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NATIONAL ENTERTAINMENT LAW MOOT COURT COMPETITION

No. 70392-2017

IN THE SUPREME COURT OF THE UNITED STATES
November Term 2019

GEORGIA R.R. MARVIN AND HOME VIDEO OFFICE, INC.

vs.

COMEDY ROCKS CENTRAL

On Writ of Certiorari to the
United States Court of Appeals
for the Fifteenth Circuit

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United States Court of Appeals,
Fifteenth Circuit

1124 F.3d 340

Georgia R.R. Marvin and Home Video Office, Inc., Plaintiff/Appellant,
v.
Comedy Rocks Central, a New Monica Corporation, Defendant/Appellee.

No. 70392-2017

Argued and Submitted: May 8, 2019
Decided: June 1, 2019

Appeal from the United States District Court for the Eastern District of New Monica;
C. Hindley, District Judge, Presiding.

Before: J. MORRISON, Chief Judge, A. ORTEGA, and N. FLETCHER, Circuit Judges.

Opinion by Chief Judge MORRISON.

MORRISON, Chief Judge:

In this appeal, we consider two issues arising from Appellants Georgia R.R. Marvin ("Marvin") and Home Video Office, Inc.'s ("HVO") claim that Appellee, Comedy Rocks Central, violated Appellants' exclusive intellectual property rights to the Danny Terrygarryan character in Appellee's new comedy television show "Game of Democracy." The first is whether the character Danny Terrygarryan should be afforded copyright protection. The second issue is whether the Appellee has a fair use defense.

Marvin and HVO brought suit against Comedy Rocks Central for copyright infringement, trademark infringement, and unfair competition. Copyright infringement is the only claim at issue in this appeal.

I. Factual Background

The following facts are not in dispute. Danny Terrygarryan is a fictional character that first emerged in Marvin's bestselling series of novels called "Fire and Ice." HVO obtained a licensing agreement to use any and all content from the books in their award-winning series, "Game of Crowns" where Danny is played by the actress Emma Clarkson. Both the show and the novels follow Danny's journey to gain power over the seven kingdoms and wear the crown as the mother of three dragons. There are several main characters in the television show as well as the novels, but Danny Terrygarryan is the most popular character in the series. Danny appears in sixty-eight of the eighty episodes in "Game of Crowns" and three of the four novels by Marvin.

Danny's appearance has evolved over the years, but her key characteristics have remained consistent. Danny is most often described as uncommonly beautiful with fair skin, long silver hair, and violet eyes. She also cannot be burned by fire—a particularly unique trait. She arguably has the most diverse range of costumes on the show—from pastel silk dresses to heavy hessian burlap and leather. Beginning in season three, she is seen adorned in more queenly gowns. One of the most popular amongst fans is her vibrant blue dress with a long cape. In the last two seasons, she is seen in an all-black gown with a red cape adorned with the Terrygarryan sigil of a three-headed dragon. According to internet search results, this dress was the most popular character costume bought by consumers in 2016 and 2017. Also, famed costume designer, Maria Walker, won several awards for her work on the show as the

director of costume design for all the main characters.

Danny's evolution toward fierce war gowns coincides with her character's rise to power. Danny Terrygarryan began as an innocent young woman striving to provide peace in a world of war, death, and slavery. But as she rose to power, she became known for brutality. At the very end of the series, Danny is seen atop a dragon burning an entire city—filled with men, women, and children—to ashes. Many began calling her the "Mad Queen."

Following Danny's dramatic evolution, fans began to question their love for the character. Some fans actually admired her brutality, but others were shocked and disappointed at the character's direction. In fact, there was so much public outrage that 1.2 million people signed an online petition urging HVO to re-write the direction of the character.

Before the first airing of "Game of Democracy," Appellee released a short, thirty-minute video starring one of the world's most famous comedians, Ray Leno. Leno criticized the direction taken by the authors of "Game of Crowns" stating that "Danny's sudden descent into madness is like a punch to the face," and that "HVO transformed her from one we all were rooting for to one that could easily be dispensed." After the release of this video, HVO reported a 15% drop in sales for Danny Terrygarryan merchandise.

Overall, HVO has made millions in merchandise sales from products based on the Danny Terrygarryan character, including shirts, hats, blankets, mugs, etc. The show has soared to the top of the charts with each season (total of eight seasons). Last season alone brought in an average of 17.4 million viewers, per episode, from all over the world. The market value of "Game of Crowns" passed the $1 billion mark following the release of its seventh season. However, this number has dropped slightly below $1 billion following the release of its controversial last season as well as Appellee's new show "Game of Democracy." Episode budgets were in excess of $15 million each, which is unheard of for a television show. The show alone has secured the most Emmy nominations—at 125—of any other show. It has won 50, including best drama series, and numerous acting awards for Emma Clarkson for her role as Danny Terrygarryan.

