

# What's In a Name?

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## 5th Edition: Trends in Marketing Communications Law

Selecting the title of a film, book or other creative content can be a daunting task. The creator must convey a message about the content and draw interest from the viewer. Also to be considered is that the title can become intertwined with the fame of a project and result in merchandising that extends far beyond the life of the original work. For example, Disney or Marvel films often result in years of residual merchandise and the products usually bear the title of the film. Title selection may even be more challenging when the creator must consider how to avoid infringing the intellectual property rights of others.

In general, a single title is not considered a trademark use unless it is part of a series, and the creator cannot claim exclusive trademark rights to it as the name of a work. However, a title still has the potential to cause confusion or infringe the rights of others. Fortunately, many courts will review the titles of expressive works under different standards than the general “likelihood of confusion” analysis used to determine trademark infringement because titles may implicate the First Amendment right of free speech. In most cases, and first established in *Rogers v. Grimaldi*, if the title has artistic relevance to the underlying content and if it otherwise does not explicitly mislead consumers as to the creator of the work, then a court would not find it to be infringing.

Most recently, in *Twentieth Century Fox TV v. Empire Distrib., Inc.*, the Ninth Circuit found that the popular Fox television show title “Empire” does not infringe the trademark rights of Empire Distribution, a hip-hop and R&B record label. The court held that use of the Empire title was relevant because the subject of the show is a fictional hip-hop record label and entertainment company named Empire Enterprises (a figurative empire) and the show is set in New York, the Empire State. Further, the court stated that the show contains no explicit references to Empire Distribution, and thus, is not explicitly misleading. Although the court in this case ruled in favor of Fox’s continued right to use the name Empire, this case is a prime example of the precautions that must be considered when selecting a title to avoid such litigation. Therefore, the importance of a title lies in what it signals to the consumer about its content, while at the same time not overstepping the intellectual property rights of others.

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## Key Takeaways

- The First Amendment gives creators of expressive content some leeway with title selection, but the intellectual property rights of others must still be considered.
- Many courts will review the use of a title under a different standard, which takes into account the right to free speech and expression.
- If a title uses or incorporates a similar trademark of another, be sure that the title has some legitimate connection to the underlying content and that the title does not explicitly mislead the consumer as to the source of the content.

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## Related People

### **Brooke Erdos Singer**

Partner

212 468 4940

[bsinger@dglaw.com](mailto:bsinger@dglaw.com)

### **Joy J. Wildes**

Counsel

212 468 4974

[jwildes@dglaw.com](mailto:jwildes@dglaw.com)