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16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **DR. SEUSS ENTERPRISES, L.P.,**

19 Plaintiff,

20 v.

21 **COMICMIX LLC; GLENN**
22 **HAUMAN; DAVID JERROLD**
23 **FRIEDMAN a/k/a DAVID**
24 **GERROLD; and TY TEMPLETON,**

25 Defendants.

Case No. 3:16-cv-02779-JLS-BGS

**COMICMIX LLC'S NOTICE OF
MOTION AND MOTION TO
DISMISS PURSUANT TO FED. R.
CIV. P. 12(b)(6)**

Assigned to Hon. Janis L. Sammartino
United States District Judge

Hearing Date: March 16, 2017
Hearing Time: 10:00 a.m.
Hearing Place: Schwartz Courthouse,
Courtroom 4A

26 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

27 **PLEASE TAKE NOTICE** that defendant ComicMix LLC (“ComicMix”) will move and hereby does move the Court to dismiss this action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). This motion will be heard on March 16, 2017, at 10:00 am in Courtroom 4A of the Edward J. Schwartz United States Courthouse, located at 940 Front Street, San Diego, California 92101, before the Honorable Judge Sammartino.

1 The instant motion is based on this notice of motion and the memorandum of
2 points and authorities in support hereof, the accompanying request for judicial notice
3 and exhibits thereto, undersigned counsel's affidavit in support thereof, the papers
4 on file in this matter, and on such other evidence or argument as the Court may
5 consider in a hearing on this matter.

6
7
8 Respectfully submitted,

9 DATED: December 19, 2016

10
11 BOOTH SWEET LLP

D'EGIDIO LICARI & TOWNSEND, APC

12
13 /s/ Dan Booth

/s/ Michael Licari

14 Dan Booth
15 *Pro Hac Vice Pending*

Michael Licari
Local Counsel

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17 *Attorneys for Defendant ComicMix LLC*

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19
20
21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on this December 19, 2016 I electronically filed the
23 foregoing document by using the Court's ECF system, thereby causing a true copy
24 thereof to be served upon counsel of record for each party to have appeared to date,
25 as identified on the Notice of Electronic Filing.

26
27 /s/ Michael Licari

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Case No. 3:16-cv-02779-JLS-BGS

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
COMICMIX LLC'S MOTION TO
DISMISS PURSUANT TO FED. R.
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1 **I. Introduction: *Oh, the Uses Seuss Sues!***

2 Defendant ComicMix LLC (“ComicMix”) respectfully moves the Court for an
3 order dismissing this matter for failure to state a claim pursuant to Fed. R. Civ. P.
4 12(b)(6), on the grounds that ComicMix’s allegedly infringing book constitutes fair
5 use of any elements of Dr. Seuss books protected by copyright or trademark law.

6 This case presents a simple question: May an author’s estate use the courts to
7 stymie publication of a book that makes critical, parodic use of the author’s books?
8 On the facts alleged, the answer must be no. The Copyright Act, the Lanham Act and
9 the First Amendment fully protect ComicMix’s right to comment and build on Dr.
10 Seuss’ works. The law does not place his beloved books above parody, beyond
11 critical commentary, or past the reach of cultural transformation and nominative use.

12 **II. Applicable Legal Standards**

13 **a. Federal Rule of Civil Procedure 12(b)(6)**

14 Under Federal Rule of Civil Procedure 12(b)(6), a party may raise by motion the
15 defense that the complaint “fail[s] to state a claim upon which relief can be granted.”
16 To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient
17 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
18 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must assert “more than labels and
20 conclusions[] and a formulaic recitation of the elements of a cause of action.”
21 *Twombly*, 550 U.S. at 555. “Factual allegations must be enough to raise a right to
22 relief above the speculative level.” *Id.*

23 “All allegations of material fact are taken as true and construed in the light most
24 favorable to the nonmoving party. ... The court need not, however, accept as true
25 allegations that contradict matters properly subject to judicial notice or by exhibit.”
26 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A “court may
27 consider a writing referenced in a complaint but not explicitly incorporated therein if
28 the complaint relies on the document and its authenticity is unquestioned.” *Swartz v.*

1 *KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). And “on a motion to dismiss, courts
2 ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’”
3 *Twombly*, 550 U.S. at 555 (quoting *Papasain v. Allain*, 478 U.S. 265, 286 (1986)).

4 **b. 17 U.S.C. § 107 - Fair Use Under Copyright Law**

5 Section 107 of the Copyright Act codifies the judicial doctrine of fair use. *Marcus*
6 *v. Rowley*, 695 F.2d 1171, 1174 (9th Cir. 1983). It provides that, “the fair use of a
7 copyrighted work . . . for purposes such as criticism [or] comment . . . is not an
8 infringement of copyright.” 17 U.S.C. § 107.

9 In determining whether the use made of a work in any particular case
10 is a fair use the factors to be considered shall include—

- 11 (1) the purpose and character of the use, including whether such
12 use is of a commercial nature or is for nonprofit educational purposes;
- 13 (2) the nature of the copyrighted work;
- 14 (3) the amount and substantiality of the portion used in relation to
15 the copyrighted work as a whole; and
- 16 (4) the effect of the use upon the potential market for or value of
17 the copyrighted work.

18 *Id.*

19 **c. Nominative Fair Use Under Trademark Law**

20 A “nominative fair use . . . is, by definition, not infringement.” *Toyota Motor*
21 *Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175 (9th Cir. 2010). “In cases where
22 a nominative fair use defense is raised, we ask whether (1) the product was ‘readily
23 identifiable’ without use of the mark; (2) defendant used more of the mark than
24 necessary; or (3) defendant falsely suggested he was sponsored or endorsed by the
25 trademark holder.” *Id.* at 1175-76 (quoting *Playboy Enters, Inc. v. Welles*, 279 F.3d
26 796, 801 (9th Cir. 2002)). “The nominative fair use test replaces the traditional *AMF,*
27 *Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), analysis” of likelihood
28 of confusion. *Mattel Inc. v. Walking Mt. Prods.*, 353 F.2d 792, 810 n. 19 (9th Cir.
2003) (citing *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1150 (9th Cir. 2002) and
Welles, 279 F.3d at 801). “The nominative fair use analysis is appropriate where a

1 defendant has used the plaintiff’s mark to describe the plaintiff’s product, *even if the*
2 *defendant’s ultimate goal is to describe his own product....*” *Cairns*, 292 F.3d at
3 1152 (emphasis in original).

4 “[A]ctions pursuant to California Business and Professions Code § 17200 are
5 ‘substantially congruent’ to claims made under the Lanham Act.” *Cleary v. News*
6 *Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994) (*citing Acad. of Motion Picture Arts &*
7 *Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1457 (9th Cir. 1991)).
8 For such claims, the Court’s “analysis of the fair use defense is identical.” *Playboy*
9 *Enters., Inc. v. Welles*, 78 F. Supp. 2d 1066, 1075 n. 4 (S.D. Cal. 1999).

10 **III. Statement of Material Facts**

11 The pertinent facts alleged in the complaint, taken as true for purposes of this
12 motion, and those drawn from writings referenced in the complaint but not expressly
13 incorporated therein and otherwise subject to judicial notice, are as follows.

14 The late Theodor S. Geisel, better known under his pseudonym Dr. Seuss, wrote
15 and illustrated children’s books. Doc. 1 ¶ 1, 12. Plaintiff Dr. Seuss Enterprises, L.P.
16 (“DSE”) is the assignee of the copyright registration for Dr. Seuss books and owner
17 of certain trademark rights in Dr. Seuss goods. *Id.* ¶¶ 3, 16-17. *Oh, the Places You’ll*
18 *Go!* (“*Go!*”) is one of Dr. Seuss’ best-known books. *Id.* ¶ 15.

19 Defendants are comics publisher ComicMix, its co-founder and vice-president
20 Glenn Hauman (“Hauman”), author David Gerrold (“Gerrold”), and illustrator Ty
21 Templeton (“Templeton”). *Id.* ¶¶ 4-7. ComicMix marketed, and each Defendant
22 intended “to sell, reproduce, and distribute” a projected book written by Gerrold,
23 illustrated by Templeton, and edited by Hauman, entitled *Oh, the Places You’ll*
24 *Boldly Go!* (“*Boldly*” or “the book”). *Id.* ¶¶ 2, 4-7, 19-22. DSE alleges that *Boldly*
25 “misappropriates key elements” of *Go!* and four other Dr. Seuss books. *Id.* ¶ 26.
26 DSE alleges that *Boldly* “purports to be an amalgamation of the Dr. Seuss works and
27 certain characters, imagery, and other elements from *Star Trek*, the well-known
28 science fiction entertainment franchise created by Gene Roddenberry.” *Id.* ¶ 18.

1 ComicMix ran a crowdfunding campaign for the costs of printing and distributing
 2 *Boldly* on the website Kickstarter.com (the “Campaign”). *Id.* ¶ 34; *see* ComicMix’s
 3 Request for Judicial Notice (“RJN”) Ex. 1.¹ The Campaign told potential donors:

4 ***Oh, The Places You’ll Boldly Go!*** is a parody mash-up from the mind
 5 that brought you “[The Trouble With Tribbles](#)” that brings together two
 6 of the most beloved creations in history in a joyous celebration that
 will inspire you to join the high fliers who soar to high heights!

7 RJN Ex. 1. In a section titled “Risks and challenges,” the Campaign explained:

8 While we firmly believe that our parody, created with love and
 9 affection, fully falls within the boundary of fair use, there may be
 10 some people who believe that this might be in violation of their
 11 intellectual property rights. And we may have to spend time and
 money proving it to people in black robes. And we may even lose that.

12 *Id.*; Doc. 1 ¶ 35. The Campaign “raised nearly \$30,000” in pledges toward
 13 production costs. Doc. 1 ¶ 2. DSE moved to suppress the Campaign and obstruct
 14 publication. Its attorneys sent Defendants cease-and-desist letters on September 28
 15 and October 7, 2016. *Id.* ¶¶ 36, 38. On October 7, 2016, sent a takedown notice to
 16 Kickstarter asserting that Defendants’ use of Dr. Seuss works infringed DSE’s
 17 copyrights. *Id.* ¶ 40; RJN Ex. 2.² Kickstarter responded to the notice by disabling the
 18 Campaign. Doc. 1 ¶ 41. It remains suspended due to DSE’s claims. *See* RJN Ex. 3.³

19 ¹ The Campaign, incorporated by reference in the complaint, is subject to judicial
 20 notice. The Court may take judicial notice of documents whose contents are alleged
 21 in the complaint where no party disputes its authenticity. *Branch v. Tunnell*, 14 F.3d
 22 449, 453 (9th Cir. 1994). That includes the content of publicly available websites.
Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Fed. R. Evid. 201(b).

23 ² The Court may take judicial notice of web pages referenced in the complaint.
 24 *Knievel*, 393 F.3d at 1076.

25 ³ The Campaign web page now redirects to a page that states, “Oh The Places You’ll
 26 Boldly Go! is the subject of an intellectual property dispute and is currently
 27 unavailable.” *Id.* The Court may take judicial notice of web pages referenced in the
 28 complaint, the fact that the website redirects to a different page than identified in the
 complaint, and the content of the current web page. *See Closed Loop Mktg. v. Closed
 Loop Mktg., LLC*, 589 F. Supp. 2d 1211, 1215 & n.2 (E.D. Cal. 2008).