The final season aired in June 2017 but there are multiple prequels currently in the works at HVO, based on several of the characters in Marvin's novels, including Danny Terrygarryan. While these derivative works have yet to be released or to yield any financial reward, HVO has spent millions of dollars in production and advertisements. HVO and Martin also claim they have considered licensing some of the main characters from "Game of Crowns," including Danny Terrygarryan, to New Comedy Network ("NCN"), a well-known comedy network, to use in a new satirical television series. After the release of Appellee's show, the discussions between Appellants and NCN fizzled out. The record does not reveal why. To Appellants' knowledge, NCN has not yet made a formal decision to continue pursuing the licenses or to do any further work on the show. NCN has not released to Appellants or to the public the name or description of the new show.

The alleged copyright infringement arises out of Comedy Rocks Central's use of the Danny Terrygarryan character in the animated comedy show "Game of

Democracy." This show is a combination of both comedy and politics, and Danny Terrygarryan is at the forefront. Portrayed as the President of the United States, during the opening sequence, Danny is seen standing in front of the White House with a black banner draped behind her displaying the Terrygarryan sigil. She exhibits her same signature features, such as fair skin, silver hair, and violet eyes. But she is dressed in a navy-blue blazer with a white blouse and a skinny red tie. The show attempts to combine elements of the real world with the medieval-inspired world of "Game of Crowns," with Danny as the President of the United States in place of Donald Trump, the current sitting U.S. President. The show follows the President as she tries to juggle her political career with her personal life, as well as her controversial relationship with her cabinet members.

In "Game of Democracy," Danny's main attributes have, in some ways, remained the same. She is a strong, powerful woman who has shown moments of ruthlessness. The new show also uses some of her most famous phrases from "Game of Crowns," such as, "We both want to help people. We can only help them from a position of strength. Sometimes strength is terrible," as well as, "They can live in my new world or they can die in their old one."

On the other hand, the show also delves into several of the current political controversies that have occurred since Donald Trump became President, including, the Mueller investigation on Russian interference in the Presidential election and the President's unprecedented meeting with the leader of North Korea. The Danny Terrygarryan character is also shown reciting portions of some of President Trump's most famous speeches, such as his inauguration speech and his two State of the Union speeches. The new show puts a comical spin on the current political atmosphere in the United States. Only one season has aired but the show has already developed a significant fan base and has been rated the number one comedy show of the year.

II. Procedural History

On January 16, 2018, Marvin and HVO filed an action against Comedy Rocks Central, claiming copyright infringement for its use of the Danny Terrygarryan character. It is undisputed that Marvin and HVO, respectively, own the copyrights to the novels and each of the eight seasons of the television series. Appellee and Appellants each filed a motion for summary judgment. Appellee argued that the Appellants do not own the copyright to the Danny Terrygarryan character itself, and therefore Appellants could not prevail on a copyright claim. Appellee further argued that, even if the character was copyrightable, Appellee's use of the character in "Game of Democracy" is a parody and protected by the fair use doctrine. Conversely, Appellants argued that Danny Terrygarryan is copyrightable, that Appellee infringed upon the copyright, and that Appellee's fair use defense fails.

Judge Charles A. Hindley of the United States District Court for the Eastern District of New Monica was presented with a novel issue in this Circuit: how to determine whether a visually-depicted character should be afforded copyright protection. Rejecting the "Character Delineation" test and applying the *Sam Spade* test, following Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., 216 F.2d 945, 946-51 (9th Cir. 1954), (hereafter, "CBS"), Judge Hindley found the Danny Terrygarryan character is not subject to

copyright protection. Although it could have stopped there, the district court went on to conclude that, if the character had been copyrightable, Appellee would not have prevailed on its fair use defense, because the character is satirical in nature and not a parody.

The district court granted Appellee's motion for summary judgment, denied Appellant's motion and entered a judgment in Appellee's favor. Appellants timely appealed.

We now reverse the district court's decision on both issues and remand for further proceedings consistent with this opinion.

III. Standard of Review

We review the district court's rulings on motions for summary judgment *de novo*.

IV. Discussion

Copyright protection was created to protect an author's creativity and freedom of expression while also allowing his or her work to be available to the public. However, copyright protection must also have limits. If granted leniently, it could hinder other authors' ability to build off the ideas of copyrighted material, thereby creating a monopoly over ideas and creations. There needs to be a balance between allowing the author to continue to develop and publicize his or her work, while also leaving enough base-line, or general, materials and ideas for new authors to build off of and create new works.

