

Fair Use in Documentary? Sounds Fishy

Brown et al. v. Netflix, Inc. et al., C.A. No. 19-cv-1507 (ER) (S.D.N.Y. 2019)

By: Lisa Holubar & Adam Reis | June 1, 2020

A federal judge recently ruled that the inclusion of the chorus of a children’s song in a documentary about burlesque dancers amounted to fair use. The decision shows just how impactful the evolving transformative use issue can be in a fair use analysis.

Tamita Brown, along with two coauthors (“the Authors”), wrote, arranged, and recorded the children’s song *Fish Sticks n’ Tater Tots* (the “Song”) in 2011. On March 3, 2017, Defendants Amazon.com, Inc. (“Amazon”), Netflix, Inc. (“Netflix”), and Apple Inc. (“Apple”) (collectively, “Defendants”) released the documentary film *Burlesque: Heart of the Glitter Tribe* (the “Film”) on their streaming platforms. The Film depicts a group of burlesque dancers in Portland, Oregon by means of interviews, backstage happenings, and on-stage performances. One of these segments features an on-stage performance by “Babs Jamboree,” whose food-themed performance explored the concept of the “reverse mermaid,” *i.e.*, a mermaid with the head of a fish but the legs of a woman. At one point during the performance, “Jamboree steps behind a sign labeled ‘hot oil’ and emerges, having removed her fish head and changed into brown leggings to appear as though she has been transformed into fish sticks.” At this point, the Song plays for eight seconds, repeating the chorus “fish sticks n’ tater tots” five times.

In February 2019, the Authors filed suit in the United States District Court for the Southern District of New York alleging copyright infringement based on the unauthorized reproduction and performance of the Song. In November 2019, Defendants jointly moved to dismiss the claims against Netflix and Apple pursuant to Federal Rule of Civil Procedure 12(b)(6), and for judgment on the pleadings on the claims against Amazon pursuant to Rule 12(c). Defendants’ motions were based entirely on fair use.

The Court granted Defendants’ motions, finding their use of the Song in the Film to constitute a fair use. As to the first factor, the purpose and character of the use, the Court found the allegedly infringing use to be sufficiently transformative. The Song, which was originally written as a children’s song about eating a cafeteria lunch, had been used in a risqué scene depicting “decidedly mature themes that portray fish sticks not as a lunch food, but as a component of a ‘reverse mermaid.’” In reaching this conclusion, the Court was not persuaded by the fact that the Song was unaltered, finding that the “new and different function” sufficient to supporting a finding that the use was transformative. The Court also declined to expressly rule on whether the Film was a documentary serving an educational purpose or more commercial in nature, noting the potential commercial nature of the use was not significant given the transformative nature of the use. Concerning the second factor, the nature of the copyrighted work, the Court found this factor neutral because the transformative nature of the use rendered this factor “of limited usefulness.” Likewise, factor three, the amount and substantiality used, was found to favor fair use because the portion of the Song used, despite potentially being the heart of the song, was necessary to achieve the transformative purpose of Defendants’ use. Finally, the Court found the fourth factor, the effect of the use on the potential market for the work, weighed in favor of fair use because the Film targeted a different market than the Song. Again pointing to the same consideration, the Court noted “[a]s the Film’s use is transformative of the original, the potential market ... would not opt to acquire the copy of a limited eight seconds of the Song in preference to the original.” The Court discounted arguments concerning the effect of this use potential licensing markets because they were not alleged in the complaint, and only made in response to Defendants’ motions.

This case demonstrates how the transformative use test has all but supplanted the statutorily mandated four-factor test, leading to perverse results that ignore key criteria such as the commercial nature of the use. Such results would likely not be achieved under a faithful application of the traditional (again, statutorily mandated) four-factor test, and demonstrate the ongoing erosion of the value of copyrights in the modern era.