1 DSE’s attorneys sent ComicMix a third letter on October 25, 2016. Doc. 1 ¶ 42.
 2 Three days later, ComicMix’s undersigned attorney sent DSE’s attorneys a response
 3 letter explaining its position that *Boldly* constitutes fair use. *Id.* ¶ 43; *see* RJN Ex. 4.⁴
 4 That same day, October 28, 2016, the undersigned attorney sent DSE’s attorneys a
 5 complete copy of *Boldly* in PDF form. RJN Ex. 5.⁵ The U.S.S. *Enterprise*, familiar
 6 from the *Star Trek* series, occupies more than half of *Boldly*’s cover art. *Id.* p. 1. The
 7 cover, title page, and copyright page each credit the book as “by David Gerrold & Ty
 8 Templeton.” *Id.* pp. 1-2. The copyright page bears a disclaimer in large type that
 9 states, “This is a work of parody, and is not associated with or endorsed by CBS
 10 Studios or Dr. Seuss Enterprises, L.P.” *Id.* p. 2. Immediately below, a second
 11 disclaimer states, “Copyright Disclaimer under section 107 of the Copyright Act
 12 1976, allowance is made for ‘fair use’ for purposes such as criticism, comment, news
 13 reporting, teaching, scholarship, education, research, and parody.” *Id.* The page also
 14 bears a dedication: “for Gene [Roddenberry] and Ted [Geisel] who went before.” *Id.*

15 ComicMix sent a counter-notice to Kickstarter seeking reinstatement of the
 16 Campaign on October 31, 2016. Doc. 1 ¶ 44. On November 10, 2016, DSE filed a
 17 complaint including pages from the otherwise unreleased *Boldly*, alleging copyright
 18 and trademark infringement and unfair competition. Doc. 1 ¶ 28; *see* RJN Ex. 5.

19 **IV. Argument**

20 DSE fails to state a claim. The Court may resolve the issue of fair use upon this
 21 motion to dismiss. *Boldly* is neither infringing nor unfair, so none of the causes of
 22 action can survive and the action should be dismissed.

23 _____
 24 ⁴ The Court may take “judicial notice of the fact that counsel made particular
 25 statements” in correspondence between the parties’ counsel referenced in the
 26 complaint. *Theta Chi Fraternity, Inc. v. Leland Stanford Junior Univ.*, No. 16-
 cv-01336-RMW, 2016 U.S. Dist. LEXIS 116863, *12-13 (N.D. Cal. Aug. 30, 2016).

27 ⁵ The Court may take judicial notice of the contents of a defendant’s allegedly
 28 infringing work referenced in, but not attached to, the complaint. *Campbell v. Walt
 Disney Co.*, 718 F. Supp. 2d 1108, 1111 n.3 (N.D. Cal. 2010) (“*Walt Disney*”).

1 **a. The Court may resolve the issue of fair use upon this motion.**

2 Under both copyright and trademark law, fair use is appropriate for resolution
3 under Rule 12(b)(6) where it appears on the face of the complaint, and no material
4 facts are in dispute. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th
5 Cir. 2008) (copyright); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687,
6 692 (7th Cir. 2012) (copyright; “When a defendant raises a fair use defense claiming
7 his or her work is a parody, a court can often decide the merits of the claim without
8 discovery or a trial.”); *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11
9 F.3d 1460, 1466-67 (9th Cir. 1993) (trademark).

10 The complaint, and documents sufficiently referenced therein or otherwise
11 subject to judicial notice, are sufficient to enable the Court to evaluate the issue of
12 fair use. The complaint raises the issue directly. It quotes from the Campaign where
13 ComicMix explained its belief that *Boldly* constitutes fair use, while recognizing that
14 others (such as DSE) might dispute the issue, including through litigation. Doc. 1 ¶
15 35. The Campaign further explained that *Boldly* “is a parody mash-up.” RJN Ex. 1.

16 The material facts are not disputed. ComicMix ran the Campaign in anticipation
17 of publishing *Boldly*, the only allegedly infringing work. Doc. 1 ¶¶ 34-35. The
18 content of the Campaign, which was publicly available online, is not in dispute. *See*
19 RJN Ex. 1. The content of *Boldly* is also not disputed. *Id.* Ex. 5. ComicMix
20 voluntarily provided a copy to DSE, which DSE excerpted in the complaint. Doc. 1
21 ¶ 28. As alleged, *Boldly* makes use of elements of certain works by Dr. Seuss,
22 primarily *Go!*, the content of which is also not disputed. *See id.*; RJN Ex. 6 (Dr.
23 Seuss, *Oh, the Places You'll Go!* (Random House 1990)).⁶ The only dispute is
24 whether the use was fair. Such fair use “judgments are legal in nature,” and are to be
25 made by the court. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

26
27
28 ⁶ The Court may take judicial notice of allegedly infringed written works referenced
in the complaint but not attached thereto. *Walt Disney*, 718 F. Supp. 2d at 1111 n.3.

1 **b. ComicMix’s book is a non-infringing fair use under copyright law.**

2 Copyright is wholly a ‘creature of statute, and the only rights that exist under
3 copyright law are those granted by statute.’” *Sybersound Records, Inc. v. UAV Corp.*,
4 517 F.3d 1137, 1143-44 (9th Cir. 2008) (quoting *Silvers v. Sony Pictures Entm’t*, 402
5 F.3d 881, 883-84 (9th Cir. 2005) (en banc)). Copyright protects few of the elements
6 that DSE claims as a basis for infringement, *Boldly* employs fewer and infringes
7 none. Its transformative, parodic use poses no risk of market substitution for Dr.
8 Seuss books and constitutes fair use under the guiding factors in 17 U.S.C. § 107.

9 **i. Copyright law limits the scope of DSE’s claims.**

10 DSE alleges that *Boldly* infringes its copyrights to *Go!*’s title, “story arc,” and
11 characters and illustrations from *Go!*, *Horton Hears a Who*, *How the Grinch Stole*
12 *Christmas!* (“Grinch”), *The Lorax*, and *The Sneetches and Other Stories*. Doc. 1 ¶
13 26. Yet copyright covers few of those elements, and *Boldly* infringes none.

14 Titles of books are not independently copyrightable. “Words and short phrases
15 such as names, titles, and slogans” are “examples of works not subject to copyright.”
16 37 C.F.R. § 202.1. “[T]itles, in and of themselves, cannot claim statutory copyright.”
17 *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990). Identical titles can support a
18 showing of substantial similarity between two works, *see id.*, but not in this case,
19 where *Boldly* makes non-infringing fair use of *Go!* and its title, as discussed *infra*.

20 “[C]haracters are ordinarily not afforded copyright protection.” *Rice v. Fox*
21 *Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003). “[C]opyright protection is available
22 only ‘for characters that are especially distinctive.’” *DC Comics v. Towle*, 802 F.3d
23 1012, 1019 (9th Cir. 2015) (quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*,
24 547 F.3d 1213, 1224 (9th Cir. 2008)). “To meet this standard, a character must be
25 ‘sufficiently delineated’ and display ‘consistent, widely identifiable traits.’” *Id.*
26 (quoting *Rice*, 330 F.3d at 1175). “[C]haracters that have been ‘lightly sketched’ and
27 lack descriptions may not merit copyright protection.” *Id.* (citing *Olson v. NBC*, 855
28 F.2d 1446, 1452-53 (9th Cir. 1988)).

1 DSE declines to identify any such well-delineated character, leaving its allegation
2 of character “misappropriation” wholly speculative. No character in *Go!* meets this
3 standard. The one character to appear more than once (except perhaps some
4 elephants, who do not reappear in *Boldly*) is the protagonist, a walking cipher. The
5 boy has no name or dialogue and few distinguishing characteristics beyond his
6 yellow knit-cap and onesie. This lightly sketched everyman lacks the “distinctive
7 character traits” required to be protectable by copyright. *Towle*, 802 F.3d at 1020.

8 Further, *Boldly* does not copy any Dr. Seuss character or its traits. In the boy’s
9 place is the *Enterprise*’s captain, wearing the uniform of *Star Trek* commanding
10 officers (a gold shirt with an arrowhead insignia over the left breast, and black
11 trousers) or a spacesuit, or on one page, a green tunic like Captain Kirk sometimes
12 wore. His spiky, adult hairstyle is not covered by a child’s knit-cap. *Boldly*’s wholly
13 distinct characters do not infringe on any protectable character trait of the original.

14 Nor does *Boldly* infringe on *Go!*’s simple, episodic storyline. See RJN Ex. 6. In
15 *Go!*, the boy decides to leave town. He joins a balloon race, taking the lead before
16 getting stuck in a tree. He lands in a “Slump,” comes to a place with unmarked
17 streets, and has a hard time deciding where to turn. In confusion, he races down the
18 road to “The Waiting Place,” where “everyone is just waiting.” He escapes to watch
19 a musical performance by a “Boom Band”, then to join a parade of banner-flying
20 elephants, and then to play on a convoluted ball-field. His athletic skill makes him
21 world-famous, but he is again left all alone to face more scary things.

22 Copyright does not protect the general plot line of an adventurer persevering as
23 he faces both emotional and physical highs and lows. “The copyright of a story
24 covers what is new and novel in it.” *Bradbury v. CBS*, 287 F.2d 478, 485 (9th Cir.
25 1961). “General plot lines are not protected by copyright law.” *Cavalier v. Random*
26 *House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (internal citations omitted). “Familiar
27 stock scenes and themes that are staples of literature are not protected.” *Id.*

28

1 Any story element in *Go!* that is not too generic to warrant copyright protection
 2 is not copied in *Boldly*, which depicts no confusing streets, balloon races, Slump,
 3 Waiting Place, music, elephants, or parades. The *Go!* boy’s one idiosyncrasy, a talent
 4 for playing an unusual multi-player sport, also does not recur in *Boldly*. Instead,
 5 *Boldly* is filled with allusions to episodes of the original *Star Trek* series. Any
 6 similarities between the plot lines of *Boldly* and *Go!* are generic and unprotectable.

7 **ii. Any use of protected elements of DSE’s works in *Boldly* is a fair use.**

8 The allegedly misappropriated title, story arc and characters are either
 9 unprotected by copyright or not infringed by *Boldly*, leaving illustrations as the sole
 10 pleaded basis for DSE’s copyright claim. Doc. 1 ¶ 26. Certain backgrounds and the
 11 physical postures and positioning of certain characters in *Boldly* refer to selected
 12 visual elements from Dr. Seuss illustrations. The complaint identifies seven
 13 instances of alleged copying from three Dr. Seuss books: *Go!*, *Grinch*, and *The*
 14 *Sneetches and Other Stories* (specifically, “The Sneetches” and “The Zax”). *Id.* ¶ 28
 15 & pp. 7-10.⁷ In each such case, and in the title, the use is a fair use that substantially
 16 transforms and repurposes its source, leaving no grounds for the copyright claim.

