumer expects and appreciates creative expression by the artists, in fact "[t]he subtleties of a title can enrich a reader's or a viewer's understanding of a work."⁵⁸ However, when buying a can of peas the consumer expects the supplier to use an accurate description of its contents and does not expect creative liberty. Although a celebrity's name in a song title is not misleading, the courts have expanded the purview of false advertising claims to include using a celebrity's name in the title of an artistic work.

Furthermore, having the trier of fact determine the "artistic relevancy" of the title as required by the *Rogers* test is an inherently flawed process; the test is highly subjective and the

⁵⁴ *Id.* at 450.

⁵⁵ *Id.*

⁵⁶ *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

⁵⁷ *Parks*, 329 F.3d at 453.

⁵⁸ *Rogers*, 875 F.2d at 998.

artist of the work is not involved in determining relevancy. Although the district court found the artistic relationship between the title *Rosa Parks* and the content of the song “so obvious that the matter is not open to reasonable debate,”⁵⁹ the court of appeals chose not to follow the lower court’s reasoning.⁶⁰ To the contrary, the court of appeals held that “reasonable persons could conclude that there is no relationship of any kind between Rosa Parks’ name and the content of the song.”⁶¹

The obvious difficulty in applying this problematic standard is that there is no reliable, consistent method for determining “artistic relevancy.” According to the court, use of a celebrity’s name in a song title, either symbolically or metaphorically, to reflect the meaning of the song *may* be enough to qualify for artistic relevancy; however, the court is wary of such uses.⁶² Moreover, it seems this symbolic or metaphorical argument is available only when the song itself pertains to the actual nature of the celebrity.⁶³ The court distinguishes this type of expression from the titling method used by OutKast where the celebrity’s name creates an artistic metaphor to the meaning of part of the song.⁶⁴ Instead of allowing non-literal relevance, the court requires a literal translation of the lyrics relating to the celebrity in order to satisfy the “artistic relevancy” requirement. This awkward, ill-fitting standard can only serve to restrict artistic expression since artists can only express themselves to the extent that a trier of fact could still understand the work.

Section 43(a) of the Lanham Act is being interpreted too broadly with respect to celebrities’ false advertising claims based on song titles. This overly broad interpretation only serves to restrict artistic expression and stifle creative works of art. Limiting

⁵⁹ *Parks v. LaFace Records*, 76 F. Supp. 2d 775, 782 (E.D. Mich. 1999).

⁶⁰ *Parks*, 329 F.3d at 453.

⁶¹ *Id.*

⁶² *Id.* at 454 (“Crying ‘artist’ does not confer carte blanche authority to appropriate a celebrity’s name. Furthermore, crying ‘symbol’ does not change that proposition and confer authority to use a celebrity’s name when none, in fact, may exist. . . . [T]he use of Rosa Parks’ name in a metaphorical sense is highly questionable.”).

⁶³ *See id.* at 453.

⁶⁴ *See id.*

consumer confusion is well-intentioned, but the fact that consumers have different expectations when buying songs as compared to other commercial products should be acknowledged and appreciated by the courts. Therefore, the claim of false advertising should be inapplicable when brought by a celebrity based on use of his or her name in a song title.

B. Expansion of the Right of Publicity

Under *Rogers*, an artist's use of a celebrity's name in a title does not violate the celebrity's right of publicity and will be protected by the First Amendment unless the title is "wholly unrelated" to the content of the work or is "simply a disguised commercial advertisement for the sale of goods or services."⁶⁵ This test has roots in the *Restatement (Third) of Unfair Competition*, which states, "[u]se of another's identity in a novel, play, or motion picture is . . . not ordinarily an infringement [of the right of publicity, unless] . . . [t]he name or likeness is used solely to attract attention to the work that is not related to the identified person."⁶⁶ In *Parks*, the court's expansive reading of the *Rogers* "wholly unrelated" standard to determine the validity of the right of publicity claim serves to negatively affect artistic expression and violate the spirit of the First Amendment.

