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CASE SUMMARY

DR. SEUSS ENTERPRISES V. COMICMIX LLC: NINTH CIRCUIT AFFIRMS COPYRIGHT FAIR USE AND TRADEMARK INFRINGEMENT PRECEDENTS

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INTRODUCTION

Courts' interpretation of parody "fair use" under the Copyright Act of 1976 ("Copyright Act") arises from a well litigated path.[1] Even so, in 2020, the Ninth Circuit was again compelled to rearticulate well established circuit and Supreme Court precedents.[2]

The eponymously named Dr. Seuss Enterprises ("Seuss") is no stranger to litigation involving the prolific author's repertoire of notable children's books.[3] More than twenty years ago, in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.* ("*Penguin*"), the Ninth Circuit favored Seuss, concluding that *The Cat NOT in the Hat!*, a self-described "parody" of *The Cat in the Hat*, did not represent "fair use" of the children's book under the Copyright Act.[4] In 2019, Seuss entered litigation with ComicMix, LLC, the creator of *Oh, the Places You'll Boldly Go!*

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[1] *See* Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997); *see also* Monge v. Maya Mags., Inc., 688 F.3d 1164 (9th Cir. 2012); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); *see also* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

[2] *See* Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443, 463 (9th Cir. 2020), *cert. denied*, No. 20-1616, 2021 WL 2519166 (U.S. June 21, 2021).

[3] *See* Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d; *see also* Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d.

[4] Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d at 1403.

("*Boldly*"), another self-proclaimed parody, this time of the Dr. Seuss classic *Oh, the Places You'll Go!* ("*Go!*"), and other Seussian works.[5] The case presented a set of facts strikingly similar to those in *Penguin*.[6] Yet, in *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, the district court held that *Boldly*, despite structural similarities with *The Cat in the Hat*, constituted a "fair use" of Dr. Seuss's seminal work under the Copyright Act.[7] Further, the court concluded that First Amendment protections immunized *Boldly* from Seuss's claim of trademark infringement under the Lanham Act.[8] As a result, the court granted ComicMix's motion for summary judgment on both claims.[9]

On appeal, the Ninth Circuit reversed and remanded the district court's holding on copyright "fair use."[10] However, the Ninth Circuit affirmed the district court's Rule 12(c) dismissal and summary judgment in favor of ComicMix as to Seuss's trademark infringement claim.[11] The Ninth Circuit's holding reinforced its prior holdings—as well Supreme Court precedent—regarding "fair use" under the Copyright Act and the Lanham Act.[12] Further, the Supreme Court tacitly reaffirmed established precedent regarding both copyright and trademark fair use by denying ComicMix's petition for certiorari on June 21, 2021.[13]

I. BACKGROUND

A. FACTUAL BACKGROUND

Seuss holds copyrights in Dr. Seuss books and trademarks in the Dr. Seuss brand.[14] The corporation "carefully vets the many licensing requests it receives and works closely with the licensees and collaborators to produce" derivative works.[15]

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[5] *See* Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 372 F. Supp. 3d 1101 (S.D. Cal. 2019), *aff'd in part*, *rev'd in part and remanded*, 983 F.3d 443 (9th Cir. 2020), *cert. denied*, No. 20-1616, 2021 WL 2519166 (U.S. June 21, 2021).

[6] *See* Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d; *see also* Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 372 F. Supp. 3d.

[7] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 372 F. Supp. 3d at 1125.

[8] *Id.* at 1128.

[9] *Id.*

[10] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 463.

[11] *Id.*

[12] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); *see also* Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d at 1401.

[13] ComicMix, LLC v. Dr. Seuss Enterprises, L.P., (No. 20-1616), 2021 WL 2519166 at *1 (U.S. June 21, 2021).

[14] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 449.