17 “Fair use is not just excused by the law, it is wholly authorized by the law.” *Lenz*
 18 *v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016). “As a statutory
 19 doctrine, however, fair use is not an infringement. ... [I]nstead, it is logical to view
 20 fair use as a right.” *Id.* at 1152 (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532,
 21 1542 n.22 (11th Cir. 1996)). Recognizing fair use, the Copyright Act “limits the
 22 rights of a copyright owner regarding works that build upon, reinterpret, and
 23 reconceive existing works.” *Walking Mt. Prods.*, 353 F.3d at 799 (citing *Campbell v.*
 24 *Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-77 (1994)). Fair use doctrine “calls for
 25 case-by-case analysis.” *Campbell*, 510 U.S. at 577.

26
 27 ⁷ The complaint does not depict or otherwise specify any element of *The Lorax* or
 28 *Horton Hears A Who!* that could support any of its claims, so DSE’s copyright claim
 also fails to the extent it is based on any infringement of either book. *See id.*

1 “The four factors identified by Congress as especially relevant in determining
2 whether the use was fair are: (1) the purpose and character of the use; (2) the nature
3 of the copyrighted work; (3) the substantiality of the portion used in relation to the
4 copyrighted work as a whole; (4) the effect on the potential market for or value of
5 the copyrighted work.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S.
6 539, 560-61 (1985). Those factors vindicate *Boldly* as a fair use.

7 **1. First Factor: The Purpose and Character of the Use**

8 An allegedly infringing work’s commercial character “tends to weigh against a
9 finding of fair use.” *Id.* at 562. Such commercial character is “‘not conclusive,’ but
10 rather a fact to be ‘weighed along with other[s] in fair use decisions[.]’” *Campbell*,
11 510 U.S. at 585 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S.
12 417, 448-49 & n. 32 (1984)). “The central purpose of this investigation is to see ...
13 whether the new work merely ‘supersede[s] the objects’ of the original creation, ...
14 or instead adds something new, with a further purpose or different character, altering
15 the first with new expression, meaning, or message; it asks, in other words, whether
16 and to what extent the new work is ‘transformative.’” *Id.* at 579 (quoting *Folsom v.*
17 *Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841)). “[T]he more
18 transformative the new work, the less will be the significance of other factors, like
19 commercialism, that may weigh against a finding of fair use.” *Id.* Imbuing
20 copyrighted material with new meaning, without usurping the demand for the
21 original, is fair use. *SOFA Entm’t, Inc. v. Dodger Prods.*, 709 F.3d 1273, 1276 (9th
22 Cir. 2013). Specifically, commentary and parody are well-recognized fair uses.
23 *Campbell*, 510 U.S. at 579.

24 *Boldly* is a détournement, parody, or pastiche, adding transformative matter to
25 DSE’s works. “It is not simply a quotation or a republication.” *Seltzer v. Green Day,*
26 *Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013) (finding fair use). “[A]n allegedly
27 infringing work is typically viewed as transformative as long as new expressive
28 content or message is apparent.” *Id.* at 1177. Mashing up Seuss-like images in the

1 *Star Trek* context critically alters their meaning and message. *Boldly*'s title
 2 exemplifies that method by invoking both *Go!* and the "boldly go" split-infinitive
 3 from *Star Trek*'s iconic opening monologue: "Space: the final frontier. These are the
 4 voyages of the starship Enterprise. Its five-year mission: to explore strange new
 5 worlds, to seek out new life and new civilizations, to boldly go where no man has
 6 gone before."⁸ The title both employs and adverts to Defendants' mash-up approach
 7 to *Star Trek* and Dr. Seuss. See Doc. 1 ¶ 18. It assists readers in distinguishing the
 8 book from *Go!* while making transformative, fair use of *Go!*'s title.

9 "[P]arody has an obvious claim to transformative value," because "it can provide
 10 social benefit, by shedding light on an earlier work, and, in the process, creating a
 11 new one." *Campbell*, 510 U.S. at 579. "A parody is a 'literary or artistic work that
 12 imitates the characteristic style of an author or a work for comic effect or ridicule.'" *Walking Mt. Prods.*, 353 F.3d at 801 (quoting *Campbell*, 510 U.S. at 580 (quoting
 13 American Heritage Dictionary 1317 (3d ed. 1992))). "The original work need not be
 14 the sole subject of the parody; the parody 'may loosely target an original' as long as
 15 the parody 'reasonably could be perceived as commenting on the original or
 16 criticizing it, to some degree.'" *Id.* (quoting *Campbell*, 510 U.S. at 580-81, 583).
 17 "The germ of parody lies in the definition of the Greek *parodeia*, ... as 'a song sung
 18 alongside another.' *Campbell*, 510 U.S. at 580 (quoting *Acuff-Rose Music, Inc. v.*
 19 *Campbell*, 972 F.2d 1429, 1440 (6th Cir. 1992) (Nelson, J., dissenting) (quoting 7
 20 Encyclopedia Britannica 768 (15th ed. 1975))).

21 So defined, parody aptly conveys the Defendants' recombinant method. Tying
 22 together Dr. Seuss and *Star Trek*, disparate threads of popular culture, *Boldly*

23
 24 ⁸ See Smithsonian Nat'l Air & Space Museum, *Opening Credits* (June 27, 2016),
 25 [https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-model-
 26 opening-credits](https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-model-opening-credits) (last visited Dec. 14, 2016); see also YouTube, *Star Trek Original
 27 Series - Opening Credits* (Oct. 13, 2016), <https://youtu.be/4pptCGR9N4g> (posted by
 28 Nat'l Air & Space Museum) (last visited Dec. 14, 2016). Filmed dialogue is a proper
 subject for judicial notice. See *Walt Disney*, 718 F. Supp. 2d at 1111 n.3. Materials
 on a museum website are also fit for judicial notice. *Cairns*, 107 F. Supp. 2d at 1216.

1 amplifies the thematic resonances between them, highlighting their common ground.
2 A trek, of course, is a long, arduous journey, typically one made on foot. *See*
3 *generally Thane Int'l v. Trek Bicycle Corp.*, 305 F.3d 894, 912 n.14 (9th Cir. 2002).
4 In both *Go!* and *Star Trek*, daring travelers explore alien landscapes and encounter
5 unusual creatures, so they do in *Boldly* as well. Yet as *Boldly* targets those
6 similarities, it teases out fundamental differences, developing a study in contrasts.

7 *Go!* glorifies individualism, establishing the theme from the outset: “You’re on
8 your own.” RJN Ex. 6 p. 5. Its boy adventurer sets out by himself and stays that way,
9 forging no lasting bonds. As the narrator warns, “You’ll get mixed up with many
10 strange birds as you go. So be sure when you step. Step with care and great tact.” *Id.*
11 p. 42. He moves mountains single-handed. *Id.* pp. 43-44. He appears on the same
12 page with other people only twice, both times at a distance. *Id.* pp. 29, 33. Even in a
13 parade of elephants, he is the only person in sight. *Id.* pp. 11, 31. His experiences are
14 all extremes: either soaring above the world as “the best of the best,” “the
15 winningest winner of all ... famous as famous can be,” *id.* pp. 18 & 33, or left
16 behind, stuck in a Slump, all alone. Either way, *Go!* foregrounds his separateness.

17 *Boldly* questions that separation by emphasizing community and mission. It
18 depicts the adventures of the captain of a starship and, critically, the crew he leads.
19 *See* RJN Ex. 5 p. 1 (“You’ve earned the big chair of the best in the fleet!”).
20 Downplaying *Go!*’s isolated individualism, *Boldly* points out that the captain is far
21 from alone; he has a “marvelous crew” of “lifelong friends.” *Id.* p. 4. Unlike the *Go!*
22 wanderer, the captain can rely on others for support: “You can get out of trouble, any
23 that’s knotty, because in a pinch you’ll be beamed out by Scotty.” *Id.* p. 9. *Go!*’s
24 narration repeatedly hails the boy for choosing where to go, while *Boldly* hails the
25 captain for choosing what to *be*: “You know what you are now, and what you are
26 not.” *Id.* And unlike in *Go!*, the captain has more choices than simply fight or flight,
27 either running from danger or overcoming it: “here there be dangers, *but here you’ll*
28 *make friends out of those who are strangers.*” *Id.* p. 8 (emphasis added).

1 *Boldly*'s book-length reframing of *Go!* through the lens of *Star Trek*, while
 2 irreverent, cheeky, and tongue-in-cheek, consistently turns to a critical re-evaluation
 3 of priorities. It proposes an alternate mission statement for *Go!* readers built on the
 4 ideals fostered through the *Star Trek* series' "five-year mission," imbued with a pro-
 5 communitarian ethos. *Boldly* contrasts the independence touted in *Go!* with *Star*
 6 *Trek*'s ideal of interdependence, both among people and between species. Where *Go!*
 7 tells us "you're on your own," *Boldly* conveys the message that we are not alone.

8 Understood in that context, the seven illustrations depicted in the complaint do
 9 not show "slavish copying" as alleged. Doc. 1 ¶ 28 & pp. 7-10. Rather, they
 10 demonstrate *Boldly*'s transformative purpose, character, and message at work.

- 11 1. An empty field traversed alone by the *Go!* boy is populated, in *Boldly*, by
 12 characters from various *Star Trek* episodes, standing in two rows.⁹ *Id.* p. 7; RJN
 13 Ex. 5 p. 3. In *Boldly*, the text alludes to the mission recited in *Star Trek*'s opening
 14 monologue: "You'll seek out new life-forms for you to behold, and civilizations
 15 both youngish and old." That reference to mission alters, and implicitly critiques,
 16 the *Go!* boy's naive freedom ("It's opener there in the wide-open air."). *Boldly*
 17 further sheds the carefree aspect of the *Go!* image, as the *Star Trek* characters are
 18 depicted as looming over the captain, several times his height; one character
 19 shakes a fist. Against a similar background, *Boldly* conveys a weightier effect.
- 20 2. In a *Grinch* tableau, dozens of Who-ville residents sing Christmas songs hand-
 21 in-hand, with their jubilation undercut because it inspires the anti-hero Grinch's
 22 attack on Christmas. Doc. 1 p. 8. *Boldly* replaces the carolers with fifteen *Star*
 23 *Trek* characters, largely *Enterprise* crew members and the Captain's lovers. *Id.*;

24
 25 ⁹ The episodes referenced are "Arena" (broadcast Jan. 19, 1967); "The
 26 Cage" (rejected 1965 pilot) (broadcast Oct. 14, 1986); "The Menagerie" (broadcast
 27 Nov. 17 & 24, 1968); "The Devil in the Dark" (broadcast Mar. 9, 1967); "That
 28 Which Survives" (broadcast Jan. 24, 1969); "The Apple" (broadcast Oct. 13, 1967);
 "A Taste of Armageddon" (broadcast Feb. 23, 1967); "What Are Little Girls Made
 Of?" (broadcast Oct. 20, 1966); and "The Savage Curtain" (broadcast Mar. 7, 1969).