The Copyright Act of 1976 is the primary basis for copyright law and outlines what is subject to copyright protection. Section 102 of the Copyright Act provides protection "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C.A. § 102. The Act specifically lists eight works of authorship that are entitled to copyright protection: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Id.

The main works of authorship at issue here are literary works, motion pictures, and other audiovisual works.

Because this Circuit has never had the opportunity evaluate how to determine the copyrightability of a visually-depicted character, in the first part of our analysis, we examine the prevalent character copyright tests: the Second Circuit's "Character Delineation" test, the Ninth Circuit's *Sam Spade* test, a combination of the two tests, and a new test adopted by the Ninth Circuit, which we refer to as the *Towle* test. We now adopt the *Towle* test in this Circuit. Applying it to this case, we conclude that the Danny Terrygarryan character is protected by copyright and that, absent a defense, Comedy Rocks Central has infringed on that Copyright.

Because the record is well developed and the relevant facts are not in dispute, in the second part of our analysis, we take up the issue of Appellee's fair use defense. We conclude that Appellee is protected from copyright infringement under the fair use doctrine.

A. Copyrightability

Literary characters are generally introduced in a written format such as a book or novel. Literary characters become graphic characters when they are depicted in a more visual context such as a comic book, motion picture, or television show. For example, some of the most popular and recognizable literary characters who also are visually-depicted are James Bond, Batman, and Sherlock Holmes. Danny Terrygarryan is introduced as a fictional literary character in Marvin's novels and then becomes a graphic character when she is visually depicted in HVO's television show "Game of Crowns."

This is an important distinction to make because literary characters and graphic characters are generally not afforded the same protections. Providing copyright protection to a literary character presents greater challenges because character descriptions are often spread out and hard to distinguish. Also, different readers will use their imagination to fill in the gaps left by the author and come up with their own interpretation of how the character looks and acts. Graphic characters, on the other hand, are depicted on page or screen exactly how the author intends them to be. Viewers don't need to imagine what the character looks like. However, courts are still confused over how to determine whether characters should be afforded copyright protection. Just because a character is visually-depicted, does not mean it is automatically granted protection.

Here, our focus will lie primarily on the Danny Terrygarryan character as depicted in the "Game of Crowns" television show due to the fact that she evolved from a literary character into a visually-depicted one. This court believes the literary aspect of the character is still important to keep in mind because it shows the depth with which the character has been described as well as its popularity.

To determine the copyrightability for any character, literary or graphic, courts have created several tests. The two leading tests for decades were the Second Circuit's "Character Delineation" test, and the Ninth Circuit's "Story Being Told," or *Sam Spade*, test. Due to the confusion created by the two tests, many district courts in various circuits were unsure which test to apply. They generally resorted to either following the "Character Delineation" test or utilizing a combination of both tests. The Second Circuit has stuck to its "Character Delineation" test. *See e.g.*, Salinger v. Colting, 607 F.3d 68, 73 (2d Cir. 2010). The Ninth Circuit has moved away from the *Sam Spade* test and in DC Comics v. Towle, 802 F.3d 1012 (9th Cir. 2015) (hereafter "Towle"), established a new test. Since this Circuit has yet to rule on the issue of copyright for a visually-depicted character, we will be looking to the persuasive authority set by our sister circuits.

Here, the district court rejected the "Character Delineation" test because as too broad and instead applied the *Sam Spade* test, finding that the Danny Terrygarryan character was not copyrightable. However, we disagree with the district court's decision and reverse on the basis that the *Sam Spade* test is too strict and would provide little protection for authors and their works. We adopt the Towle test in this Circuit.

(1) "Character Delineation" Test

The idea that characters, whether literary or graphic, could be afforded copyright protection was first conceptualized by Judge Learned Hand in Nichols v. Universal Pictures, 45 F.2d 119, 120-23 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

Judge Hand introduced the idea that characters may be entitled to copyright protection outside and independent from the plot of the original work. Id. at 121. A decade later, the Second Circuit developed the "Character Delineation" test in Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432, 433-34 (2d Cir. 1940), which involved the copyright infringement of the "Superman" character. Under this test, copyright protection is only granted to characters who have been significantly developed to be recognizable on their own, or, in other words, sufficiently delineated. The court in Warner Brothers Inc. v. American Broadcasting Companies, Inc. 720 F.2d 231, 235 (2d Cir. 1983) (hereafter "American Broadcasting Companies"), stated that proper character delineation is seen when "the visual perception of the character tends to create a dominant impression against which the similarity of a defendant's character may be readily compared, and significant differences readily noted." Id. at 241- 42.