[15] *Id.*

In May 2016, Glenn Hauman, Vice President of ComicMix; David Gerrold, a screenwriter of *Star Trek* television episodes; and Ty Templeton, an illustrator (collectively "ComicMix"), set out to create—and profit from—an unlicensed "mash-up" of *Star Trek* and three Dr. Seuss classics, *Oh the Places You'll Go!*, *How the Grinch Stole Christmas*, and *The Sneetches and Other Tales* (collectively "*Go!*").[16] A "mash-up" is "created by combining elements from two or more sources," for example, "a movie or video having characters or situations from other sources."[17] ComicMix decided to call their mash-up *Oh the Places You'll Boldly Go!* ("*Boldly*"), combining the Dr. Seuss title with the signature *Stark Trek* adjective, boldly.[18] Here, ComicMix intended for *Boldly*'s title, story, and illustrations to "evoke" *Go!* by placing *Star Trek* characters in a strange, new world—a "colorful Seussian landscape full of wacky arches, mazes, and creatures"—a world unlike the universe inhabited by the *Star Trek* crew.[19]

Despite potential legal risks, ComicMix concluded, without consulting a lawyer, that they need not seek a license for *Boldly*.[20] Hauman dismissed the risks, writing in an email to colleagues that *Boldly* would be "a parody of [Seuss's] work, which legally allows for reuse, vs. satire, which doesn't. Ironically, it was a Seuss lawsuit that helped define the legal distinction."[21] ComicMix planned to publish, sell, and profit from *Boldly*, engaging ecommerce retailer ThinkGeek to handle distribution and merchandising,[22] eventually agreeing to sell them 5,000 copies of *Boldly* ahead of the holiday shopping season.[23] ComicMix launched a crowdsourcing campaign on Kickstarter to pay for production and other costs, eventually raising almost $30,000.[24] Moreover, an editor at Andrews McMeel Publishing ("AMP") proposed a direct sale publication of *Boldly*.[25]

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[16] *Id.* ComicMix sought licenses for its use of neither Star Trek characters, nor literary elements from Seussian works. Only the latter are an issue in this case.

[17] *Mash-up*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/mash-up.

[18] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 448.

[19] *Id.* at 450.

[20] *Id.*; Def.-Appellees Answering Br. at 5-6, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No.19-55348.).

[21] Def.-Appellees Answering Br. at 7, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

[22] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 449.

[23] Def.-Appellees Answering Br. at 9, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

[24] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 449.

[25] *Id.* at 449-50; Reply Br. of Pl.-Appellant at 9, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

Buzz surrounding *Boldly* eventually caught the attention of Seuss.[26] On September 28, 2016, Seuss sent a cease and desist letter, asserting that *Boldly* was not fair use of *Go!*[27] On September 29, 2016, AMP backed out of the project to avoid being drawn into a dispute with Seuss.[28] On October 7, 2016, Seuss sent a takedown notice to Kickstarter, claiming ComicMix infringed the copyright in *Go!*[29] Kickstarter complied and placed all raised funds on hold.[30] On October 25, 2016, Seuss sent a follow-up cease and desist letter, which restated their position.[31] On October 28, 2016, ComicMix replied to Seuss, stating that *Boldly* was "a mashup protected by fair use."[32] Upon Seuss's request, ComicMix provided a draft copy of *Boldly*.[33] After reviewing the draft, Seuss filed suit against ComicMix on November 10, 2016.[34]

B. PROCEDURAL BACKGROUND

On November 10, 2016, Seuss filed suit in the Southern District of California against ComicMix.[35] In its amended complaint, Seuss asserted copyright infringement, trademark infringement, and unfair competition.[36] As with the original complaint, ComicMix moved to dismiss all of Seuss's claims.[37] The district court declined to dismiss Seuss's copyright infringement claim.[38]??The court then considered ComicMix's motion to dismiss Seuss's three trademark infringement claims, which involved "illustration style," the title of *Go!*, and typeface.[39]?The district court granted ComicMix's Rule 12(c) motion, dismissing Seuss's trademark infringement claim regarding the title of *Boldly*.[40] Then, the parties filed cross-motions for summary judgment on Seuss's copyright claim.[41] ComicMix moved for summary judgment on the remainder of Seuss's

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[26] *Id.* at 450.

[27] Reply Br. of Pl.-Appellant at 10, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

[28] *Id.* at 11.

[29] *Id.*

[30] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 450.

[31] Reply Br. of Pl.-Appellant at 13, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 14.

[35] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 450.

[36] *Id.*

[37] *Id.*

[38] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 372 F. Supp. 3d at 1111.

[39] *Id.*

[40] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 450.