1 RJN Ex. 5 p. 4. They stand in an arc, at a lesser angle than the carolers, in color
 2 rather than black-and-white. *Boldly* alludes to the jagged red lines that frame the
 3 *Grinch* image, but employs fewer strokes, reducing the frame's size to present
 4 the crew in a bigger close-up. The *Grinch* pages highlights the Grinch's
 5 perceived conflict with the villagers, while the *Boldly* image accentuates
 6 camaraderie ("You'll make lifelong friends. You'll love them like brothers."),
 7 romance ("lovers of every hue," alluding to "The Menagerie" episode's green-
 8 skinned Vina), and shared experience ("Weird things will happen, and usually
 9 do, to starship explorers and their marvelous crew."). This embrace of teamwork
 10 and companionship offers an implicit critique of the dogged individualism of
 11 both the Grinch and *Go!*

- 12 3. A tree limb snags the *Go!* boy's balloon, leaving him suspended over a valley to
 13 look up at other balloonists flying past, emphasizing his isolation. Doc. 1 p. 8. A
 14 similar tree in *Boldly* hoists the captain in a wedgie, where he looks down aghast
 15 at three Klingons taunting him nearby, emphasizing their dangerous proximity.
 16 *Id.*; RJN Ex. 5 p. 5. Resemblances are limited to the setting and physical terrain,
 17 which are recast for different purposes. Where the *Go!* boy's concern is being
 18 left behind, the captain faces mockery, a concern more social than solitary.
- 19 4. The *Go!* boy races across another empty field under uneven arches down a pink
 20 road toward the cavernous Waiting Place, on the horizon beneath clouds. Doc. 1
 21 p. 8. In *Boldly*, only the arches remain. *Id.*; RJN Ex. 5 p. 7. The road has become
 22 two long red bands on a dark blue background of stars and planets beside the
 23 *Enterprise* as it passes a large human figure floating upside-down.¹⁰ The near-
 24 total transformation reframes the image from the *Go!* boy's meandering to the
 25 *Enterprise* charting a course for adventure in outer space.

26
 27 ¹⁰ The red bands are reminiscent of the barrier at the end of the galaxy in "Where No
 28 Man Has Gone Before" (second pilot) (broadcast Sept. 22, 1966). The upside-down
 man recalls Harry Mudd from "I, Mudd" (broadcast Nov. 3, 1967).

- 1 5. The crowded Waiting Place in *Go!* is transformed in *Boldly* into a bevy of textual
2 and visual allusions to *Star Trek* episodes.¹¹ Doc. 1 p. 9; RJN Ex. 5 p. 8. Unlike
3 the Waiting Place’s stationary figures, the kinetic *Boldly* image depicts mostly
4 motion: dozens of women running, with their ponytails flying; a man on a sofa
5 poised to plunge a dagger into a startled woman; enchanting tears flowing from
6 Princess Elaan’s eyes and dripping from her drenched handkerchief, and in the
7 sky, the Beta XII-A entity from the “Day of the Dove” episode, a glowing mass
8 of pure aggression-triggering energy. The *Go!* boy is not shown, but an adult-
9 sized Captain is fully engaged in the counterpart image in *Boldly*, besotted with
10 Elaan upon contact with her tears. In *Go!* a fisherman sits in profile on a column,
11 “waiting for the fish to bite”; in *Boldly*, a different fisherman sits facing forward,
12 with his bag full of fish. From a sixty-person outhouse queue in *Go!*, a man,
13 woman, and child are employed in *Boldly* in an illustration of one person’s
14 progression through life’s stages, growing from infancy to adulthood, leading to
15 a tombstone. In addition to those three people, the sofa, and the column, a
16 modicum of other Waiting Place items appear in *Boldly*: a clock, an umbrella,
17 and a cat; enough to call the original image to mind while transforming it.
- 18 6. In “The Sneetches,” the titular ostrich-like characters drop their cash on a table
19 to pay a salesman for entry to his Star-On Machine, which places a star on their
20 bellies. Doc. 1 p. 9. In *Boldly*, the machine is reimagined as the transporter, *Star*
21 *Trek*’s teleportation device; the *Enterprise*’s engineer Scotty, at the helm of a
22 control panel, replaces the salesman at his table; other crew members replace the
23 sneetches. *Id.* The machine is the only common element in the two images, and
24 its role is transformed to a means to get somewhere, not to chase status symbols.

25
26 ¹¹ The episodes referenced are “The Deadly Years” (broadcast Dec. 8, 1967); “Wink
27 of an Eye” (broadcast Nov. 29, 1968); “Elaan of Troyius” (broadcast Dec. 20, 1968);
28 “Day of the Dove” (broadcast Nov. 1, 1968); “Wolf in the Fold” (broadcast Dec. 22,
1967); “And the Children Shall Lead” (broadcast Oct. 11, 1968); and “This Side of
Paradise” (broadcast Mar. 2, 1967).

1 7. In “The Zax,” an arm’s length apart on two dunes in an otherwise empty desert,
2 two hairy creatures (“Zax”) heading opposite directions block each others’ paths,
3 each demanding that the other step aside. Doc. 1 p. 10. *Boldly* heightens the
4 absurdity, with two Spocks playing three-dimensional chess on one dune while
5 four Kirks play basketball in the distance. *Id.*; RJN Ex. 5 p. 10. The *Boldly*
6 illustration alludes to a few visual aspects of “The Zax”: some outlines of the
7 foregrounded figures’ stances and postures, the footprints in the sand behind
8 them, and the desert itself. Yet the Zax conflict is repurposed to a more civil and
9 rational form. Both Zax have their mouths open to argue, facing and leaning
10 towards each other. One gestures angrily behind him as the other puffs up his
11 chest and threatens to stand his ground for fifty-nine days. By contrast, both
12 Spocks’ mouths are closed, and they stand further apart, facing the chess board
13 between them. One kneads his chin in contemplation as his hand hovers over his
14 next move, while the other waits with belly sagging, back straight, and head
15 tipped back. The Zax argument has been rendered just another game.

16 Notably, while many illustrations in *Boldly* parody and play off only images from
17 *Go!*, the images depicting interactions with the crew also use other Dr. Seuss books
18 as visual reference points. The crew holding hands alludes to a *Grinch* image; Scotty
19 beaming out the crew alludes to *The Sneetches*; and the Captain and Spock each play
20 games against themselves in an illustration that alludes to the Zax standoff. Doc. 1
21 pp. 8-10. In so doing, *Boldly* uses Dr. Seuss’s own works in service of a group-
22 oriented counterpoint to the *Go!* individualist ideal. Responding to *Go!* by deploying
23 these images from Dr. Seuss’s other books is the height of fair-use commentary.

24 In sum, any material taken from or based on Dr. Seuss works is fundamentally,
25 rigorously transformed. The first factor weighs heavily in favor of finding fair use.

26 **2. Second Factor: The Nature of the Copyrighted Work**

27 The second factor, the nature of the copyrighted work, “typically has not been
28 terribly significant in the overall fair use balancing.” *Dr. Seuss Enters., L.P. v.*

1 *Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997) (finding no fair use
2 upon finding allegedly infringing work was not a transformative parody). Creative
3 works like Dr. Seuss’s books are “‘closer to the core of intended copyright
4 protection’ than informational or functional works,” so their nature sometimes “tilts
5 the scale against fair use” under this factor. *Id.* (quoting *Campbell*, 510 U.S. at 586).
6 But this factor has limited use when “the creative work of art is being used for a
7 transformative purpose.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d
8 605, 612 (2d Cir. 2006). It is especially limited in a case of parody, since “parodies
9 almost invariably copy publicly known, expressive works.” *Campbell*, 510 U.S. at
10 586. And this factor’s significance is further mitigated because the copyrighted
11 works were already published. *Seltzer*, 725 F.3d at 1178. “‘Published works are more
12 likely to qualify as fair use because the first appearance of the artist’s expression has
13 already occurred.’” *Id.* (quoting *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th
14 Cir. 2003)). This second factor has negligible weight in this case.

15 **3. Third Factor: The Amount and Substantiality of the Work Used**

16 “The third factor looks to the quantitative amount and qualitative value of the
17 original work used in relation to the justification for that use.” *Seltzer*, 725 F.3d at
18 1178 (citing *SOFA*, 709 F.3d at 1279 and *Campbell*, 510 U.S. at 586). “[A]n
19 allegedly infringing work that copies little of the original is likely to be a fair use.”
20 *Id.* (citing *SOFA*, 709 F.3d at 1279). Yet “this factor will not weigh against an alleged
21 infringer, even when he copies the whole work, if he takes no more than is necessary
22 for his intended use.” *Id.* (citing *Kelly*, 336 F.3d at 820-21). The “extent of
23 permissible copying varies with the purpose and character of the use.” *Campbell*,
24 510 U.S. at 586-87. The extent of permissible copying must be broadest for a
25 parody, so as not to stifle its ability to comment coherently on its source material.

26 A parody is entitled at least to “conjure up” the original. Even more
27 extensive use would still be fair use, provided the parody builds upon
28 the original, using the original as a known element of modern culture
and contributing something new for humorous effect or commentary.

1 *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980)
 2 (construing *Columbia Pictures Corp. v. Nat'l Broad. Co.*, 137 F. Supp. 348, 354
 3 (S.D. Cal. 1955)). A “parody’s humor, or in any event its comment, necessarily
 4 springs from recognizable allusion to its object through distorted imitation.”
 5 *Campbell*, 510 U.S. at 588. “[T]he parody must be able to ‘conjure up’ at least
 6 enough of the original to make the object of its critical wit recognizable.” *Id.*

7 These precedents effectively anticipated the fair use *Boldly* makes of *Go!* and
 8 other Dr. Seuss works: building on them by adding humorous reflections on their
 9 similarities to broad themes and storylines in *Star Trek*, and using those elements to
 10 cast a critical eye on the shortcomings of the self-fulfillment *Go!* preaches. This
 11 factor supports, or at least does not weigh against, a finding of fair use.

12 **4. Fourth Factor: The Effect on the Market for the Copyrighted Work**

13 “The fourth factor asks what effect the allegedly infringing use has on the
 14 ‘potential market for or value of the copyrighted work.’ ... Where the allegedly
 15 infringing use does not substitute for the original and serves a ‘different market
 16 function,’ such factor weighs in favor of fair use.” *Seltzer*, 725 F.3d at 1179 (quoting
 17 17 U.S.C. § 107(4) and *Campbell*, 510 U.S. at 590). “This factor also considers any
 18 impact on ‘traditional, reasonable, or likely to be developed markets.’” *Id.* (quoting
 19 *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997)).

20 “A work that is very transformative will often be in a different market from the
 21 original work and therefore is less likely to cause harm to the original work’s
 22 market.” *Kelley*, 280 F.3d at 948. For transformative works, which “involv[e]
 23 something beyond mere duplication for commercial purposes,” market harm cannot
 24 be presumed. *Campbell*, 510 U.S. at 591. “Indeed, as to parody pure and simple, it is
 25 more likely that the new work will not affect the market for the original in a way
 26 cognizable under this factor, that is, by acting as a substitute for it[.]” *Id.* (citations
 27 omitted). “This is so because the parody and the original usually serve different
 28 market functions.” *Id.* (citations omitted). Indeed, “the law recognizes no derivative

1 market for critical works, including parody.” *Id.* at 592. In the case of parody, the
2 only relevant harm to derivatives “is the harm of market substitution. The fact that a
3 parody may impair the market for derivative uses by the very effectiveness of its
4 critical commentary is no more relevant under copyright than the like threat to the
5 original market.” *Id.* at 593.