In Detective Comics, Inc., the creator of 'Superman,' filed suit for copyright infringement against another comic book publisher for their very similar superhero, "Wonderman." Id. at 433. The court explained that both characters are superheroes with great strength and speed. Id. They both attempt to conceal their powers by dressing in regular clothing, but in times of danger, they reveal a "skintight acrobatic costume." Id. The main difference between the two characters, according to the court, is the color of their costume. "Superman" has a blue costume, and 'Wonderman' is adorned in red. Id. The court found that "[s]o far as the pictorial representation and verbal descriptions of 'Superman' are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are the proper subjects of copyright and susceptible of infringement." Id. at 433-434.

While both Nichols and Detective Comics case were decided under the old Copyright Act, the Second Circuit continues to apply the "Character Delineation" test to visually-depicted characters, following the passage of the more recent Copyright Act of 1976.

The "Character Delineation" test provides several benefits consistent with the purposes of the Copyright Act. The test analyzes whether a character is developed enough to warrant copyright protection or whether the character's description is too general and basic so as to not be protected under copyright law. It forces an author to make sure to sufficiently describe a character or else risk losing copyright protection. Judge Hand put it this way: "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly." Nichols, 45 F.2d at 121. It also means that the character can be easily recognized and identified across multiple occasions. This test favors authors of original works and characters. It is very lenient, meaning that, under it, it is relatively easy for authors to get copyright protection. But this leniency led the Ninth Circuit to implement the stricter *Sam Spade* test.

(2) "Story Being Told"/*Sam Spade* Test

The Ninth Circuit established the "story being told" test, also known as the *Sam Spade* test, in CBS, 216 F.2d at 946-51 (9th Cir. 1954). There, the Ninth Circuit held that the *literary* character Sam Spade was not copyrightable because the character itself was not the "story being told" but instead was merely a vehicle for the story told. Id. at 950. Under this test, a character must be a

stand-alone character, not a stock-character, to be copyrightable. A stand-alone character is one without which the story would not make sense. The character "Rocky" from the well-known Rocky series of movies is a prime example. A stock character, on the other hand, plays a supporting role in the story. The CBS Court described stock characters as vehicles for the story told that do not go with the sale of the story. Id. In our "Rocky" example, characters such as "Adrian," "Paulie" and "Apollo" are stock characters.

The *Sam Spade* test is strict, significantly limiting the copyrightability of a character apart from the work in which the character appears. It limits copyright protection to only very prominent characters, which prevents authors from claiming a monopoly over any characters other than a select few who constitute the story being told.

After finding that the Danny Terrygarryan character was sufficiently delineated, the district court applied the *Sam Spade* test. The district court determined that the Danny Terrygarryan character, though sufficiently delineated, did not meet the *Sam Spade* test because she is not the 'story being told.' The district court reasoned that the Danny Terrygarryan character is not the only main character on the show and that if you were to remove the character, there would still be a show and a storyline.

(3) Application of Character Delineation and *Sam Spade* Tests

Following its declaration of the *Sam Spade* test in CBS, the Ninth Circuit as well as district courts within the Circuit, have varyingly applied the test. Some decisions have limited the *Sam Spade* test to literary characters and completely disregarded the test for visually-depicted characters, implementing the "Character Delineation" test instead. *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 754-55 (9th Cir. 1978), *cert. denied* 439 U.S. 1132 (1979) (hereafter "Air Pirates"). Other decisions have lessened the severity of the *Sam Spade* test by incorporating "Character Delineation" in their analyses. *See, e.g.*, Anderson v. Stallone, No. 87–0592 WDKGX, 1989 WL 206431 at *2 (C.D. Cal. April 25, 1989); Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F.Supp. 1287, 1290 (C.D. Cal. 1995).

In 1978, the Ninth Circuit held in Air Pirates that the *Sam Spade* test did not preclude copyright protection of several Disney comic book characters. Air Pirates, 581 F.2d at 754-55. The court recognized that literary characters are particularly difficult to recognize because the character's look is subject to the imagination of the reader. Id. at 755. However, when the author includes a visual image, it becomes easier to recognize the character delineation. Id. Therefore, the Ninth Circuit concluded that "a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression." Id. Air Pirates appears to limit the *Sam Spade* test to literary characters while requiring application of the "Character Delineation" test to graphic or otherwise visually-depicted characters.

The Ninth Circuit's opinion in Olson v. National Broadcasting Co., Inc., 855 F.2d 1446 (9th Cir.1988), further perpetuated the confusion. In Olson, the author of the television series "Cargo," brought a copyright infringement claim against NBC, contending that the television series "The A-Team" was substantially similar. Citing Air Pirates, the Court discussed the "Character Delineation" test and stated that "copyright protection may be afforded to characters

visually depicted in a television series or in a movie." Id. at 1452. But later in its opinion, the court approved of the *Sam Spade* test, and referred to the "Character Delineation" test as "the more lenient standard[] adopted elsewhere." *Id.*

After Air Pirates and Olson, several district court decisions applied both the "Character Delineation" test and the "story being told'"/*Sam Spade* test to visually-depicted characters. For example, in Anderson, where the copyrightability of the characters from the "Rocky" movies was at issue, the court reasoned that the more restrictive "story being told test" was inapplicable to the facts of the case." 1989 WL 206431, at *7. However, "out of an abundance of caution," the court then applied both tests. Id. The court held that the Rocky character was sufficiently delineated as well as the story being told, and therefore entitled to copyright protection. Id. at *8.