[41] *Id.*

trademark infringement claim.[42] The district court granted ComicMix's summary judgment motion while denying Seuss's motion, holding that *Boldly* was a fair use of *Go!*[43] As such, the remainder of Seuss's trademark infringement claim failed.[44] On March 26, 2019, Seuss appealed to the Ninth Circuit, raising for review all copyright and trademark issues presented to the district court.[45] The specific issue on appeal was whether *Boldly* constituted fair use of *Go!* in copyright and trademark.[46]

II. ANALYSIS

The Ninth Circuit considered first whether *Boldly* constituted fair use under the Copyright Act, then whether *Boldly*'s use of the Seussian typeface and style of illustration constituted trademark nominal fair use under the *Rogers* test.[47] The Court held that *Boldly*'s use of various copyrighted portions of *Go!* did not constitute fair use under the Copyright Act.[48] As a result, the Court reversed the district court's summary judgment in favor of ComicMix, and remanded for further proceedings.[49] Then, the Court affirmed the district court's dismissal of Seuss's trademark claims, holding that *Boldly* constituted nominal fair use under the *Rogers* test.[50]

A. COPYRIGHT: *BOLDLY* DOES NOT MAKE FAIR USE OF *GO!*

In *Folsom v. Marsh*, a United States court first recognized the fair use defense, holding that copying President George Washington's writings constituted a "justifiable use of the original material, such as the law recognized as no infringement of copyright."[51] In 1976, Congress codified *Folsom*'s four-factor test in section 107 of the Copyright Act.[52]

Here, the Court considered all four fair use factors, which are: (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

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Opening Br. of Pl.-Appellant at 1, Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

[46] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 450.

[47] *Id.* at 463.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

[52] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 450-51.

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."[53] The Court characterized the analysis as a "Great Balancing Act," of which all factors are "to be explored, and the results weighed together, in light of the purposes of copyright."[54] The Court eventually concluded that all four factors weighed "decisively against a finding of fair use.[55]

1. Purpose and Character: Boldly *Constitutes a Commercial, Non-Transformative Use of* Go!

Under the first fair use factor, the Court considered the "purpose and character" of *Boldly*, specifically whether *Boldly* constituted a commercial or transformative use of *Go!*[56] Here, the Court concluded that *Boldly* constituted an "indisputably commercial use of *Go!*,"[57] recalling language from *Penguin* that commercial use "further cuts against the fair use defense" in the absence of "effort to create a transformative work."[58]

Next, the Court addressed transformative use.[59] To be transformative, a work must "add something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[60] The Court acknowledged that although the term "transformative" does not appear in the Copyright Act, the Supreme Court in *Campbell* interpreted the "central purpose" of the first factor inquiry to be to determine "whether and to what extent the new work is 'transformative.' "[61] Transformative use of the original work, the Court wrote, "can tip the first factor in favor of fair use."[62]

Under the transformative use inquiry, the Court first considered whether *Boldly* constituted parody.[63] Parody borrows elements from an original work to criticize or comment on the original.[64] In doing so, the

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[53] *Id.* at 451.

[54] *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994)).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 451-52 (quoting Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997)).

[59] *Id.* at 451.

[60] *Id.* at 453 (quoting Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d at 1401).

[61] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 452 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

[62] *Id.*

[63] *Id.*

[64] *Id.*

derivative work has "an obvious claim" to transformative use.[65] Here, the Court forcefully rejected ComicMix's arguments that *Boldly* constituted parody of Dr. Seuss's works because *Boldly* situated elements of *Star Trek*—a mature, adult-oriented form of entertainment—in a Seussian world in order to create a "funny" book.[66] The Court invoked its prior ruling in *Penguin*, writing, "[w]e considered and rejected this very claim in an appeal involving another well-known book by Dr. Seuss—*The Cat in the Hat*."[67] The Court concluded that, like the authors of *The Cat NOT in the Hat!*, the authors of *Boldly* had juxtaposed Seussian elements and outside elements, yet they had failed to introduce "critical bearing on the substance or style of" Dr. Seuss.[68] Therefore, the Court found that *Boldly* could not be characterized as parody.[69]

Next, the Court concluded that *Boldly* lacked "the benchmarks of transformative use" under the Ninth Circuit's three-factor analysis.[70] The three factors are: (1) "further purpose or different character," (2) "new expression, meaning, or message," and (3) the use of quoted matter as "raw material," instead of repackaging it.[71] First, the Court found that *Boldly* did not possess a further purpose or different character than *Go!*, but simply "propound[ed] the same message."[72] Second, the Court found that *Boldly* failed to add "new expression, meaning, or message," but simply "repackaged into a new format . . . the *Enterprise* crew's journey through a strange star in a story shell already intricately illustrated by Dr. Seuss."[73] Finally, the Court found that *Boldly* copied extensively from *Go!*, including illustrations, text, and story structure.[74] The Court concluded under its three-factor analysis that *Boldly* was not transformative.

