

Fair Use Mashup Theory Ga-Fluppted by Ninth Circuit

December 31, 2020 – The TMCA

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Just in time to steal ComicMix's Christmas, the Ninth Circuit recently held that the bookmaker's mashup story *Oh, the Places You'll Boldly Go!* (which combines elements of the Dr. Seuss book *Oh, the Places You'll Go!* with *Star Trek*) is not a defensible fair use under copyright law.

The opinion reverses in part a summary judgment ruling by the District Court for the Southern District of California, which we wrote about here. Seuss Enterprises had sued ComicMix for copyright and trademark infringement over *Boldly*, which features *Star Trek* characters set in a Seussian world highly reminiscent (and in some instances directly copied from) *Go!* and other works by Dr. Seuss. The TMCA featured a Seuss-styled introduction to the case here. ComicMix was able to eliminate Seuss's trademark and associated unfair competition claims on a motion to dismiss. Next, on summary judgment, the district court concluded that ComicMix's work constituted fair use (and thus defeated Seuss's copyright claim) because the book was a highly transformative "literary and pictorial 'mash-up.'" Seuss appealed both decisions.

Beginning with its own riff on a quote from *Go!* ("mash-ups can happen to you"), a unanimous Ninth Circuit panel concluded that none of the four fair use factors favored ComicMix and reversed the district court. Considering the all-important transformative-

use factor, the court concluded that “[a]lthough ComicMix’s work need not boldly go where no one has gone before, its repackaging, copying, and lack of critique of Seuss, coupled with its commercial use of [Dr. Seuss’ work], do not result in a transformative use.” Next, the court found that the creative nature of *Go!* tilted in favor of Seuss. With respect to the amount and substantiality of the work copied, ComicMix “extensive[ly] and meticulous[ly]” copied *Go!*, and statements in the record showed that ComicMix could have created *Boldly* without this sort of “wholesale copying.” Finally, the court held that ComicMix’s book “targets and usurps” Seuss’s potential market, including because it intentionally aimed to capitalize on the same graduation market as Seuss.

Although Seuss may have gotten its green eggs, it didn’t get its ham. The Ninth Circuit affirmed the district court’s denial of Seuss’s trademark claim. That analysis focused on whether the federal Lanham Act even applies given that the alleged infringing mark is the title of ComicMix’s *Boldly*. Under the *Rogers* test, a Lanham Act claim applies only if the allegedly infringing title of an artistic work is (1) not artistically relevant to the underlying work or (2) explicitly misleads consumers as to the source or content of the work. The test was not satisfied because the title helped to achieve ComicMix’s artistic purpose and did not explicitly mislead consumers.

The question now is whether ComicMix will seek further review and, if so, whether the Supreme Court will take up the issue. Until then, we leave you with some further Seussian stylings:

We wrote ’bout it before, so you’ll want to hear more,

Of the rulings on mashups and smashups galore.

So come round once again, and listen my friend,

To a story that could be quite far from the end.

Now, the first-level court, in its SJ report,

Found a combo of works a sufficient retort

To the claims of the Seuss shouting, “This ain’t fair use!

A mashup, transformative? That’s far, far too loose!”

Undeterred by a loss from that first-level boss,

Seuss went back to work to perfect its next toss.

De novo review, don’t you know that it’s true,

Can provide quite a different result when it’s through.

So appeal Seuss did file 'gainst the judgment reviled,
In hopes to proceed to the coveted trial.
The Ninth was enthused (and slightly amused),
And its notions of fair use downright disabused.
"A mashup you say? We don't see it that way.
You took all of their content, and that's not okay.
Your work doesn't transform and quite far from the norm,
In the mind of book buyers 'twill cause a s***storm."
"So go back to the start and take this to heart,
Fair use isn't accomplished by jamming some parts
Of a couple of works with some relative quirk
Together like some sort of drunk soda jerk."
'Fore this wears to the bone and again you do groan,
I believe that its time that we leave this alone.
So, we'll try to be curt yet remain quite alert,
And we'll see if the masher is granted its cert.