We seek to avoid the breadth of the Character Delineation, the restrictions of the *Sam Spade* test, and the confusion of applying both tests. We therefore turn to the Towle test.

(4) Towle Test

In 2015, the Ninth Circuit in Towle, articulated a new test, which it applied to determine whether the "Batmobile" was a copyrightable character. Id., 802 F.2d at 1021. The Towle test for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection has three parts:

> First, the character must generally have physical as well as conceptual qualities. Second, the character must be sufficiently delineated to be recognizable as the same character whenever it appears…. Third, the character must be especially distinctive and contain some unique elements of expression.

Id. at 1021 (citations and internal quotations omitted). Applying this test, the court concluded that the Batmobile was, indeed, copyrightable. Id. at 1022-23.

We conclude that the Towle test strikes the right balance between protecting authors while also allowing new authors to build off of and appropriate the work of others, thereby preserving the creative thinking and imagination originally intended by the Copyright Act. This test also avoids the confusion created by applying both the "Character Delineation" and *Sam Spade* tests, which only has the potential to lead to inconsistent rulings.

We now apply each element of this test to the Danny Terrygarryan character. First, as to physical and conceptual qualities, the Danny Terrygarryan character has not only been introduced as a literary character through words but also has been presented visually. Therefore, the character has "physical as well as conceptual qualities." Thus, the first element is satisfied.

Second, the character is "sufficiently delineated" to be recognizable as the same character whenever it appears. As the district court determined, the Danny Terrygarryan character has maintained her signature physical and conceptual qualities throughout the novels as well as in all eight seasons of the television series. She has always had her distinct silver hair, fair skin, and violet eyes. All of these traits alone are consistent throughout both the novels as well as all eight seasons of the television

show. Thus, the second element has been satisfied.

Finally, the Danny Terrygarryan character is "especially distinctive" and contains unique elements of expression. She has an easily recognizable name as well as physical traits. In regard to her unique elements of expression, she is a strong-willed woman who fights to rid the injustices of the world, and then suddenly becomes a key contributor to those injustices. She also has the power to withstand extreme heat without getting burned, which is unique to her character. Danny is not merely a stock character but rather she is a stand-alone character. She is easily recognizable outside the plot of the story.

We now make clear that in this Circuit, to be copyrightable, a visually-depicted character must satisfy the Towle test, and we conclude that the Danny Terrygarryan character meets this test, and therefore is subject to copyright protection.

(5) Copyright Infringement

To demonstrate copyright infringement, a plaintiff must show "(1) ownership of a valid copyright, and (2) copying of constituent elements of that work that are original." Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 361 (1991).

As to the first element, ownership of a valid copyright, it is now clear, following our analysis, *ante*, that Marvin and HVO own the copyright to the Danny Terrygarryan character.

The second element has two sub-elements. Copying may be established by demonstrating (1) "that the [defendant] had access to plaintiff's copyrighted work," and (2) "that the works at issue are substantially similar in their protected elements." Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002). Appellee does not dispute that these two sub-elements are met here. Therefore, Appellee has infringed on Appellants' copyright Terrygarryan.

But that is not the end of the matter. If Appellee has a fair use defense, it will not be liable for infringement.

B. Fair Use Doctrine

From its inception, the primary goal of fair use for copyrighted materials has been to fulfill the very purpose of copyright law: "[t]o promote the Progress of Science and useful Arts." U.S. CONST., ART. I, § 8, cl. 8. Fair use is an "equitable rule of reason," Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984), requiring careful balancing of multiple factors "in light of the purposes of copyright." Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 578 (1994). The fair use doctrine thus "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Stewart v. Abend, 495 U.S. 207, 236 (1990).

Under section 107 of the Copyright Act, we must consider four factors to determine whether Appellee's use of the Danny Terrygarryan character was fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

We now analyze Appellee's use of the Danny Terrygarryan character under each of the four factors.

(1) Purpose and Character of the Use

The first factor to consider in a fair use analysis is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). While this definition does not specifically state what purpose is "fair," the preamble to § 107 provides a general list, which includes "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. Under this factor we must determine whether the new work supersedes the original, or whether it is transformative enough for it to be classified as a new work with a new meaning. Campbell, 510 U.S. at 579.