2. *Nature of the Work:* Go!'s *"Nature" Constitutes an Expressive Work.*

After concluding that *Boldly* was neither a parody, nor transformative, the Court considered the "nature" of *Go!*, the original work. The Court weighed this factor in Seuss's favor, finding that ComicMix, in

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[65] *Id.*

[66] *Id.*

[67] *Id.* at 452-53.

[68] *Id.* at 453 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994)).

[69] *Id.*

[70] *Id.*

[71] *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 579); Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) (quoting Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990)). *Boldly* possesses none of these qualities; it merely repackaged *Go!*

[72] *Id.* at 454.

[73] *Id.*

[74] *Id.* at 450.

copying *Go!*, had copied a creative and expressive work.[75] Yet, the Court recognized that the second factor "typically has not been terribly significant in the overall fair use balancing."[76]

3. Amount and Substantiality: Boldly *Took Substantially from* Go!

Next, the Court found that the "amount and substantiality" of content *Boldly* took from *Go!* weighed "decisively" against fair use.[77] The Court weighed both "the quantitative amount and qualitative value of the original work used in relation to the justification for that use."[78] With regard to the quantity taken from *Go!*, ComicMix argued that it "judiciously incorporated just enough of the original to be identifiable."[79] The Court rejected this argument, pointing out that *Boldly* copied close to sixty percent of *Go!*[80], and that Templeton testified that he had copied the illustrations "down to the last detail."[81]

The Court explained that this factor's qualitative prong explores whether "the most valuable and pertinent portion," or "heart," of a work was copied.[82] The Court found that ComicMix's qualitative taking weighed against fair use.[83] To support its conclusion, the Court again pointed to *Boldly*'s illustrations, which copied the poses of Dr. Seuss's characters, as well as details as specific as the "crosshatch" on the illustration of a whimsical machine—which ComicMix "painstakingly" copied from *Go!*[84] The Court concluded that the third fair use factor weighed "decisively" in favor of Seuss, citing the fact that "ComicMix offer[ed] no justification for the commercial exploitation and the extensive and meticulous copying of *Go!*"[85]

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[75] *Id.* at 455-56.

[76] *Id.* at 456 (quoting Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1402 (9th Cir. 1997)).

[77] *Id.* at 458.

[78] *Id.* at 456 (quoting Seltzer v. Green Day, 725 F.3d 1170, 1178 (9th Cir. 2013)).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 456-57.

[82] *Id.* at 457 (quoting L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 940 (9th Cir. 2002)); Monge v. Maya Mags., Inc., 688 F.3d 1164, 1178 (9th Cir. 2012).

[83] *Id.* at 458.

[84] *Id.* at 457-58.

[85] *Id.* at 458.

4. Effect on Market and Value: Boldly *"Targets and Usurps"* Go!'s *Potential Market.*

The Court concluded its fair use inquiry by considering "the effect of the use upon the potential market for or value of the copyrighted work."[86] Here, the Court addressed the extent of market harm caused by the infringer and "'whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market' for the original" and "the market for derivative works."[87]

First, the Court found that ComicMix bore the burden to show that no potential for market harm existed.[88] To meet this burden, ComicMix offered as evidence an expert report, which the Court characterized as "premised on *Boldly* being transformative" and therefore insufficient to address the relevant inquiries under the fourth fair use factor.[89] The Court found that ComicMix intentionally targeted the same graduation market as *Go!*, as evidenced by the fact that ComicMix had scheduled to launch *Boldly* "in time for school graduations."[90] Next, the Court found that allowing publication of unlicensed works like *Boldly* under the aegis of fair use "would curtail *Go!*'s potential market for derivative works."[91]

Next, the Court considered "whether unrestricted and widespread conduct of the sort engaged in" would undermine Seuss's potential market.[92] The Court found against fair use, reasoning that allowing publication of *Boldly*—a non-transformative, unlicensed mash-up—could "create incentives to pirate intellectual property," resulting in a glut of similar mash-ups.[93] The Court concluded that factor four weighed in favor of *Go!*, and that, on balance, the district court erred in granting summary judgment in favor of ComicMix as to fair use under the Copyright Act.[94]

B. TRADEMARK

Next, the Court considered Seuss's trademark infringement claims with regard to the "Seussian style of illustration" and the "Seussian font,"

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[86] 17 U.S.C. § 107(4).

