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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROL BURNETT, an individual; WHACKO, INC., a California corporation,
Plaintiff,
v.
TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation,
Defendants.

Case No. CV 07-01723 DDP (RCx)
ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
[Motion filed on April 27, 2007]

This matter comes before the Court on Twentieth Century Fox Film Corporation's ("Fox") motions to dismiss for failure to state a claim and special motion to strike pursuant to California's Anti-SLAPP statute. After reviewing the papers submitted by the parties, the Court grants the motion to dismiss, deny the special motion to strike as moot, and adopts the following order.

I. BACKGROUND

Family Guy is a half-hour, animated, comedy television program broadcast on primetime and geared toward an adult audience. Compl.

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1 ¶ 10. The show borrows heavily from popular culture, following the
2 exploits of the Griffin family and friends in the fictional suburb
3 of Quahog, Rhode Island. Id. ¶ 9. Family Guy routinely puts
4 cartoon versions of celebrities in awkward, ridiculous, and absurd
5 situations in order to lampoon and parody those public figures and
6 to poke fun at society's general fascination with celebrity and pop
7 culture. See, e.g., Ex. A.

8 On or about April 23, 2006, Fox aired an episode of "Family
9 Guy" entitled "Peterotica." Id., ¶ 10. Near the beginning of the
10 episode, the Griffin family patriarch, Peter Griffin, an "Archie
11 Bunker"-like character, enters a porn shop with his friends. Id.
12 ¶¶ 9, 10. Upon entering, Peter remarks that the porn shop is
13 cleaner than he expected. Id., ¶ 10; Ex. A. One of Peter's
14 friends explains that "Carol Burnett works part time as a janitor."
15 Id. The screen then switches for less than five seconds to an
16 animated figure resembling the "Charwoman" from the Carol Burnett
17 Show, mopping the floor next to seven "blow-up dolls," a rack of
18 "XXX" movies, and a curtained room with a sign above it reading
19 "Video Booths." Id. As the "Charwoman" mops, a "slightly altered
20 version of Carol's Theme from The Carol Burnett Show is playing."
21 Id. ¶ 10. The scene switches back to Peter and his friends. Id.
22 One of the friends remarks: "You know, when she tugged her ear at
23 the end of that show, she was really saying goodnight to her mom."
24 Id.; Ex. A. Another friend responds, "I wonder what she tugged to
25 say goodnight to her dad," finishing with a comic's explanation,
26 "Oh!" Id.

27 In response to this Family Guy clip, plaintiffs Carol Burnett
28 and Whacko, Inc., filed this suit against defendant Fox for: (1)

1 copyright infringement; (2) violation of the Lanham Act, 15 U.S.C.
2 § 1125; (3) violation of California's statutory right of publicity,
3 Civil Code § 3344; and (4) common law misappropriation of name and
4 likeness. Defendant now moves to dismiss plaintiffs' claims.
5 Defendant also brings a special motion to strike Burnett's
6 supplemental state law (claims) under California's anti-SLAPP
7 statute, California Code of Civil Procedure § 425.16.

8
9 **II. LEGAL STANDARD**

10 Dismissal under Rule 12(b)(6) is appropriate when it is clear
11 that no relief could be granted under any set of facts that could
12 be proven consistent with the allegations set forth in the
13 complaint. Newman v. Universal Pictures, 813 F.2d 1519, 1521-22
14 (9th Cir. 1987). The court must view all allegations in the
15 complaint in the light most favorable to the non-movant and must
16 accept all material allegations - as well as any reasonable
17 inferences to be drawn from them - as true. North Star Int'l v.
18 Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).

19 The scope of review on a motion to dismiss for failure to
20 state a claim is generally limited to the content of the complaint.
21 Pegasus Holdings v. Veterinary Centers of America, Inc., 38
22 F.Supp.2d 1158, 1159-60 (C.D. Cal. 1998). The Court may, however,
23 consider exhibits submitted or referenced in the complaint and
24 matters that may be judicially noticed pursuant to Federal Rule of
25 Evidence 201. Id. Indeed, "documents specifically referred to in
26 a complaint, though not physically attached to the pleading, may be
27 considered where authenticity is unquestioned." Daly v. Viacom,

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1 Inc., 238 F.Supp.2d 1118, 1121-22 (N.D. Cal. 2002) (considering
2 television program referenced in, but not attached to, complaint).

