Kluwer Copyright Blog

Fair Use for Documentaries in US Copyright Law: Brown v Netflix

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Photo by Geoff Gill via Pixabay

In February 2019, Tamita Brown, Glen S. Chapman, and Jason T. Chapman ('plaintiffs') collectively filed a copyright infringement lawsuit against Netflix, Amazon, and Apple ('defendants'), claiming that the defendants had directly and indirectly infringed their copyright over the song "Fish Sticks n' Tater Tots" by using it in their documentary titled 'Burlesque' (*Brown v. Netflix, Inc.*). The United States District Court for the Southern District of New York ('District Court') held that the defendants' use of the song was fair use and granted the motion to dismiss the claims. On appeal, on 18 May 2021 the US Court of Appeals for the Second Circuit ('Second Circuit') upheld the District Court's decision.

Background

The song "Fish Sticks n' Tater Tots" was composed by the plaintiffs in 2011. The song shows a student's journey from her classroom to the school's cafeteria to have fish sticks and tater tots for lunch. In 2017 the documentary titled "Burlesque: Heart of the Glitter Tribe" was released on Netflix, Amazon, and Apple. The film uses eight seconds of this particular song in a two minute and forty-seven second burlesque dance routine. The lyrics of the song's chorus 'fish sticks n' tater tots' repeats five times in the dance routine, during which the burlesque dancer wearing a 'reverse mermaid' costume with the head of a fish and legs of a woman steps behind a sign that says 'hot oil' to change into brown leggings, removing the fish head, and emerging as a fish stick. The rest of the dance routine music consists of other songs.

Decision

The plaintiffs filed a lawsuit against Netflix, Amazon, and Apple, claiming that they had directly (by unauthorized public performance under 17 U.S.C. § 106(4), and by unauthorized reproduction under 17 U.S.C. § 106(1)) and indirectly (by inducement of copyright infringement, contributory copyright infringement, and vicarious copyright infringement) infringed their copyright by distributing and streaming the film. The defendants in response moved under Federal Rule 12(b)(6) to dismiss the plaintiffs' claims, contending that their use of the song in the documentary was fair use under 17 U.S.C. § 107.

In 2020 the District Court agreed with the defendants that the use of the song in the documentary was fair use and hence granted the motion to dismiss. The court found that three out of four fair use factors i.e. the purpose and character of the use, the amount and substantiality of the portion used, and the effect on the potential market, weighed in favor of fair use (with the remaining factor, i.e. the nature of the copyrighted work, being considered neutral and favoring neither party). As mentioned, the Second Circuit upheld the District Court's decision.

The Second Circuit first found that the documentary character of the film is within the fair uses identified by 17 U.S.C. § 107, as the film provides commentary on the art of burlesque. The performance of the song clip in the film was transformative, as it was held that the filmmaker had used the unaltered song as "raw material" to produce a work with undoubtedly "new aesthetics" (in this regard, the District Court had cited the 2006 Second Circuit's precedent *Blanch v. Koons*). Instead of merely using various material including the song in question – added the court – the film combined it with cultural commentary on topics such as gender, sexuality, and the artistic process. The defendants' incidental use of the song was therefore found consistent with the documentary nature of the film providing commentary and criticism (the purpose and character of the use). The District court had further cited another Second Circuit precedent, i.e. the 2013 decision *Cariou v. Prince* (where it had held that artist Richard Prince's appropriation of Patrick Cariou's photographs of Jamaican Rastafarians was fair use, and that a number of his works were transformative fair uses of Cariou's pictures), noting that even if the film was "purely commercial, as Plaintiffs allege, because the secondary use is of a transformative nature, the first factor still weighs in favor of Defendants".

The court did not address the 'nature of the copyright work' factor (the second factor) as the District Court had already determined that such factor favored neither party.

The application of the third factor, the amount of borrowing, was favorable to the defendants as well. Only eight seconds out of the total 190 second song are heard in the film. Although the chorus of the song used was recognizable and can be called the 'heart' of the song, the Second Circuit determined that the use of a recognizable chorus was reasonable in relation to the documentary purpose of the use. The plaintiffs had contended that it is not fair use as the film uses more than what is necessary to fulfil this purpose and instead of using eight seconds, they could have used a shorter clip since only the phrase "fish sticks" was required to convey the message. The argument could not persuade the Second Circuit, though. It was indeed noted by the court that the fair use exception does not require the film to use the shortest possible snippet to convey its message of commentary and criticism.

Finally, the Second Circuit found that the fourth factor – the 'effect on the potential market' – favors fair use as well. It noted that a mere eight seconds of the song's chorus rather than the full 190 seconds of the song is used in the documentary film – and therefore the intended audience for the song 'Fish Sticks n' Tater Tots' would be unlikely to buy 'Burlesque' as a substitute for the original song. Furthermore, the Second Circuit stated that there was "virtually no possibility" of usurpation where the original work was "a children's song intended for an all-ages audience" and the infringing work was "clearly intended for adult audiences" (citing *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 512, S.D.N.Y. 2017). To strengthen further its finding, the Second Circuit also cited its own 2015 ruling in *Authors Guild v. Google, Inc., where it held that the* Google Books Library Project, which consists of scanning and making searchable the book collections of major research libraries, did not produce a competing substitute for the books.

Since the Second Circuit found the use of the song in the film fair and thus there was no direct infringement, the claims for secondary copyright infringement were also dismissed.

Comments

This decision will certainly be welcomed by documentary makers, who may now feel more encouraged to use works created by others – not only music but also visual artworks, especially those which are placed in the public environment. It should also be borne in mind that the court rejected the plaintiffs' argument that the film should not be considered a documentary but just a "scripted creative work" which does not refer to real facts.

Those who work on documentaries cannot help praising the fair use finding in *Brown v Netflix*. The way the Second Circuit interpreted the transformative use test here is different from how the same court applied it in a previous case, i.e. *The Andy Warhol Foundation v. Goldsmith*, an early 2021 case on (denied) fair use of photographs depicting the popstar Prince by Andy Warhol. As has been noted, in *Warhol v. Goldsmith* the court found that rather than identifying "the meaning or impression that a critic – or for that matter, a judge – draws from the work", the test in question aims at determining how the third party's work may be "reasonably perceived", a sort of objective test. On the contrary, in *Brown v Netflix* the Court's finding of transformativeness appears to focus on how the documentary intends to transmit the critical (and modified) artistic message – and not on the way the third party's work is objectively perceived by the public. As has been pointed out, such a change in the Second Circuit's case law may have been prompted by the recent US Supreme Court decision in *Google v Oracle*, a ruling published after *Warhol v Goldsmith and focusing on computer code and copyright*, where the transformative use analysis was based on the user's subjective intent.

The evolution in the case law of the Second Circuit may constitute a game changer for documentary makers. The latter have in the past too often run into difficulties as clearing rights over the (often incidental and documentary) use of third parties' music or artistic works had turned in an almost impossible task, something comparable to a walk through a minefield. Take as an example the documentary makers who have tried to use the iconic "I have a dream" speech by Martin Luther King and have been prevented from doing so because of his Estate's aggressive licensing and enforcement strategy.

As pointed out by Keith Aoki, James Boyle and Jennifer Jenkins in Bound by Law? Tales from the

Public Domain, “documentaries are records of our culture. But our culture is full of artifacts protected by intellectual property rights – music, images, photographs”. More decisions like the ruling in *Brown v Netflix* will certainly help restore the right balance between the interest of copyright owners and those of documentary makers, by affirming a robust fair use space which allows said filmmakers to use necessary raw material.

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