First, we easily dispose of the question whether "Game of Democracy" serves a commercial purpose or a nonprofit educational purpose. Appellee's new show undoubtedly is a commercial product. There is no evidence to find otherwise. This factor weighs against a finding of fair use.

However, commerciality is only a small factor to be considered, and is strongly outweighed by the transformative nature of the new work. *See* Campbell, 510 U.S. at 579. When evaluating the "transformative" nature of a work, courts are to evaluate "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Campbell, 510 U.S. at 579.

One issue to address when evaluating a works "transformative," nature is whether it contains parody or satire, because, "[a] work's transformative value is of special import in the realm of parody, since a parody's aim is, by nature, to transform an earlier work." Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

The Supreme Court in Campbell described the relationship between parody and fair use:

> For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.... If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.

Campbell, 510 U.S. at 580 (1994). The court in Campbell then pointed out the difference between parody (in which the copyrighted work is the target) and satire (in which the copyrighted work is merely a vehicle to poke fun at another target): "Parody needs to copy or mimic the original in order to make a point, while satire stands on its own and therefore requires justification for its use of the protected work."[1] Id. at 580-81.

[1] It is also important to note that, whether the parody is in good taste or bad does not and should not matter to the fair use analysis. As Justice Holmes explained, "[i]t would be a dangerous undertaking for

Dr. Seuss Enterprises v. Penguin Books, 109 F.3d 1394 (9th Cir. 1997), and Suntrust Bank, 268 F.3d at 1267 (11th Cir. 2001), help to illustrate the contours of parody and satire.

In Dr. Seuss Enterprises, the defendants published a book making fun of the O.J. Simpson murder trial called, "The Cat NOT in the Hat." Dr. Seuss Enterprises, 109 F.3d at 1396. The defendants' work copied the graphic artist style and the lyric structure of Theodore Geisel's famous book, "The Cat in the Hat." Id. at 1396-97. The Ninth Circuit rejected the defendants' claim of fair use, suggesting that it was satire, not parody, because their intent was to poke fun at the O.J. Simpson trial and not at the Dr. Seuss book. Id. at 1400-02. The court accordingly rejected the fair use defense. Id. at 1403.

In Suntrust Bank, the holder of the copyright for "Gone with The Wind" and any derivative works brought a copyright infringement against the publisher of "The Wind Done Gone," which is a retelling of the same story from the perspective of another character. Id. at 1259. The court stated that, for purposes of fair use analysis, it would "treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work." Id. at 1268-69. The court found that the "The Wind Done Gone" did not simply comment on the original work, but rather criticized and transformed the original by stripping away the romantic portrait of the antebellum south painted in the original work and reversing race roles originally portrayed. Id. at 1269-71. The court determined that the new work was a parody because its intent was to criticize the original work. Id. at 1268-69.

Here, the district court found that there was a lack of transformation due to the fact that Appellee's show took the exact same appearance and personality of the Danny Terrygarryan character, by showing her as a strong woman with immense power who, at times, could be feared by the people as well as her cabinet. The court also emphasized that Appellee's show consistently used the Terrygarryan house sigil.

Further, the district court concluded that Appellee's use of the Danny Terrygarryan character in "Game of Democracy" was similar to the situation in Dr. Seuss Enterprises. It reasoned that "Game of Democracy" broadly mimics the Danny Terrygarryan characteristics and style, but it does not ridicule the character itself; rather it ridicules the current sitting president, Donald Trump and the current state of U.S. politics. According to the district court, Appellee merely uses the Danny Terrygarryan character "to get attention" or "to avoid the drudgery in working up something fresh." *See* Campbell, 510 U.S. at 580. The court focused on the new work's clear evocation of some of the most contentious political events during Donald Trump's presidency, including the Mueller investigation on Russia's alleged interference in the Presidential election, and the President's historical meeting with North Korea's leader. The district court also concluded that Appellee intended to compare the "Mad Queen" to one of the most controversial sitting Presidents of the United States. For example, Danny Terrygarryan recited nearly verbatim portions of several of President Trump's

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persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

famous speeches, such as his inauguration speech and his two State of the Union speeches. The district court accordingly came to the conclusion that the new work was satire—not parody— due to its lack of transformation and its criticism of President Trump, rather than the Danny Terrygarryan character.

However, this reasoning is flawed. Appellee transformed the character dramatically by taking the Danny Terrygarryan character from a medieval fantasy realm and placing her in a modern political world. In "Game of Democracy," the Danny Terrygarryan character is shown as less brutal and violent a ruler compared to how she was depicted in "Game of Crowns." The new show is also parodic in nature. We disagree that Appellee primarily intended to criticize President Trump. "Game of Democracy" clearly attempts to ridicule the original work, "Game of Crowns," and more specifically the character Danny Terrygarryan, while using elements of the contemporary political world, including the current President.