6 DSE alleged that it has licensed “new works based upon, and incorporating” its
7 copyrights and trademarks. Doc. 1 ¶ 32. It did not, and could not plausibly, allege,
8 that it has licensed or would license any derivative work that parodies or criticizes
9 Dr. Seuss books, or creates a hybrid pastiche of those books with works from a
10 different entertainment franchise. *See id.* ¶ 18. There is no likelihood of market
11 substitution. “[B]ecause the author is unlikely to permit the use of his or her work to
12 criticize or ridicule that work, a parody is unlikely to supplant the market for the
13 original or its derivatives.” *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1151-52 (C.D.
14 Cal. 2010) (*citing Campbell*, 510 U.S. at 592). “It seems more reasonable to
15 speculate that the Book would, if anything, enhance the value of the copyrighted
16 work; it is difficult to see any decrease in its value.” *Time Inc. v. Bernard Geis*
17 *Assocs.*, 293 F.3d 130, 146 (S.D.N.Y. 1968) (finding fair use in book making
18 unauthorized use of copyrighted pictures).

19 The fourth factor also strongly supports a finding of fair use. Viewed in tandem,
20 the four-factor analysis confirms that *Boldly* is a hallmark case of fair use. Fair use is
21 not an infringement, so DSE fails to state a copyright claim.

22 **c. ComicMix’s book is not an infringement under trademark law.**

23 DSE’s trademark infringement and unfair competition claims fail for several
24 reasons. Copyright law, not trademark law, protects the contents of Dr. Seuss books.
25 And to the extent that DSE pleads any cognizable trademark rights in a title, or any
26 other matter used in *Boldly*, that use is protected by the First Amendment and
27 constitutes a nominative fair use, not an infringement.

28

1 The complaint identifies no registered trademarks in support of its claims, and
2 little that could constitute a trademark. DSE alleges that it owns trademark rights in
3 the title *Oh, the Places You'll Go!*, a stylized font used in Dr. Seuss books, and an
4 illustration style of characters and backgrounds depicted in Dr. Seuss books. Doc. 1
5 ¶ 17. DSE alleges only ownership of “common law trademark rights” in those
6 alleged marks. *Id.* ¶ 59. “Without a federal registration, however, the claimant loses
7 out on the presumption of validity that registration confers.” *Fletcher Studios, Inc. v.*
8 *A.V.E.L.A., Inc.*, 654 F.3d 958, 966-67 (9th Cir. 2011) (citing *Toho Co. v. Sears,*
9 *Roebuck & Co.*, 645 F.2d 788, 790 (9th Cir. 1981)).

10 DSE cannot claim trademark rights based on the content of Dr. Seuss books.
11 Trademark law protects words and symbols that designate a product’s source, but it
12 “does not protect the content of a creative work of artistic expression as a trademark
13 for itself. Copyright law protects the artist’s right in an abstract design or other
14 creative work.” *RDF Media Ltd. v. Fox Broad Co.*, 372 F. Supp. 2d 556, 562 (C.D.
15 Cal. 2005) (quoting *EMI Catalogue P’ship v. Hill, Holliday, Connors, Cosmopulos,*
16 *Inc.*, 228 F.3d 56, 63 (amended by 2000 U.S. App. LEXIS 30761 (2d Cir. 2000)). A
17 product itself cannot serve as its own trademark. *EMI Catalogue P’ship*, 228 F.3d at
18 63. Under the Lanham Act, “a trademark is any combination of words, names,
19 symbols or devices that are used to identify and distinguish goods and services and
20 to indicate their source.” *Am. Express Co. v. Goetz*, 515 F.3d 156, 159 (2d Cir. 2000)
21 (citing 15 U.S.C. § 1127). “While copyright law protects the content of a creative
22 work itself, ... it is trademark law that protects those symbols, elements or devices
23 which identify the work in the marketplace and prevent confusion as to its source.”
24 *Id.* (citations omitted). “For example, the title of a song might identify that song in
25 the marketplace, but the musical composition itself would not perform that function;
26 thus, while the title may be protectable by trademark, the composition would not
27 be.” *Id.* (citations omitted). The font and illustration style in Dr. Seuss books are not
28 trademarks designating the source of goods. They are integral parts of the goods.

1 DSE's attempt to cloak copyright claims in trademark clothing is precluded by
2 the Copyright Act, which governs claims of infringement of rights in the content of
3 creative works. *See Sybersound Records*, 517 F.3d at 1150; *Ryan v. Editions Ltd. W.,*
4 *Inc.*, 417 F. App'x 699, 701 (9th Cir. 2011). The Lanham Act, 15 U.S.C. § 1125(a), is
5 not to be construed to "conflict with the law of copyright." *Dastar Corp. v. Twentieth*
6 *Cent. Fox Film Corp.*, 539 U.S. 23, 33 (2011). *Dastar* instructs courts "to avoid
7 overlap between the Lanham and Copyright Acts." *Sybersound Records*, 517 F.3d at
8 1144. "The Lanham Act cannot be used to circumvent copyright law." *Comedy III*
9 *Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (disagreeing with
10 "fanciful agreement" that footage from Three Stooges film was a cognizable
11 trademark "rather than the subject of copyright"). Accordingly, DSE's alleged
12 trademark rights in a stylized font in Dr. Seuss books, and in an illustration style for
13 characters and backgrounds in those books, cannot sustain a claim.

14 DSE also cannot prevail on its trademark claim over the title *Oh, the Places*
15 *You'll Go!* "Consumers expect a title to communicate a message about the book or
16 movie, but they do not expect it to identify the publisher or producer." *Mattel, Inc. v.*
17 *MCA Records*, 296 F.3d 894, 902 (9th Cir. 2002). A book title ordinarily "does not
18 perform a trademark function. That is, it does not identify the source of the book, but
19 serves merely to identify the material found therein, i.e., the work of the author. In so
20 doing it is nothing more than a descriptive designation therefor." *In re Scholastic,*
21 *Inc.*, 223 U.S.P.Q. (BNA) 431, 431 (Trademark Trial & App. Bd. 1984).

22 Even if Dr. Seuss's style, font, or the title of *Go!* do function as DSE's trademark
23 as claimed, their use would not constitute infringement under the First Amendment
24 and the doctrine of nominative fair use.

25 The First Amendment limits the application of the Lanham Act against artistic
26 works that use the plaintiff's trademarks to describe or comment on the plaintiff's
27 goods or services. "When unauthorized use of another's mark is part of a
28 communicative message and not a source identifier, the First Amendment is

1 implicated in opposition to the trademark right.” *MCA Records*, 296 F.3d at 900
2 (quoting *Yankee Publ’g, Inc. v. News Am. Publ’g, Inc.*, 809 F. Supp. 267, 276
3 (S.D.N.Y. 1992)). “Simply put, the trademark owner does not have the right to
4 control public discourse whenever the public imbues his mark with a meaning
5 beyond its source-identifying function.” *Id.*

6 To balance trademark law and the First Amendment, the Ninth Circuit has
7 adopted the approach taken by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d,
8 994, 999 (2d Cir. 1989). See *Walking Mt. Prods.*, 353 F.3d at 807. Under the *Rogers*
9 test, an artistic or creative work does not violate the Lanham Act by using a mark
10 unless the use “has no artistic relevance to the underlying work whatsoever, or, if it
11 has some artistic relevance, unless [it] explicitly misleads as to the source or the
12 content of the work.” *MCA Records*, 296 F.3d at 902 (quoting *Rogers*, 875 F.2d at
13 999). Though the Ninth Circuit first applied the *Rogers* test to the use of a trademark
14 in a work’s title in *MCA Records*, 296 F.3d at 902, it has found “no principled reason
15 why it ought not also apply to the use of a trademark in the body of the work.” *E.S.S.*
16 *Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008).

17 The use of DSE’s alleged marks in *Boldly* merits First Amendment protection
18 under *Rogers*. First, it has “at least ‘some artistic relevance.’” *Id.* at 1100 (quoting
19 *MCA Records*, 296 F.3d at 902). The use of *Go!*’s title in *Boldly*, and of fonts and
20 illustrations that recall Dr. Seuss’s style, are directly relevant to a creative work that
21 addresses the relationship between *Go!* and other Dr. Seuss works and the *Star Trek*
22 universe. Second, there is nothing misleading about *Boldly*, explicitly or otherwise.
23 “[T]he mere use of a trademark alone cannot suffice to make such use explicitly
24 misleading.” *Id.* (citing *MCA Records*, 296 F.3d at 902). And the book expressly
25 disclaims DSE’s endorsement: “This is a work of parody, and is not associated with
26 or endorsed by CBS Studios or Dr. Seuss Enterprises, L.P.” RJN Ex. 5 p. 2. The
27 Campaign did so at least implicitly, by calling the book a “parody mash-up,” and by
28 warning that despite fair use, “there may be some people who believe that this might

1 be in violation of their intellectual property rights.” *Id.* Ex. 1. Under the *Rogers* test,
2 and the Ninth Circuit’s precedents, those people would be wrong.

3 ComicMix’s nominative fair use also defeats DSE’s claim. A use of the plaintiff’s
4 mark in a defendant’s product is not infringement if it is not used as a source-
5 identifier. Because the nominative use of a mark “does not implicate the source-
6 identification function that is the purpose of trademark, it does not constitute unfair
7 competition; such use is fair because it does not imply sponsorship or endorsement
8 by the trademark holder.” *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d
9 302, 308 (9th Cir. 1992). The nominative fair use test established in *New Kids* is also
10 animated by First Amendment concerns. “Much useful social and commercial
11 discourse would be all but impossible if speakers were under threat of an
12 infringement lawsuit every time they made reference to [Dr. Seuss] by using its
13 trademark.” *Id.* at 307. “[T]his would have serious First Amendment implications.”
14 *Tabari*, 610 F.3d at 1180. “The nominative fair use doctrine is designed to prevent
15 this type of abuse of the rights granted by the Lanham Act.” *Id.*

16 The three-part nominative fair use test would also defeat the claim. It first asks if
17 the plaintiff’s goods could be readily identified without the mark. It is “virtually
18 impossible to refer to a [book] for purposes of comparison, criticism, point of
19 reference or any other such purpose without using the [title].” *Id.* at 306. Indeed, the
20 function of a title is that it “‘identifies a specific literary work.’” *MCA Records*, 296
21 F.3d at 902 (*quoting Application of Cooper*, 45 C.C.P.A. 923, 254 F.2d 611, 615
22 (C.C.P.A. 1958)). DSE cannot make communications about its book avoid the title.
23 Likewise, DSE cannot preclude parody and parody cannot be effective without
24 directly employing the most recognized terms and designs that identify its subjects.

25 The second question under *New Kids* is whether more of the mark was used than
26 “reasonably necessary to identify the product.” *Id.* at 308. “[W]hat is ‘reasonably
27 necessary to identify the plaintiff’s product’ differs from case to case.” *Cairns*, 292 F.
28 3d at 1154.

1 The use of DSE’s full title, and illustrations and fonts from Dr. Seuss books, was
2 reasonably necessary to facilitate *Boldly*’s parody.

3 [T]he keystone of parody is imitation. It is hard to imagine, for
4 example, a successful parody of Time magazine that did not reproduce
5 Time’s trademarked red border. A parody must convey two
6 simultaneous—and contradictory—messages: that it is the original, but
7 also that it is *not* the original and is instead a parody. To the extent that
8 it does only the former but not the latter, it is not only a poor parody
but also vulnerable under trademark law, since the customer will be
confused.