[87] Dr. Seuss Enterprises, L.P. v. ComicMix LLC, 983 F.3d at 458 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (quotation marks and citations omitted)).

[88] *Id.* at 459.

[89] *Id.* at 459-60.

[90] *Id.* at 460.

[91] *Id.*

[92] *Id.* at 461.

[93] *Id.* (quoting Monge v. Maya Mags., Inc., 688 F.3d 1164, 1182 (9th Cir. 2012)).

[94] *Id.*

concluding that both failed as a matter of law.[95] Here, the threshold question was whether the Lanham Act applies.[96] To determine this, the Court applied the *Rogers* test, which considers whether the allegedly infringed trademark is (1) "not artistically relevant to the underlying work" or (2) "explicitly misleads consumers as to the source or content of the work."[97] If a Plaintiff meets one prong, then the Lanham Act applies.[98] However, neither prong is easy to fulfill.[99] "Any artistic relevance 'above zero'" is sufficient to preclude fulfilling the first prong.[100] To fulfill the second prong, an allegedly infringing use must be an "explicit indication, overt claim, or explicit misstatement."[101]

The Court found that *Boldly*'s use of *Go!*'s "allegedly valid trademarks" in title, typeface, and style precluded fulfilling the first prong of *Rogers* because use of these three elements was "relevant to achieving *Boldly*'s artistic purpose."[102] The Court also found that *Boldly* was not explicitly misleading as to source or content, despite borrowing the Seussian font, style of illustrations, and altering the title by a single word—boldly.[103] Seuss's survey evidence showing actual consumer confusion did not sway the Court.[104] The Court explained that the *Rogers* test tolerates "the slight risk that [the use of the trademark] might implicitly suggest endorsement or sponsorship to some people." Further, the Court explained that *Boldly,* unlike other recent Ninth Circuit cases, did not "stress the outer limits of *Rogers.*"[105] Although ComicMix used the Seussian typeface, title, and style in *Boldly* in the same way that Dr. Seuss used them in his works, ComicMix "added . . . expressive content to the work beyond the mark itself."[106] The Court concluded that Seuss had failed to fulfill either prong of the *Rogers* test, and the Court therefore affirmed the district court's dismissal of Seuss's trademark claims.

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[95] *Id.*

[96] *Id.*

[97] *Id.* (quoting VIP Prods. LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170, 1174 (9th Cir. 2020)).

[98] *Id.* at 462.

[99] *Id.*

[100] *Id.* (quoting Twentieth Century Fox Television v. Empire Distribution, Inc., 875 F.3d 1192, 1198 (9th Cir. 2017)).

[101] *Id.* (quoting Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1245 (9th Cir. 2013)).

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 463.

[106] *Id.* (quoting Gordon v. Drape Creative, Inc., 909 F.3d 257, 270 (9th Cir. 2018)).

III. IMPLICATIONS

Dr. Seuss Enterprises, L.P. v. ComicMix LLC is unlikely to have an impact on statutory interpretation of the Copyright Act or trademark fair use. In this case, the Ninth Circuit adhered strongly to both its own and Supreme Court precedents on both sets of claims. Further, the Court at times chided ComicMix both for clearly attempting to eschew fair use precedent, and for misreading statutory language.[107] The Supreme Court denied ComicMix's petition for certiorari on June 21, 2021, a development that buttresses the conclusion that this case raises unremarkable questions regarding copyright and trademark fair use.

CONCLUSION

In *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, the Ninth Circuit reversed and remanded the district court's grant of ComicMix's motion to dismiss with regard to copyright fair use. However, the Ninth Circuit affirmed the district court's grant of ComicMix's motion to dismiss with regard to trademark infringement. This case confirms that, although mash-ups may constitute fair use, a mash-up must be considered in light of the fair use factors articulated in the Copyright Act. Further, this case confirms the Ninth Circuit's use of the *Rogers* test with regard to alleged trademark infringement in an expressive work.

[107] *Id.* at 458 ("This view misreads *Lenz*[.]"); *Id.* at 459 ("This is fake math that distorts the result because ComicMix has identified the wrong denominator[.]").