

Live Long and Mashup: Seussian-Style Universe Deemed Acceptable Fair Use

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by Lindsey Sadler



In June of 2017, channeling the Seussian musings of the case at hand, we first introduced you to the Southern District of California case, *Seuss Enters., L.P. v. Comicmix LLC*, 372 F. Supp. 3d 1101 (S.D. Cal. 2019), which promised to have a major impact on copyright fair use rulings. Since the time of our first blog post, an important ruling in the case has transformed how “mash-ups” factor into a fair use defense.

By way of background, Plaintiff Seuss Enterprises is the assigned copyright owner of the late Dr. Seuss’s works, including the piece at issue in this case—*Oh, the Places You’ll Go!* Defendants include the aforementioned company and individuals (“Defendants”) with experience in writing television shows and illustrations, with notable credits including

work on the famous sci-fi series, *Star Trek*. They decided to collaborate on the creation of a “Seuss-style Star-Trek” theme of backgrounds for use with a book and related merchandising. In a nod to inspiration culled from Dr. Seuss’s work, Defendant called the project, *Oh, the Places You’ll Boldly Go!* (“*Boldly!*”).

Defendants successfully raised enough money and interest to work with distributors, but before *Boldly!* could be published, Plaintiff filed suit in the Southern District of California, halting Defendants’ efforts to release and monetize the book. In its lawsuit, Plaintiff alleged both copyright and trademark infringement, as well as a claim for unfair competition. Defendants moved to dismiss all claims, but the Court only granted the motion as to Plaintiff’s trademark and unfair competition claims, noting that Plaintiff’s “general illustration style is not protectable.” Plaintiff’s copyright infringement claim survived, for the time being.

In summary judgment briefing on Plaintiff’s remaining copyright claim, Defendants admitted they copied from Dr. Seuss’s work to inspire their own designs and illustrations, including attempts to make them “nearly identical.” But such copying, the Defendants claim, was “essential to the parody,” relying heavily on the copyright doctrine of fair use to shield themselves.

In its March 12, 2019, order on Defendants’ motion for summary judgment, the court ruled in favor of Defendants, despite the explicit “copying” of the underlying work. First and foremost, the court held the Defendants’ work was **not** a parody, despite claims to the contrary, because Defendants’ work merely used the Seussian illustration style and story format as a medium to convey particular adventures and tropes from the *Star Trek* universe. But *Boldly!* made no attempt to comment on or ridicule Dr. Seuss’s work. Instead, the court defined Defendant’s works as “most appropriately” a “literary and pictorial ‘mash-up.’”

The court held that “the copied elements are always interspersed with original writing and illustrations that transform [Dr. Seuss’s] pages into repurposed, *Star-Trek* centric one.” Although Defendants certainly “borrowed” from the Dr. Seuss original, even “at times liberally,” the court found the borrowed elements were always adapted or transformed in the Seussian cosmos theme of the project.

Circling back to the main thrust of a copyright infringement analysis, the court evaluated whether Defendants copied more than is necessary to accomplish the transformative purpose. Such an evaluation was key to determining whether Defendants’ use of Plaintiff’s work was justified fair use, or whether Defendants’ improperly infringed. And although Defendants did use certain discrete elements foundational to the Dr. Seuss work, they did not use Dr. Seuss’s words, his characters, or his universe. At the essence of the mash-up, “portions of the old work [were] incorporated into the new work, but emerge[d] imbued with a different character.” Therefore, *Boldly!* was a transformative mash-up, and the court granted summary judgment against Plaintiff’s final claim for copyright infringement.

Plaintiff appealed the decision to the Ninth Circuit Court of Appeals. Numerous interested

parties filed amicus briefs in support of either Seuss Enterprises or Comicmix, clearly indicating the outcome of this case has ramifications for copyright infringement claims moving forward. Oral arguments were originally scheduled for April 1, 2020, but given current events, arguments were pushed back until April 27, 2020. As that new schedule held, we anticipate a ruling in late summer, early fall 2020. But until then, as we part, we'll leave you with our own Seussian stylings:

Defendants claimed they copied that, they borrowed this;
To channel Seuss in the great unknown abyss;
"We had to use the style and theme;
So that our readers would understand the dream."

But as expected, Plaintiff continued to cry foul;
And on MSJ, refused to throw in the towel.
"It is blatant infringement, you see;
Surely, district judge, you must agree!"

Alas, Plaintiff has found a worthy adversary,
As the judge ruled Defendants didn't use more than was necessary;
She found the mash-up continues to rule the day;
But we'll have to see what the Ninth Circuit has to say.

The moral of this chapter is clear,
If you borrow from there, and copy from here;
Make sure you do not take too much,
And transform what you do, adding your own touch.

Mashups are interesting, and creative too,
But take more than you need, and someone might sue;
So we will leave you with a parting chore,
Always try to go where no creator has gone before.