3 Leave to amend should not be granted where the complaint is
4 futile. In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970,
5 991 (9th Cir. 1999).

6 Federal district courts may exercise supplemental jurisdiction
7 "over all other claims that are so related to claims in the action
8 within such original jurisdiction that they form part of the same
9 case or controversy" 28 U.S.C. § 1367(a). Courts "may
10 decline to exercise supplemental jurisdiction over a claim under
11 subsection (a) if . . . (3) the district court has dismissed all
12 claims over which it has original jurisdiction" 28 U.S.C.
13 § 1367(c)(3). See also Ove, 264 F.3d at 822 (upholding district
14 court's refusal to exercise supplemental jurisdiction over state
15 claims after dismissing federal claims, including dismissal of §
16 1983 claim for failure to state a claim).

17

18 **III. DISCUSSION**

19 **A. Plaintiffs' First Claim for Relief**

20 Plaintiffs' first claim of relief alleges that Fox infringed
21 plaintiffs' copyrighted material. Defendant contends that even
22 assuming arguendo that plaintiffs possess valid copyrights,
23 plaintiffs' first claim of relief is barred as a matter of law by
24 the doctrine of fair use.

25 The Copyright Act of 1976 protects the fair use of another's
26 copyrighted work:

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1 ...[T]he fair use of a copyrighted work ... for purposes
2 such as criticism [and] comment ... is not an
3 infringement of copyright. In determining whether the
4 use of a made work in any particular case is a fair use
5 the factors to be considered shall include:\
6 (1) the purpose and character of the use, including,
7 whether such use is of a commercial nature or is for
8 nonprofit educational purposes;
9 (2) the nature of the copyrighted work;
10 (3) the amount and substantiality of the portion used in
11 relation to the copyrighted work as a whole; and
12 (4) the effect of the use on the potential market for or
13 value of the copyrighted work. ...

14 17 U.S.C. § 107. The fair use doctrine calls for a "case-by-case
15 analysis." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577
16 (1994). "The text [of 17 U.S.C. § 107] employs the terms
17 'including' and 'such as' in the preamble paragraph to indicate the
18 'illustrative and not limitative' function of the examples given."
19 Id. Courts must consider and weigh all four factors. Id. The
20 Court may conduct a fair use analysis, as a matter of law, where
21 the facts are presumed or admitted. See Harper & Row Publishers,
22 Inc. v. Nation Enters., 471 U.S. 539 (1985); see also Fisher v.
23 Dees, 794 F.2d 432, 435-36 (9th 1986) (finding fair use where the
24 material facts were not at issue or were admitted; judgments
25 pertaining to fair use "are legal in nature" and are to be made by
26 the court).

21

22 1. The Purpose and Character of the Use

23 The first factor, the "purpose and character of the use,"
24 addresses "whether the new work merely 'supercedes the objects' of
25 the original creation, or instead adds something new, with a
26 further purpose or different character, altering the first with new
27 expression, meaning or message, in other words, whether and to what

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1 extent the new work is 'transformative.'" Campbell, 510 U.S. at 579
2 (internal citations omitted).

3 Among the various forms of "transformative use" is that of
4 parody. See id. A parody is a "'literary or artistic work that
5 imitates the characteristic style of an author or a work for comic
6 effort or ridicule,' or as a 'composition in prose or verse in
7 which the characteristic turns of thought and phrase or class of
8 authors are imitated in such a way as to make them appear
9 ridiculous.'" Id. at 580. "[P]arody has an obvious claim to
10 transformative value" because "[l]ike less ostensibly humorous
11 forms of criticism, it can provide social benefit, by shedding
12 light on an earlier work, and, in the process, creating a new one."
13 Id. at 579. "For purposes of copyright law, the nub of the
14 definitions, and the heart of any parodist's claim to quote from
15 existing material, is the use of some elements of a prior author'
16 composition to create a new one, that, at least in part, comments
17 on that author's works." Id. at 580.