The song in this case repeats the line "[e]verybody move to the back of the bus" ten times throughout the four minute and twenty-four second song.⁶⁷ Naming the song after someone known for refusing to move to the back of a bus undoubtedly creates a relation between the content of the song and title. OutKast admits that the title is not a literal reference but a metaphorical or symbolic usage of Rosa Parks' name.⁶⁸ Although the song is not about the civil rights movement or about Rosa Parks in a biographical sense, the song is far from being "wholly unrelated"

⁶⁵ See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

⁶⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

⁶⁷ OutKast, *Rosa Parks*, on *AQUEMINI* (LaFace Records 1998).

⁶⁸ *Parks*, 329 F.3d at 452-53 ("The lyrics' sole message is that OutKast's competitors are of lesser quality and, therefore, must 'move to the back of the bus,' or in other words, 'take a back seat.'").

to the historical figure.

In reversing the lower court's grant of summary judgment, the appellate court is unjustifiably expanding the "wholly unrelated" test at the expense of artistic expression. The term "wholly" means "to the full or entire extent."⁶⁹ Under this test, the title has to be unrelated to every aspect of the song for a First Amendment defense to fail. Having the title directly relate to a line in the song that is repeated ten times should easily satisfy the *Rogers* test. The court of appeals, however, claimed that this was not sufficient to satisfy the test.⁷⁰ Apparently, the court does not appreciate the fact that "authors frequently rely on word-play, ambiguity, irony, and allusion in titling their works."⁷¹ Instead of stripping artists of their freedom of expression and limiting their creative options, courts should reject this expansive application of *Rogers*.

C. Diminution of Public Domain

The "public domain" is "the realm embracing property rights that belong to the community at large, are unprotected by copyright or patent, and are subject to appropriation by anyone."⁷² As the courts continue to broadly apply the Lanham Act to creative works and expand the right of publicity, they do so at the expense of the public domain. The reduction of the public domain inhibits artists who express themselves by drawing from the public domain without having to pay royalties to the owners of copyrights or trademarks. The diminution of the public domain is seemingly motivated by corporate intellectual property owners.⁷³

The governmental reduction of the public domain is not a new phenomenon, as Congress began to manipulate the public

⁶⁹ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1347 (1998).

⁷⁰ *Parks*, 329 F.3d at 461.

⁷¹ *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989).

⁷² WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 952 (1998).

⁷³ Linda Greenhouse, *20-Year Extension of Existing Copyrights is Upheld*, N.Y. TIMES, Jan. 16, 2003, at A24 (For "big corporate copyright holders that had lobbied strenuously for the extension [of copyright protection], the ruling had the effect of keeping the original Mickey Mouse as well as other icons of mid-century American culture from slipping into the public domain.").

domain in 1976. Under the Copyright Act of 1976,⁷⁴ copyright protection attaches as soon as the work is fixed in a tangible medium of expression.⁷⁵ Under this Act, the work is then removed from the public domain for most purposes for the life of the author plus fifty years. The 1998 Sonny Bono Copyright Extension Act further shrinks the volume of the public domain by protecting works for seventy years after the author's death.⁷⁶ Corporate authors currently enjoy a ninety-five year protection period.⁷⁷

The corporate undertones of the Sonny Bono Act revolve around Mickey Mouse. If the copyright laws had not been changed, "Steamboat Willie," the first Mickey Mouse cartoon created in 1928,⁷⁸ would have entered the public domain sometime between 2000 and 2004. As a result of the 1998 extension, every post-1922 copyrightable work is completely removed from the public domain for most purposes until 2018.⁷⁹ Furthermore, "[o]f those works, maybe five percent are being commercially exploited. So we're locking up 100 percent to save maybe five

⁷⁴ Copyright Act of 1976, 17 U.S.C. §§ 101–810 (1994 & Supp. 2000).

⁷⁵ 17 U.S.C. § 102 (Supp. 2000) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.").

⁷⁶ *Id.* § 302(a).

⁷⁷ The Sonny Bono Copyright Term Extension Act of 1998 (codified as amended 17 U.S.C. §§ 301–04) retroactively extended the duration of copyright from the life of author plus fifty years to the life of the author plus seventy years, in the case of individual works, and from seventy-five years to ninety-five years in the case of works of corporate authorship and works first published before January 1, 1978.