Appellee released the new character following the drastic drop in the original character's popularity following her significant trajectory towards rage and violence. Fans were extremely upset at the direction the original character was moving to and what she ultimately became—a brutal monarch, guilty of murdering thousands of innocent people. 1.2 million people even signed an online petition urging HVO to re-write her final place in the show. Appellee also released a short video starring one of the world's most famous comedians, Ray Leno, who criticized the direction taken by the authors of "Game of Crowns" regarding Danny's sudden dissent into madness. The political aspect of the new show was simply the basis used to lay down a foundation for Appellee to create something new and humorous, while also criticizing the original character. The main purpose of parody is to "seek[] to comment upon or criticize another work by appropriating elements of the original." Suntrust Bank, 268 F.3d at 1268-69 (11th Cir. 2001). Given the facts presented above, the new work is a parody due to its clear comedic criticism of the original work.

Having established that the new work here is largely transformative, we must consider the weight to give this conclusion. There is some confusion among the Circuits regarding the significance of the transformative factor and its application to the fair use analysis. The Second and Ninth Circuits have given the transformative nature a work significant weight. The Seventh Circuit has criticized this approach, and instead put the most weight on the fourth statutory fair use factor—impact on the market.

In Cariou v. Prince, the Second Circuit applied the transformative factor quite broadly, stating "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute." 714 F.3d 694, 706 (2d Cir.2013). For the Cariou court, the focus is on whether the new work presents a "new expression, meaning or message." Id. With this definition, the court primarily looked at the transformative aspect of the new work instead of focusing on its purpose. The court also placed significant weight onto the transformative factor as compared to the other three factors. The Ninth Circuit followed this approach in Seltzer v. Green

Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013), adopting the Second Circuit's broad interpretation of the transformative factor, requiring only that the new work contain "new expressive content or message."

In Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014), the Seventh Circuit disagreed with the Second Circuit's approach: "We're skeptical of Cariou's approach, because asking exclusively whether something is 'transformative' not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works." This Court has chosen to apply each factor with the "most important [being] the fourth (market effect)." Id.

We agree with the Second Circuit, that the transformative nature of the new work is the most important factor in a fair use defense and should be given significant weight. This approach comports with the main objectives of copyright law.

On this basis, we conclude that Appellee's use of the Danny Terrygarryan character is transformative enough from the original to heavily weigh the first factor of our fair use analysis in favor of a finding of fair use.

(2) Nature of Copyrighted Work

The second factor is "the nature of the copyrighted work." 17 U.S.C. § 107(2). Original creative works are afforded greater copyright protection compared to derivative factual works: "some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." Campbell, 510 U.S. at 586 (1994). Danny Terrygarryan is a fictional character in an original work of fiction and therefore, is entitled a high degree of protection, compared to an original factual work.

"[S]ince parodies almost invariably copy publicly known, expressive works," Campbell, 510 U.S. at 586, this factor is not given heavy weight here. However, given the imagination, originality, and creativity required to create the Danny Terrygarryan character, this factor does tilt against a finding of fair use.

(3) Amount and Substantiality of Portion Used

The third factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). This factor requires us to analyze the quantity and quality taken from the original work. Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997). According to the Second Circuit, "[t]he qualitative component concerns the copying of expression, rather than ideas, facts, works in the public domain, or any other non-protectable elements. The quantitative component generally concerns the amount of the copyrighted work that is copied." Id.

The district court found that the work taken was qualitatively substantial in that the copied portions consisted of the heart of the original and that the Appellee, in turn, made them the heart of its new work.

But the district court's analysis is flawed because this analysis should not be applied to a parody. Campbell, 510 U.S. at 588. As the Supreme Court in Campbell put it, "[p]arody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation." Id. The purpose of parody "lies in the tension between a known

original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable." Id.

The district court is correct in its analysis that the quality used by the new work was the heart of the original, however the heart of the work is also what "conjures up" the part of the work that makes it recognizable. Parody's have to take the heart of the work to make their point, but they cannot take more than necessary. Once enough has been taken in order for viewers to be able to identify the original work, the question then becomes, how much more is reasonable? According to Campbell, this "will depend . . . on the extent to which the . . . overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original." Id.

It is significant that Appellee not only copied the key characteristics of the Danny Terrygarryan character, but went further by including her house sigil, as well as some of her most famous lines from the television show. But thereafter "Game of Democracy" departs from the Danny Terrygerryan character and adds its own spin on the character. Appellee situates her in a markedly different genera of television. "Game of Crowns" is a show placed in a medieval, science fiction, fantasy world, while "Game of Democracy" is a political comedy in modern times. We conclude that copying can be substantial when it is in relation to the parodic nature of the work, even if the work taken was the heart of the original work. That is the case here.