9 *Cliff’s Notes, Inc. v. Bantam Doubleday Dell Publ’g Grp., Inc.*, 886 F.2d 490, 494
10 (2d Cir. 1989). A parody takes from its source by necessity, and by necessity, those
11 takings may be substantial to serve its parodic purpose. Using the full title of *Go!*,
12 for example, was necessary to the comic effect of combining it with *Star Trek*’s “to
13 boldly go” phrasing. *Boldly*’s artwork and font uses also helped the parody work.

14 Third, the nominative fair use test asks if the defendant has done anything “that
15 would, in conjunction with the mark, suggest sponsorship or endorsement by the
16 trademark holder.” *New Kids*, 971 F.2d at 302. As explained *supra*, ComicMix has
17 not. This “element does not require that the defendant make an affirmative statement
18 that their product is not sponsored by the plaintiff.” *Walking Mt. Prods.*, 353 F.3d at
19 811. ComicMix even did that, disclaiming affiliation in the suppressed book. RJN
20 Ex. 5 p. 2. Indeed, crowdfunding to raise money for a print run further suggests
21 ComicMix’s lack of affiliation with the owner of dozens of books that have “sold
22 over 650 million copies worldwide.” Doc. 1, 14. First Amendment concerns weigh
23 heaviest when such a literary powerhouse sues to squelch critical creative speech.
24 DSE failed to state a claim, and its unfair use of the law should be squelched instead.

25 **V. Conclusion**

26 Therefore, ComicMix respectfully requests that the Court dismiss the action
27 pursuant to Fed. R. Civ. P. 12(b)(6).
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Respectfully submitted,

DATED: December 19, 2016

BOOTH SWEET LLP

D’EGIDIO LICARI & TOWNSEND, APC

/s/ Dan Booth

/s/ Michael Licari

Dan Booth
Pro Hac Vice Pending

Michael Licari
Local Counsel

Attorneys for Defendant ComicMix LLC

CERTIFICATE OF SERVICE

I hereby certify that on this December 19, 2016 I electronically filed the foregoing document by using the Court’s ECF system, thereby causing a true copy thereof to be served upon counsel of record for each party to have appeared to date, as identified on the Notice of Electronic Filing.

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16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **DR. SEUSS ENTERPRISES, L.P.,**

19 Plaintiff,

20 v.

21 **COMICMIX LLC; GLENN**
22 **HAUMAN; DAVID JERROLD**
23 **FRIEDMAN a/k/a DAVID**
24 **GERROLD; and TY TEMPLETON,**

25 Defendants.

Case No. 3:16-cv-02779-JLS-BGS

**COMICMIX LLC'S REQUEST FOR
JUDICIAL NOTICE PURSUANT TO
FED. R. EVID. 201**

Assigned to Hon. Janis L. Sammartino
United States District Judge

Hearing Date: March 16, 2017
Hearing Time: 10:00 a.m.
Hearing Place: Schwartz Courthouse,
Courtroom 4A

26 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

27 Pursuant to Federal Rule of Evidence 201, defendant ComicMix LLC
28 (“ComicMix”) respectfully requests that the Court take judicial notice of the records
attached hereto as Exhibits 1 through 6, and the monologue from the opening credits
of the original *Star Trek* series.

The Federal Rules of Evidence mandate that judicial notice be taken “if a
party requests it and the court is supplied with the necessary information,” Fed. R.
Evid. 201(c)(2), and authorizes it “at any stage of the proceeding.” Fed. R. Evid.

1 201(d). Judicially noticed facts are those not “subject to reasonable dispute because”
2 they are either “generally known within the trial court’s territorial jurisdiction” or are
3 capable of accurate and ready determination by resort to “sources whose accuracy
4 cannot reasonably be questioned.” Fed. R. Evid. 201(b). Here, the requested facts are
5 not subject to reasonable dispute in that they are capable of accurate and ready
6 determination by referring to “sources whose accuracy cannot reasonably be
7 questioned.” *Id.*

8 The Court “must consider the complaint, in its entirety, as well as other sources
9 courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss,
10 including documents incorporated into the complaint by reference, and matters of
11 which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
12 551 U.S. 308, 322 (2007). And “to ‘[p]revent[] plaintiffs from surviving a Rule
13 12(b)(6) motion by deliberately omitting ... documents upon which their claims are
14 based,’ a court may consider a writing referenced in a complaint but not explicitly
15 incorporated therein if the complaint relies on the document and its authenticity is
16 unquestioned.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (*quoting*
17 *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (brackets and ellipsis in
18 original)).

19 In its complaint, Plaintiff Dr. Seuss Enterprises, L.P. (“DSE”) references, quotes
20 from, and otherwise relies on a Kickstarter campaign conducted by ComicMix
21 between August 31, and September 30, 2016. *See* Doc. 1 ¶¶ 34, 35; *see also id.* ¶ 2
22 (alleging that “Defendants have already distributed portions of the Infringing Work
23 online in connection with their fundraising efforts”). The campaign web page is not
24 attached to the complaint as an exhibit. The Court may take judicial notice of the
25 content of a publicly available website referenced in the complaint when no party
26 reasonably disputes its authenticity. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
27 2005). DSE may not “seek to delay potential resolution of this action by asserting
28 that this Court may not review the material it claims is infringing and has

1 specifically identified in its Complaint.” *City of Inglewood v. Teixeira*, No.
2 CV-15-01815-MWF (MRWx), 2015 U.S. Dist. LEXIS 114539, 2015 WL 5025839,
3 at *2 (C.D. Cal. Aug. 20, 2015). A true and correct copy of screenshots reflecting the
4 full ComicMix Kickstarter campaign web page, as it appeared on the website on or
5 about September 30, 2016, is attached hereto as Exhibit 1.

6 The complaint also references and relies on a takedown notice DSE’s counsel
7 sent to Kickstarter pursuant to 17 U.S.C. § 512(g), on or about October 7, 2016.
8 Doc. 1 ¶ 40; *see also id.* ¶ 41 (alleging that Kickstarter thereafter disabled access to
9 the campaign webpage pursuant to 17 U.S.C. § 512(g)). The takedown notice is not
10 attached to the complaint. The Court may take judicial notice of web pages
11 referenced in the complaint. *Knievel*, 393 F.3d at 1076. A true and correct copy of
12 the takedown notice posted online by Kickstarter, as it appeared ComicMix
13 Kickstarter campaign web page, as it appeared on the website on December 16,
14 2016, is attached hereto as Exhibit 2.

15 The Kickstarter campaign web page now redirects to a page that states, “Oh The
16 Places You’ll Boldly Go! is the subject of an intellectual property dispute and is
17 currently unavailable.” The Court may take judicial notice of web pages referenced
18 in the complaint, the fact that the website redirects to a different page than identified
19 in the complaint, and the content of the current web page. *See Closed Loop Mktg. v.*
20 *Closed Loop Mktg., LLC*, 589 F. Supp. 2d 1211, 1215 & n.2 (E.D. Cal. 2008). A true
21 and correct copy of the page to which the Kickstarter campaign web page now
22 redirects, as it appeared on the website on December 16, 2016, is attached hereto as
23 Exhibit 3.

24 The complaint references and characterizes a letter sent to DSE by ComicMix’s
25 undersigned counsel on or about October 28, 2016. Doc. 1 ¶ 43. The letter is not
26 attached to the complaint. The Court may take “judicial notice of the fact that
27 counsel made particular statements” in correspondence between the parties’ counsel
28 referenced in the complaint. *Theta Chi Fraternity, Inc. v. Leland Stanford Junior*

1 *Univ.*, No. 16-cv-01336-RMW, 2016 U.S. Dist. LEXIS 116863, *12-13 (N.D. Cal.
2 Aug. 30, 2016). A true and correct copy of the letter is attached hereto as Exhibit 4.

3 The complaint relies on, reproduces in miniature in part, and is substantially
4 based on allegations against a book entitled *Oh, the Places You'll Boldly Go!*, which
5 ComicMix sought to publish before DSE took measures to obstruct publication. *See*
6 Doc. 1 *passim* (referring to the book as the "Infringing Work"). The book is not
7 attached to the complaint, which reproduces seven excerpts from the book, as
8 transmitted to DSE's counsel by the undersigned counsel on October 28, 2016. *See*
9 *id.* pp. 7-10. The Court may take judicial notice of the contents of a defendant's
10 allegedly infringing work referenced in, but not attached to, the complaint. *Campbell*
11 *v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1111 n.3 (N.D. Cal. 2010). DSE may not
12 "seek to delay potential resolution of this action by asserting that this Court may not
13 review the material it claims is infringing and has specifically identified in its
14 Complaint." *City of Inglewood v. Teixeira*, No. CV-15-01815-MWF (MRWx), 2015
15 U.S. Dist. LEXIS 114539, 2015 WL 5025839, at *2 (C.D. Cal. Aug. 20, 2015). A
16 true and correct copy of the book, as transmitted to DSE's counsel on October 28,
17 2016, is attached hereto as Exhibit 5.

18 The complaint relies on, alleges copyright and trademark rights in, and
19 reproduces in miniature four images from, the Dr. Seuss book *Oh, the Places You'll*
20 *Go!* Doc. 1 ¶¶ 15, 17, 26; *see also id.* pp. 7-9 (reproducing four images as a "Dr.
21 Seuss Work"). The Dr. Seuss book is not attached to the complaint. The Court may
22 take judicial notice of allegedly infringed written works referenced in the complaint
23 but not attached thereto. *Walt Disney*, 718 F. Supp. 2d at 1111 n.3. A true and correct
24 copy of the book is attached hereto as Exhibit 6.

25 The complaint relies on allegations of trademark rights in the title of *Oh, the*
26 *Places You'll Go!* and alleges misappropriation of its title by ComicMix's book *Oh,*
27 *the Places You'll Boldly Go!* Doc. 1 ¶¶ 17, 26. The complaint further alleges that
28 ComicMix's book "purports to be an amalgamation of [Plaintiff's] works and certain

1 characters, imagery, and other elements from *Star Trek*, the well-known
2 entertainment franchise created by Gene Roddenberry.” *Id.* ¶ 18. The title of
3 ComicMix’s book invokes the monologue spoken during the the original *Star Trek*
4 television series’ opening credits sequence: “Space: the final frontier. These are the
5 voyages of the starship Enterprise. Its five-year mission: to explore strange new
6 worlds, to seek out new life and new civilizations, to boldly go where no man has
7 gone before.” The Court may take notice of the opening monologue because it “is
8 generally known within the trial court’s territorial jurisdiction” or because it “can be
9 accurately and readily determined from sources whose accuracy cannot reasonably
10 be questioned.” Fed. R. Evid. 201(b)(1), (2). The Smithsonian National Air and
11 Space Museum posted the opening credits and text of the monologue on its website
12 at [https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-](https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-model-opening-credits)
13 [model-opening-credits](https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-model-opening-credits) and on YouTube at <https://youtu.be/4pptCGR9N4g>. Filmed
14 dialogue is a proper subject of judicial notice. *Walt Disney*, 718 F. Supp. 2d at 1111
15 n.3. The Court may take judicial notice of materials on a museum website because
16 their accuracy cannot be reasonably questioned. *See Cairns v. Franklin Mint Co.*,
17 107 F. Supp. 2d 1212, 1216 (C.D. Cal. 2000).