⁷⁸ Disney, Steamboat Willie, available at <http://disney.go.com/vault/archives/movies/steamboat/steamboat.html> (last visited Mar. 2, 2004) (on file with the North Carolina Journal of Law & Technology) ("Released at the Colony Theater in New York on November 18, 1928, the date used for the birth of Mickey Mouse.").

⁷⁹ Works created after 1922 will not fall into the public domain for an additional twenty years. Since the Sonny Bono Copyright Term Extension Act was implemented in 1998, protection will last 20 years from that date until the year 2018. Certain uses of copyrights are allowable as "fair uses." Fair uses include criticism, comment, news reporting, reaching and research. 17 U.S.C. §§ 301–04.

percent. Economically, that doesn't make sense."⁸⁰

The constitutionality of the Sonny Bono Act was recently upheld by the Supreme Court.⁸¹ Eric Eldred, whose website publishes public domain literature, argued that the copyright extensions harmed his businesses and took resources from the public contrary to the original intent of the Constitution.⁸² Although this argument failed, public domain advocacy groups, such as the Electronic Frontier Foundation,⁸³ still hope there will be successful challenges that will force Congress to use more reasonable expiration dates for copyrights.⁸⁴

This restriction of the public domain through congressional acts and judicial holdings negatively affects the development of works through creative expression. As stated by Ninth Circuit Court of Appeals Judge Alex Kozinski, "[c]reativity is impossible without a rich public domain. . . . Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture."⁸⁵ Expanding the protection of false advertising and the right of publicity, while diminishing the public domain, ultimately erodes the building blocks of further creative works. In order to promote artistic freedom and expression, the judicial system should strive to expand the public domain rather than suffocate its growth.

IV. Future Options

A. Narrowing § 43(a) of the Lanham Act

If the courts insist on making the trier of fact follow the

⁸⁰ Fiona Morgan, *Copywrong, copyright laws are stifling art, but the public domain can save us*, INDEPENDENT WEEKLY (Durham, N.C.), Dec. 3–9, 2003, at 24 (citing Duke Law Professor James Boyle).

⁸¹ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁸² *Id.* at 193.

⁸³ Electronic Frontier Foundation, at <http://www.eff.org/mission.php> (last visited Mar. 2, 2004) (on file with the North Carolina Journal of Law & Technology).

⁸⁴ Morgan, *supra* note 80.

⁸⁵ *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, A., dissenting).

“artistic relevance” standard when assessing celebrities’ false advertising claims, the guidelines for determining relevance should be loosened. Since the application of the standard failed in this case, the courts must give more consideration to *non-literal* relevance. In doing so, the courts would be more apt to admit the artistic relevance as a matter of law. Making the claims go to a jury interferes with the artistic expression and has a chilling effect.

In the future, perhaps courts will describe a more specific level of relevance. One option would be to institute a “minimal artistic relevance” standard. By using a lowered level of artistic relevance, the court would be more apt to make the determination as a matter of law. Under this standard, referring to Rosa Parks’ contribution to the civil rights movement, even in a metaphorical or symbolic sense, would satisfy at least a “minimal artistic relevance” test.

Likewise, the court could qualitatively analyze the content of songs that refer to celebrities in the titles. Certain aspects of a celebrity’s persona, his or her “signature elements,” are qualitatively more relevant than others. A reference to these particularly identifiable aspects of their identity within the contents of the song, even if not the focus of the song itself, would be artistically relevant to the title containing the celebrity’s name. Under this standard, OutKast’s song would satisfy this modified “artistic relevance” standard since the particular aspect of Rosa Parks’ life referenced in the song, although only one single line, represents an aspect of her life for which she is widely known.

The aforementioned interpretations of the *Rogers* “artistic relevance” standard would protect artists and celebrities. Artists will have a wide degree of freedom of expression and, as long as there is some minimal degree of relevance, even if non-literal, the test would be satisfied. Additionally, if reference to a celebrity occurs only in a small percentage of the song itself, but the content refers to their “signature element,” the test is satisfied.

