

Truth or Fiction . . . or Copyright Infringement?

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Author Denise Shull lost her challenge to the Showtime television show *Billions*, which she claims copied the character bearing her name in Shull's book *Market Mind Games: A Radical Psychology of Investing, Trading and Risk*. Shull alleges that she was never paid for the time she spent consulting with *Billions* writers and actors, and that the show committed copyright infringement in its portrayal of Dr. Rhoades, an in-house female psychological consultant who worked with traders to harness their emotions to be even more successful.

The saying is that truth is stranger than fiction, but one question here was whether Shull's book was truth or fiction. While one might think an author is most often claiming the book describes real facts, while others challenge its credibility, here the roles were reversed. Shull claimed that her book was a work of fiction, with the main character as a "fictionalized" version of herself. In other words, Shull claimed copyright infringement for Showtime's alleged copying of Shull's fictional version of herself. Defendants claimed the book was more like an academic work, and the same protections did not apply.

The federal court for the Southern District of New York granted Defendants' motion to dismiss and dismissed the case *with prejudice*. While many courts will grant an opportunity for leave to amend, Shull's attorneys did not make such a request at the time of the motion to dismiss, either by separate motion or by mention in their opposition brief. The court granted a dismissal with prejudice, and denied Shull's request for reconsideration or leave to amend as futile.

On appeal, the Second Circuit affirmed the dismissal and ended Shull's case. First, the Second Circuit agreed that the works were not substantially similar under the "more discerning observer" test, which examines "aspects such as total concept and feel, theme, characters, plot, sequence, pace and setting." The court pointed to the difference between Shull's "academic book that draws on fictional stories to illustrate Shull's ideas," and the "entirely fictional serial television drama...that lies in the age old trifecta of money, power and sex."

Second, the Court agreed that Shull failed to state a claim under the "quantitative and qualitative" approach, which requires the copying of more than a *de minimis* amount of expression – as distinct from copying of ideas, facts or non-protectible elements. The Court's dim view of Shull's case was made clear here: it found "no actionable copying, let alone copying that exceeds the *de minimis* threshold," and noted that Plaintiff "cannot copyright the idea that one should eat, sleep, and exercise to perform well."

What are the takeaways for practicing attorneys? Well, for one, the Second Circuit remains open to dismissing copyright cases at the Rule 12 stage based on the merits of

infringement. But the *Shull* opinion was released as non-precedential, and the impact of the ruling is yet to be seen. Finally, this opinion showcases how defendants enjoy the upper hand in situations where a plaintiff's initial pleadings is lacking.