We also believe the district court erred in finding that Appellee used a quantitatively substantial portion of the original work. Danny Terrygarryan appeared in sixty-eight of the eighty episodes in "Game of Crowns" and three of the four novels by Marvin. Appellee took many of the main features of the character but also aspects of her personality and demeanor, along with some outlying facts. The district court determined this to be an excessive quantity. We disagree. The amount used by Appellee does not exceed the amount needed for a parody. For Appellee to ensure the character will be recognizable, at minimum, it needs to take the basic physical characteristics of the Danny Terrygarryan character, otherwise, the work won't "conjure up" anything recognizable for the viewers.

"Game of Crowns" is one of the most popular television shows in the world and its character Danny Terrygarryan, is one of the most popular characters on the show. Appellants argue that very little reference to the character is needed in order for it to "conjure up" the original character from "Game of Crowns." Appellee, on the other hand, argues that "Game of Democracy" took only the portions that it needed to serve its parodic purpose, and that the work as a whole could not be commented on without referencing the most recognizable portions of the character.

We agree with Appellee's argument. As noted, Appellee uses a substantial portion of the protected character, but this is necessary for a parody, in order for it to be recognizable to the public as such. Therefore, taking into consideration the amount and substantiality taken along with the parodic nature of the work, this factor weighs in favor of a fair use defense.

(4) Effect on Future Markets/Value of Work

The final factor to consider in a fair use analysis is, "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This factor includes any market effect caused by the release of the derivative work as well as any future harm for the original and derivatives of the original. Campbell, 510 U.S. at 590. The Campbell court continued: "[T]he only harm to derivatives that need concern us ... is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright that the like threat to the original market." Id. at 593. The Second Circuit has characterized this factor as calling for the court to strike a balance "between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use." MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir.1981) (citations omitted).

As for the potential market, Appellants Martin and HVO introduced evidence in the district court regarding the value of its copyright for "Game of Crowns," as well as several derivative works that have not been released to the public. The derivative works have yet to yield any financial reward, however, HVO has spent millions of dollars on production of the forthcoming shows. The original work, on the other hand, has generated millions of dollars for the copyright owners, and is currently valued at just under $1 billion on the market. The show's market value had been above $1 billion but its value dropped around the time of the release of Appellee's new show. Appellants argue that the new show caused the drop in value. Appellants also contend that the new show precipitated the significant loss in profits for Danny Terrygarryan merchandise. Appellants stated at deposition that they fear the new show will significantly impact their future derivatives, which they have already spent millions of dollars to produce and advertise for. Further, Appellants have been in talks with the television network NVC to license the use of several Game of Crowns characters, including Danny Terrygarryan, in a new satirical television series.

Appellants' provide little evidence to demonstrate that "Game of Democracy" has caused any market harm cognizable under copyright law. While Appellants have presented evidence of a drop-in market value for the show, as well as a drop-in sales relating to the Danny Terrygarryan character, they provide no evidence that Appellee's new show caused it. The evidence seems to lean towards the conclusion that the drop in value and sales was due to its controversial final season.

The Supreme Court has made clear that the court "must take account not only of harm to the original but also of harm to the market for derivative works." Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 568 (1985). Also, "[e]vidence of substantial harm to [a derivative market] would weigh against a finding of fair use." Campbell, 510 U.S. at 593. But Appellants provide little evidence to demonstrate that "Game of Democracy" would supplant demand for or otherwise harm future derivative works. It is hard to determine any harm when the works have not yet been released. It would be unreasonable for this Court to assume any future harm based solely on the fact that the copyright holders have invested significant funds and efforts on its derivatives. And

since there is no evidence of a causal link between the loss in value and sales for the original and the release of Appellee's new show, there is no reason to assume that the new show will have any market effect on the future derivatives. Finally, while Appellants have discussed licensing arrangements with NVC for a show that may at least arguably be competitive with Game of Democracy, that show is still in its infancy, if that. There is no evidence that NVC will go forward with that show, that Appellants would have licensed its characters, including Danny Terrygarryan, to NVC, or that any breakdown in those talks was the result of Appellee's show. Based the evidence before us, any potential harm relating to licensing its characters—or the failure to license its characters—to NVC or anyone else, remains hopelessly speculative.

Thus, we conclude that Appellants' evidence, of both relevant market harm and future market harm, is insufficient to establish that the new work substitutes the original or any future derivative works. Therefore, the fourth factor weighs in favor of finding a fair use defense.

(5) Fair Use Conclusion

Based on the foregoing analysis, we hold that Appellee has a fair use defense to the copyrighted material.

V. Conclusion

Because of the foregoing, we reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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