18 In Campbell, the Supreme Court found that hip-hop band 2-Live
19 Crew's rendition of "Pretty Woman" was a parody because it targeted
20 the original song and commented "on the naivete of the original of
21 an earlier day, as a rejection of its sentiment that ignores the
22 ugliness of street life and the debasement that it signifies." Id.
23 at 583. Relying on Campbell in Mattel, Inc. v. Walking Mountain
24 Productions, 353 F.3d 792, 802 (9th Cir. 2003), the Ninth Circuit
25 remarked: "No doubt, 2-Live Crew could have chosen another song to
26 make such a statement. Parody only requires that 'the plaintiff's
27 copyrighted work is at least in part the target of the defendant's
28 satire,' not that the plaintiff's work be the irreplaceable object

1 for its form of social commentary." Id. (internal citations
2 omitted) (emphasis added).

3 In their opposition to the motion to dismiss, plaintiffs argue
4 that Family Guy's use of the Charwoman in the Peterotica episode
5 "does not constitute parody in the strict legal sense" and thus
6 cannot be considered "transformative." (Pls. Opp. at 7). In
7 support of this argument, plaintiffs assert that the target of the
8 Family Guy parody was not the Charwoman character as such, but
9 Carol Burnett herself. In fact, the Family Guy characters explain
10 that the porn shop is clean because "Carol Burnett works part-time
11 as a janitor" and make reference to Carol Burnett's signature ear
12 tug. Plaintiffs point out that the Charwoman never tugged her ear
13 in The Carol Burnett Show; rather, Carol Burnett playing herself
14 tugged at her ear in the closing segment of the show as a salute to
15 her grandmother. Furthermore, plaintiffs assert that the act of
16 placing the Charwoman in the role of a janitor in an erotic store
17 is neither "absurd" nor "transformative" because "one could easily
18 imagine a charwoman cleaning the floor of a porn shop." (Pls. Opp
19 at 8).

20 Secondly, plaintiffs argue that a comparison of the Family
21 Guy's Charwoman and Burnett's Charwoman demonstrates that the
22 Family Guy version is virtually a literal copy of Burnett's, see
23 Denton Decl. ¶ 2; Exh. A, which is another indication that the use
24 of the Charwoman is not "sufficiently transformative." (Pls. Opp.
25 at 8). In sum, the crux of plaintiffs' argument is that the target
26 of the "Family Guy's crude joke" appears to be Burnett, her family,
27 and her wholesome image as opposed to the Charwoman. (Pls. Opp. at
28 7).

1 However, as the Supreme Court has pointed out, the correct
2 inquiry is not whether the use of the material constitutes parody
3 in a "strict legal sense." Rather, the "threshold question when
4 fair use is raised in defense of parody is whether a parodic
5 character may reasonably be perceived" and "[w]hether ... parody is
6 in good taste or bad taste does not and should not matter to fair
7 use." See Campbell, 510 U.S. at 582. As defendant correctly
8 notes, it is immaterial whether the target of Family Guy's "crude
9 joke" was Burnett, the Carol Burnett Show, the Charwoman, Carol's
10 Theme Music or all four. The eighteen-second clip of the animated
11 figure resembling the "Charwoman," mopping the floor next to "blow-
12 up dolls," a rack of "XXX" movies, and "video booths" in a porn
13 shop is clearly designed to "imitate[] the characteristic style of
14 an author or a work for comic effort or ridicule," and is executed
15 in such a manner that "the characteristic turns of thought and
16 phrase or class of authors are imitated in such a way as to make
17 them appear ridiculous." Campbell, 510 U.S. at 580; see also
18 Lucasfilm Ltd. v. Media Market Group, Ltd., 182 F.Supp.2d 897, 901
19 (N.D. Cal. 2002) (denying injunctive relief to block pornographic
20 version of "Star Wars" because a "parodic character may reasonably
21 be perceived"). Criticism of figures as universally recognized as
22 Carol Burnett "will not always be reasoned or moderate," and may
23 come in the form of "vehement, caustic, and sometimes unpleasantly
24 sharp attacks." Hustler Magazine v. Falwell, 485 U.S. 46, 51
25 (1988). Here, Family Guy put a cartoon version of Carol
26 Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd
27 situation in order to lampoon and parody her as a public figure.
28 Therefore, the Court finds that a parodic character may reasonably

1 be perceived in the Family Guy's use of the Charwoman because it is
2 a "literary or artistic work that broadly mimics an author's
3 characteristic style and holds it up to ridicule." See Dr. Seuss
4 Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401
5 (9th Cir. 1997) (quoting American Heritage Dictionary definition of
6 parody). The episode at issue put a cartoon version of Carol
7 Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd
8 situation in order to lampoon and parody her as a public figure.
9 Accordingly, the Court finds this factor weighs in favor of fair
10 use.