18 Wherefore, ComicMix respectfully requests that the Court take judicial notice of
19 the records attached hereto as Exhibits 1 through 6, and the monologue from the
20 opening credits of the original *Star Trek* series.

21 The instant request is based on this request for judicial notice, the exhibits
22 attached hereto, and undersigned counsel’s affidavit in support hereof.

1 Respectfully submitted,

2 DATED: December 19, 2016

3
4 BOOTH SWEET LLP

D'EGIDIO LICARI & TOWNSEND, APC

5
6 /s/ Dan Booth

/s/ Michael Licari

7
8 Dan Booth
9 *Pro Hac Vice Pending*

Michael Licari
Local Counsel

10 *Attorneys for Defendant ComicMix LLC*

11
12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on this December 19, 2016 I electronically filed the
14 foregoing document by using the Court's ECF system, thereby causing a true copy
15 thereof to be served upon counsel of record for each party to have appeared to date,
16 as identified on the Notice of Electronic Filing.

17
18 /s/ Michael Licari

1 Dan Booth (MA Bar No. 672090)
2 BOOTH SWEET LLP
3 32R Essex Street
4 Cambridge, MA 02139
5 dbooth@boothsweet.com
6 (617) 250-8602
7 *Pro Hac Vice Pending*

8 Michael Licari (SBN 265241)
9 D'EGIDIO LICARI & TOWNSEND, APC
10 5402 Ruffin Road, Suite 209
11 San Diego, CA 92123
12 mlicari@deltlaw.com
13 (619) 550-3011
14 *Local Counsel*

15 *Attorneys for Defendant ComicMix LLC*

16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **DR. SEUSS ENTERPRISES, L.P.,**

19 Plaintiff,

20 v.

21 **COMICMIX LLC; GLENN**
22 **HAUMAN; DAVID JERROLD**
23 **FRIEDMAN a/k/a DAVID**
24 **GERROLD; and TY TEMPLETON,**

25 Defendants.

Case No. 3:16-cv-02779-JLS-BGS

**AFFIDAVIT OF DAN BOOTH IN
SUPPORT OF COMICMIX LLC'S
REQUEST FOR JUDICIAL NOTICE
PURSUANT TO FED. R. EVID. 201**

Assigned to Hon. Janis L. Sammartino
United States District Judge

Hearing Date: March 16, 2017
Hearing Time: 10:00 a.m.
Hearing Place: Schwartz Courthouse,
Courtroom 4A

26 I, Dan Booth, declare pursuant to 28 U.S.C. § 1746 as follows:

- 27 1. I am counsel for the defendant ComicMix LLC (“ComicMix”) in this action. I
28 make this affidavit on my own personal knowledge.
2. Exhibit 1 to ComicMix’s Request for Judicial Notice (“RJN”) is, upon
information and belief, a true and correct copy of screenshots reflecting the
content of ComicMix’s Kickstarter campaign page as it appeared on or shortly
after September 30, 2016, but before October 7, 2016. The screenshots were
taken and provided to me by Glenn Hauman of ComicMix.

3. Exhibit 2 to the RJN is a copy of a screenshot I took of a page on Kickstarter's website reflecting the DMCA takedown notice that DSE sent to Kickstarter as it appeared on the website on December 16, 2016.
4. Exhibit 3 to the RJN is a copy of a screenshot I took of a page on Kickstarter's website where the Kickstarter campaign webpage address redirected as of December 16, 2016.
5. Exhibit 4 to the RJN is a copy of a letter I sent to DSE's counsel on or about October 28, 2016.
6. Exhibit 5 to the RJN is a copy of ComicMix's unpublished book, *Oh, the Places You'll Boldly Go!*, which I transmitted to DSE's counsel on or about October 28, 2016.
7. Exhibit 6 to the RJN is a copy of the Dr. Seuss book, *Oh, the Places You'll Go!*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 2016

/s/ Dan Booth

CERTIFICATE OF SERVICE

I hereby certify that on this December 19, 2016 I electronically filed the foregoing document by using the Court's ECF system, thereby causing a true copy thereof to be served upon counsel of record for each party to have appeared to date, as identified on the Notice of Electronic Filing.

/s/ Michael Licari

1 Dan Booth (MA Bar No. 672090)
2 BOOTH SWEET LLP
3 32R Essex Street
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7 *Pro Hac Vice Pending*

8 Michael Licari (SBN 265241)
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12 mlicari@deltlaw.com
13 (619) 550-3011
14 *Local Counsel*

15 *Attorneys for Defendant ComicMix LLC*

16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **DR. SEUSS ENTERPRISES, L.P.,**

19 Plaintiff,

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21 **COMICMIX LLC; GLENN**
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23 **FRIEDMAN a/k/a DAVID**
24 **GERROLD; and TY TEMPLETON,**

25 Defendants.

Case No. 3:16-cv-02779-JLS-BGS

COMICMIX LLC'S REQUEST FOR JUDICIAL NOTICE PURSUANT TO FED. R. EVID. 201

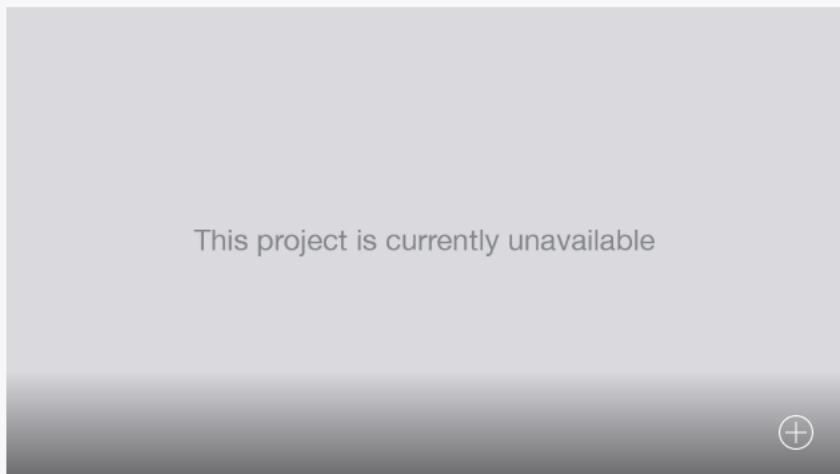
Assigned to Hon. Janis L. Sammartino
United States District Judge

Hearing Date: March 16, 2017
Hearing Time: 10:00 a.m.
Hearing Place: Schwartz Courthouse,
Courtroom 4A

TABLE OF EXHIBITS PURSUANT TO CivLR 5.1(e)

26	Exhibit 1	<i>Oh, The Places You'll Boldly Go!</i> Kickstarter Campaign	1
27	Exhibit 2	Kickstarter DMCA Takedown Notice	10
28	Exhibit 3	Kickstarter Campaign Notice of Suspension	11
29	Exhibit 4	October 28, 2016 Letter from Dan Booth to Ryan Compton	12
30	Exhibit 5	David Gerrold & Ty Templeton, <i>Oh, The Places You'll Boldly Go!</i>	18
31	Exhibit 6	Dr. Seuss, <i>Oh, The Places You'll Go!</i>	31

Oh, The Places You'll Boldly Go! ✎



"Congratulations! You just can't be beat! You've earned center chair of the best in the fleet!" Support David Gerrold's new enterprise! ✎

⊕ Add link

Created by
ComicMix, LLC

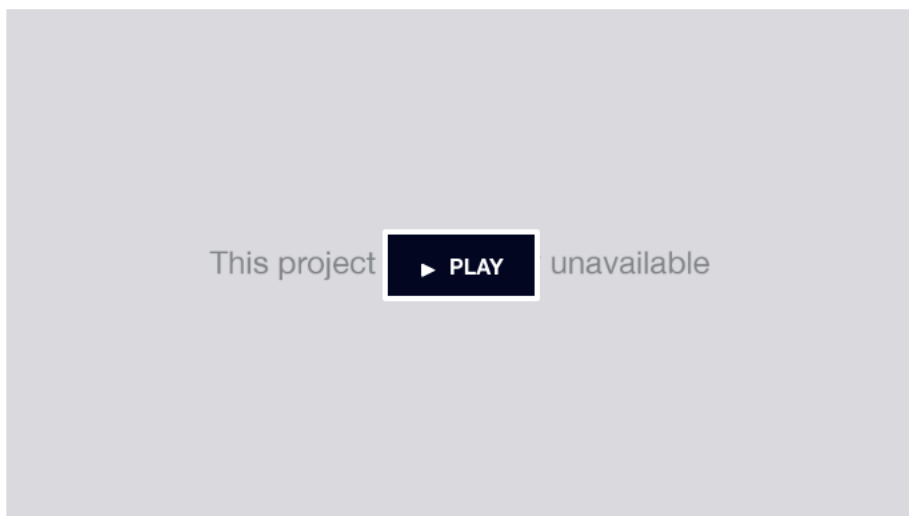
727 backers pledged \$29,575 to help bring this project to life.

Campaign Updates ⁵ Comments ⁹ Community

Share this project

About this project

Support this project



Pledge \$1 or more

Redshirt!

INCLUDES

- Oh, the Places You'll Boldly Go! wallpaper

ESTIMATED DELIVERY
Oct 2016

14 backers

Backer report

NO SURVEYS SENT

Norwalk, CT ✎ Children's Books

\$29,575
pledged of \$20,000 goal

727
backers

Pledge \$10 or more

Ensign!

INCLUDES

- Oh, the Places You'll Boldly Go! PDF
- Oh, the Places You'll Boldly Go! wallpaper

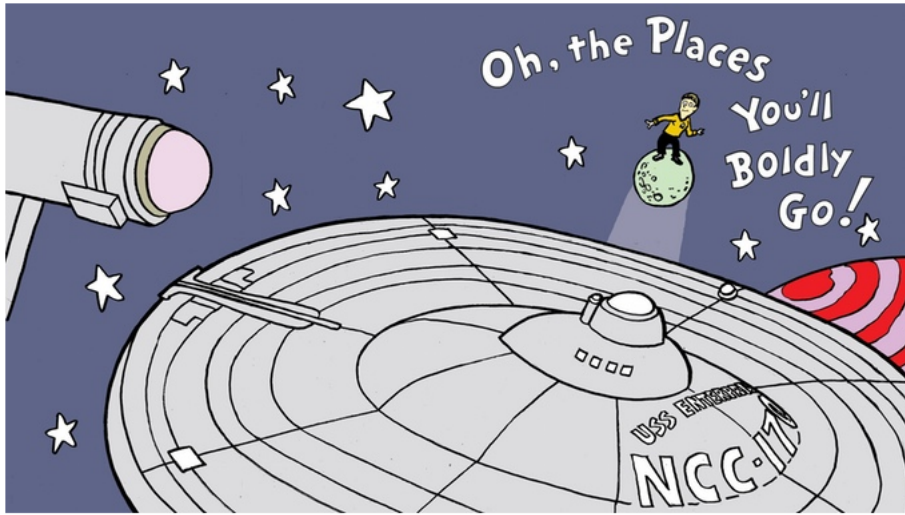
ESTIMATED DELIVERY
Dec 2016

45 backers

Backer report

PAGE 1
Exhibit 1





ESTIMATED DELIVERY
Dec 2016

45 backers

Backer report

NO SURVEYS SENT

Pledge \$15 or more

Yeoman!

