IP Litigator Ken Parker in Bloomberg Law: Places a Dr. Seuss/Star Trek Mashup Will Go Very Likely Include Return to the District Court

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Haynes Boone Partner Ken Parker talked with *Bloomberg Law* about an upcoming ruling in a copyright fight over a Dr. Seuss/Star Trek mash-up that will clarify when use of an existing work is transformative enough to constitute fair use.

Here is a recap of the case and article:

Transformative use generally allows copying an existing work if the new work changes its character sufficiently to be "fair use," which includes several factors, including giving give the work new meaning. The case landed at the U.S. Court of Appeals for the Ninth Circuit after a lower court ruling that ComicMix LLC's "Oh, the Places You'll Boldly Go!" didn't infringe Dr. Seuss' classic because it sufficiently altered the character of the children's book.

The appellate court's three-judge panel probed attorneys for Dr. Seuss Enterprises and ComicMix on whether "Boldly" went far enough to alter "Oh, the Places You'll Go!" and met other factors required to qualify as fair use. Among other things, Dr. Seuss Enterprises argued that a clear admission that an author of the mash-up "slavishly" mimicked the Dr. Seuss classic fatally undermined ComicMix's fair use defense. The mash-up shows Star Trek characters drawn in Dr. Seuss' distinctive, colorful style and closely tracks the layouts of the original work.

The judges skeptically probed several issues. They included the importance of Dr. Seuss Enterprises' licensing of other Go! mash-ups; the district court's explicit requirement that the copyright owner, not the accused infringer, bear the burden of establishing commercial damage in the process of defeating an accused infringer's fair use affirmative defense; and whether any kind of mashup, standing alone, was enough to make an accused work transformative. The district court's interpretation of a transformative work seemingly makes nearly anything fair use and would "sink the notion of copyright protection," Circuit Judge M. Margaret McKeown said during arguments.

Given the skepticism of the panel, the lower court decision is unlikely to be affirmed, intellectual property litigator Ken Parker of Haynes Boone said.

"Any one of those factors would likely be enough to reverse. . . . Together, I think you're looking at 100%," Parker said. "I think they will clarify what 'transformative use' is, particularly that mash-ups standing alone aren't transformative."

To read the full article, click here. (Subscription required)

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