11

12 2. The Nature of the Copyrighted Work

13 The second § 107 factor is "the nature of the copyrighted
14 work." This factor calls for recognition that some works are
15 closer to the core of intended copyright protection than others,
16 with the consequence that fair use is more difficult to establish
17 when the former works are copied. See Stewart v. Abend, 495 U.S.
18 207, 237-238 (1990) (contrasting fictional short story with factual
19 works); Harper & Row, 471 U.S. at 563-564 (contrasting
20 soon-to-be-published memoir with published speech); Sony Corp. of
21 America v. Universal City Studios, Inc., 464 U.S. 417, 455, n. 40
22 (1984) (contrasting motion pictures with news broadcasts); Feist
23 Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S.
24 340, 348-351 (1991) (contrasting creative works with bare factual
25 compilations); 3 M. Nimmer & D. Nimmer, Nimmer on Copyright §
26 13.05[A][2] (1993) (hereinafter Nimmer) However, as the Supreme
27 Court announced in Campbell, and both plaintiffs and defendant
28 recognize in their briefs, the second factor "is not much help in

1 resolving ... parody cases, since parodies almost invariably copy
2 publicly known, expressive works...." Campbell, 510 U.S. at 586.
3 Accordingly, the Court does not accord great weight here to the
4 second factor in the fair use analysis.

5
6 3. The Amount and Substantiality of the Amount Used

7 The third factor asks whether "the amount and substantiality
8 of the portion used in relation to the copyrighted work as a
9 whole," § 107(3) ... are reasonable in relation to the purpose of
10 the copying. Campbell, 510 U.S. at 586. Here, attention turns to
11 "the persuasiveness of a parodist's justification for the
12 particular copying done, and the enquiry will harken back to the
13 first of the statutory factors, for, as in prior cases, [the
14 Supreme Court] recognize[d] that the extent of permissible copying
15 varies with the purpose and character of the use.... The facts
16 bearing on this factor will also tend to address the fourth, by
17 revealing the degree to which the parody may serve as a market
18 substitute for the original or potentially licensed derivatives."
19 Id.

20 In explaining the application of the third factor, the Court
21 in Campbell, stated that "[w]hen parody takes aim at a particular
22 original work, the parody must be able to "conjure up" at least
23 enough of that original to make the object of its critical wit
24 recognizable.... What makes for this recognition is quotation of
25 the original's most distinctive or memorable features, which the
26 parodist can be sure the audience will know. Once enough has been
27 taken to assure identification, how much more is reasonable will
28 depend, say, on the extent to which the song's overriding purpose

1 and character is to parody the original or, in contrast, the
2 likelihood that the parody may serve as a market substitute for the
3 original. But using some characteristic features cannot be
4 avoided." Campbell, 510 U.S. at 588. In relation to its
5 discussion of the third factor, the Court relied on Fisher v. Dees,
6 794 F.2d at 438-39 (9th Cir. 1986) and Elsmere Music, Inc. v. NBC,
7 623 F.2d 252, 253 (2d Cir. 1980).

8 In Elsmere, cast members of the comedy television program
9 "Saturday Night Live" sang an eighteen-second parody of "I Love New
10 York" using the words "I Love Sodom" repeated three times, and the
11 court found fair use, noting the brief use of the material and that
12 "the repetition of the copied material served both to ensure viewer
13 recognition and to satirize the frequent broadcasting of the
14 original." Elsmere, 623 F.2d at 253. In Fisher, the Ninth Circuit
15 concluded that a twenty nine-second song parody on a forty-minute
16 comedy album, which copied the first bars of an underlying song
17 with parodic alterations to the opening lyrics, took "no more from
18 the original than necessary to accomplish reasonably its parodic
19 purpose." Fisher, 794 F.2d at 439.

20 Here, plaintiffs argue that Fox took more of the Charwoman
21 character's image and Carol's theme music than was necessary to
22 place that image in the minds of viewers. Plaintiffs stress that
23 the Family Guy Charwoman is a "near verbatim copy of Burnett's
24 Charwoman" and analogize the present case to Walt Disney
25 Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), wherein
26 the panel concluded that it was not necessary, and hence not fair
27 use, for adult comic book authors to copy Disney characters in

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