Even with these alterations to the standard, celebrities still will enjoy protection against titles using their names for the sole purpose of false advertising. In the easiest cases, when no reference of any kind is made to the celebrity within the underlying work, the celebrity would have a cause of action. Or, if a reference

is made that does not pertain to an aspect of the celebrity's persona for which the celebrity is widely known, the celebrity would still have a claim of false advertising. Thus, artists' First Amendment rights and celebrities' rights to their personas would be preserved and a better balance would be struck.

B. Restricting the Right of Publicity

In order to stop treading on artists' rights, the courts should refrain from expanding the *Rogers* "wholly unrelated" test.⁸⁶ A lyrical line within a song that directly relates to a widely known aspect of the celebrity's life establishes a relationship between the content of the song and the title. Even though the entire song is not about the life of Rosa Parks, the song is not "wholly unrelated" to the civil rights figure.⁸⁷

Notwithstanding artists' right to express themselves, "[p]oetic license is not without limits."⁸⁸ Even if reference is made to a celebrity within a song, the title cannot feign endorsement by the celebrity. The court of appeals admits that OutKast does not exceed this limitation. The song title "Rosa Parks" "make[s] no explicit statement that the work is about [Rosa Parks] in any direct sense."⁸⁹ The court further explains that the "[d]efendants did not name the song, for example . . . *Rosa Parks' Favorite Rap*."⁹⁰

The test should be quantified similarly to the false advertisement claim in order to avoid further judicial constraint on artistic works. As long as an artist does not mislead consumers to believe celebrities have endorsed songs, and the title is "minimally related" to the content of the song, the celebrity would have no right of publicity claim. Since the defendants in *Parks* did not feign endorsement and the lyrics are minimally related to the title,

⁸⁶ The Sixth Circuit appeared to unintentionally expand the *Rogers* test in *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).

⁸⁷ *Parks v. LaFace Records*, 76 F. Supp. 2d 775, 780 (E.D. Mich. 1999) ("[T]he song is not about plaintiff in a strictly biographical sense Rather, defendants' use of plaintiff's name, along with the phrase 'move to the back of the bus,' is metaphorical and symbolic.").

⁸⁸ *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989).

⁸⁹ *Parks*, 329 F.3d at 459.

⁹⁰ *Id.*

Rosa Park's cause of action would fail under this standard.

C. Expanding Public Domain

Judges and members of Congress need to be more cognizant of the effect a shrinking public domain has on First Amendment freedoms. Restrictions not only limit expression, but also ultimately increase litigation over property rights. Corporate intellectual property owners have supported recent congressional acts that ultimately have a negative effect on artists, especially those who cannot afford to pay the royalties to use material outside the public domain. Putting a price tag on creative expression should not be the effect of Congress' or the courts' actions.

Although titles of creative works do "combin[e] artistic expression and commercial promotion," the courts need to remember that the authors' "interest in freedom of artistic expression is shared by their audience."⁹¹ Since limiting titles available in the public domain limits artistic expression, it also disregards the expectations of society. Furthermore, even though the expansion of the copyright laws at the expense of the public domain has had some positive effects for copyright holders, Congress needs to appreciate the detrimental effect such acts have on the artists who rely on the public domain and on the public in general.

V. Conclusion

In order to reverse its recent interference with creative expression, the courts and Congress should take measures to protect artistic rights. Namely, artists defending false advertisement claims should be given more deference to protect the integrity of the First Amendment. A simple modification of the *Rogers* "artistic relevance" test will benefit the authors of artistic pieces who choose titles incorporating celebrities' names. This modification will also benefit the courts since they could more easily determine artistic relevance as a matter of law and would not

⁹¹ *Rogers*, 875 F.2d at 998.

have to consult dictionaries to decipher the vernacular.

Also, celebrities bringing right of publicity claims should have to prove that the use of their name is not “minimally related” to the content of the song. This subtle change in standard will serve to protect both the artist and the celebrity.

Finally, Congress should refrain from continuing to expand the long-term protection of copyrights and increase the access to works that will promote more artistic expression. Copyright law should not serve to stifle creative expression.

Although *Parks v. LaFace Records* involves only one musical group and one celebrity, the artistic rights of all artists continue to be at stake unless appropriate measures are taken by the courts and the legislature.