INCLUDES

- Oh, the Places You'll Boldly Go! paperback
- Oh, the Places You'll Boldly Go! wallpaper
- Oh, the Places You'll Boldly Go! PDF

ESTIMATED DELIVERY
Dec 2016

SHIPS TO
Anywhere in the world

184 backers

Backer report

NO SURVEYS SENT



Oh, the Places You'll Boldly Go!

Oh, The Places You'll Boldly Go! is a parody mash-up from the mind that brought you "The Trouble With Tribbles" that brings together two of the most beloved creations in history in a joyous celebration that will inspire you to join the high fliers who soar to high heights!

We're creating a 48 page, 8.5" x 11" book that's familiar and brand new at the same time, a perfect gift for children and adults of all ages, for anyone looking forward to the future.



Who's making this project? We're glad that you ask. We've brought the best people we could to the task!



David Gerrold is one of those gee-whiz-bang writers Who's written for *Star Trek*, and *Babylon 5*, and *Sliders*, He wrote the *Dingilliad*, *When HARLIE Was One*, And won **Hugos** and **Nebulas** for his Martian son. (And really, to answer the question that wearies, He promises there's a book 5 in the series.)



Ty Templeton's also a name you should know; We've followed his work back from *Stig's Inferno*. He's done *Spider-Man*, *Star Trek*, and *Batman* (it's true!) And won **Eisners** and **Shusters**, and taught comics too.



Glenn Hauman's the person we brought in to edit. He's okay, we guess. (Hey, don't blame us, *he* said it.)

Pledge \$25 or more

Lieutenant!

INCLUDES

- Oh, the Places You'll Boldly Go! hardcover
- Oh, the Places You'll Boldly Go! wallpaper
- Oh, the Places You'll Boldly Go! PDF

ESTIMATED DELIVERY
Dec 2016

SHIPS TO
Anywhere in the world

414 backers

Backer report

NO SURVEYS SENT

Pledge \$100 or more

Captain!

The Trouble With Tribbles limited edition variant hardcover

INCLUDES

- Oh, the Places You'll Boldly Go! hardcover
- Oh, the Places You'll Boldly Go! PDF
- Oh, the Places You'll Boldly Go! wallpaper
- The Trouble With Tribbles hardcover

ESTIMATED DELIVERY
Dec 2016

SHIPS TO
Anywhere in the world

14 backers

Backer report

NO SURVEYS SENT

Glenn Hauman's the person we brought in to edit. He's okay, we guess. (Hey, don't blame us, *he* said it). He's wrote *Star Trek* and *X-Men* and colored some pics And now does the works over at **ComicMix**.



NO SURVEYS SENT

Pledge \$100 or more

Captain in the mirror universe!

Just like the Captain's package... but different...

INCLUDES

- Oh, the Places You'll Boldly Go! hardcover
- Oh, the Places You'll Boldly Go! PDF
- Oh, the Places You'll Boldly Go! wallpaper
- The World of Star Trek hardcover

ESTIMATED DELIVERY
Dec 2016

SHIPS TO
Anywhere in the world

11 backers

[Backer report](#)

NO SURVEYS SENT

Pledge \$200 or more

Admiral!

INCLUDES

- Oh, the Places You'll Boldly Go! hardcover
- Oh, the Places You'll Boldly Go! PDF
- Oh, the Places You'll Boldly Go! wallpaper
- The World of Star Trek hardcover
- The Trouble With Tribbles hardcover
- Tribble

ESTIMATED DELIVERY
Dec 2016

SHIPS TO
Anywhere in the world

43 backers

[Backer report](#)

NO SURVEYS SENT

Funding period

Aug 31 2016 - Sep 30 2016 (30 days)

What do we offer? What will we provide?
A classical tale that becomes a wild ride!

THE REWARDS!

\$1: *Oh, The Places You'll Boldly Go!* digital wallpaper!

\$10: *Oh, The Places You'll Boldly Go!* PDF & digital wallpaper!

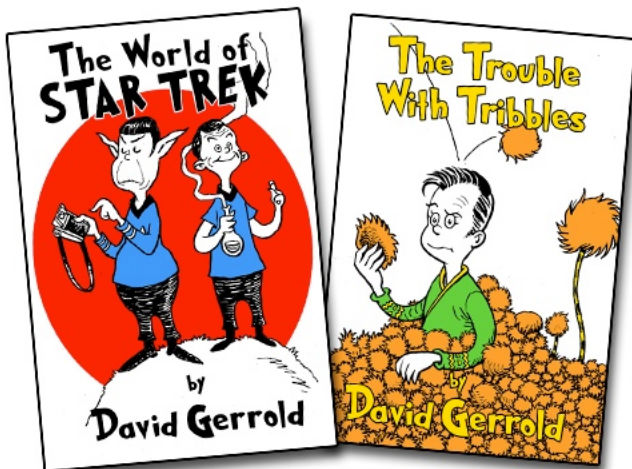
\$15: *Oh, The Places You'll Boldly Go!* paperback & digital wallpaper!



\$15: *Ob, The Places You'll Boldly Go!* paperback & digital wallpaper!

\$25: *Ob, The Places You'll Boldly Go!* hardcover & digital wallpaper!

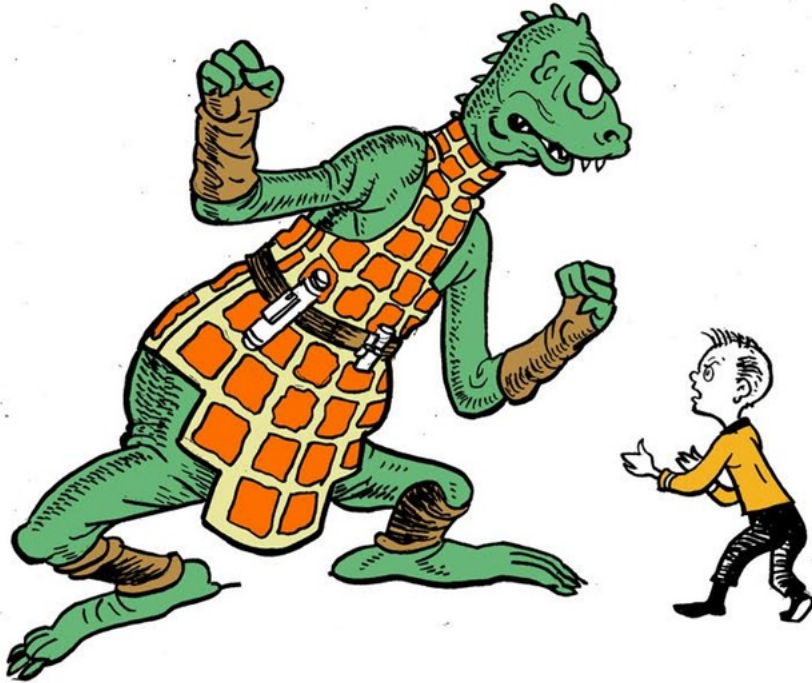
\$100: *Ob, The Places You'll Boldly Go!* hardcover & digital wallpaper, plus an exclusive hardcover edition of either David Gerrold's *The World of Star Trek* or *The Trouble With Tribbles* with special variant covers from Ty Templeton and a bound color plate signed by David Gerrold and Ty Templeton!



(not final art...but close)

\$200: *Ob, The Places You'll Boldly Go!* hardcover & digital wallpaper, plus BOTH exclusive hardcover editions of David Gerrold's *The World of Star Trek* or *The Trouble With Tribbles* with special variant covers from Ty Templeton and a bound color plate signed by David Gerrold and Ty Templeton—and a Tribble! TRIBBLES (*Polygeminus grex*) are small, non-intelligent lifeforms originating from Iota Geminorum IV. Known for their prodigious reproductive rate, these round, furry creatures emit cooing sounds while touched, which have a tranquilizing effect on the human nervous system. Tribbles make the perfect pet!





STREEEEETCH GOALS!

\$50K— Every backer will get a download of David Gerrold's story "Escape From The Planet Of The Tribbles" — the sequel to "The Trouble With Tribbles" and "More Tribbles, More Troubles"!

\$75K— Every backer will get a download of David Gerrold's *Star Trek: New Voyages* episode "Blood And Fire"!

\$100K— Audiobook! Every backer will get a download of the audio version of *Oh, The Places You'll Boldly Go!* ...read by a *very* familiar voice...

\$125K— We ain't telling yet!

Risks and challenges

While we firmly believe that our parody, created with love and affection, fully falls within the boundary of fair use, there may be some people who believe that this might be in violation of their intellectual property rights. And we may have to spend time and money proving it to people in black robes. And we might even lose that.

Construir puentes, no muros. Kickstarter is now open to creators in Mexico.

Learn more here

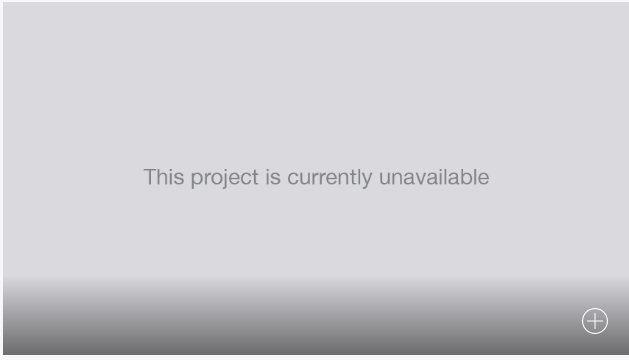
Explore Start a project For you

KICKSTARTER

Search icon

Menu Page theme

Oh, The Places You'll Boldly Go!



"Congratulations! You just can't be beat! You've earned center chair of the best in the fleet!" Support David Gerrold's new enterprise!

Add link

Created by
ComicMix, LLC

727 backers pledged \$29,575 to help bring this project to life.

Campaign Updates⁵ Comments⁹ Community

Update #5 For backers only.

Sep 30 2016

Recent updates

On the occasion of the end of our campaign...

0 Comments Like 13 likes

On the occasion of the end of our campaign...

Posted Sep 30 2016

Less than 24 hours to go

Posted Sep 29 2016

Hey! We've made it! And we're going into the home stretch!

Posted Sep 27 2016

STAR TREK turns 50! (And we hit 60%, so here's another teaser!)

Posted Sep 8 2016

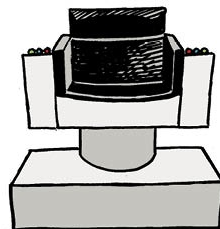
Fan mail from some flounder...?

Posted Aug 31 2016

Photos



Thanks for your backing!
We're funded today!
And with your support,
now we're well on our way!



Seriously, folks, thank you for everything. We really appreciate it, and we look forward to showing you the final product.

Seriously, folks, thank you for everything. We really appreciate it, and we look forward to showing you the final product.

Update #4

Sep 29 2016

Less than 24 hours to go

Posted by Evelyn 0 Comments Like 8 likes

Less than 24 hours to go. Do you think we will make our stretch goals?

STREEETCH GOALS!

\$50K— Every backer will get a download of David Gerrold's story "Escape From The Planet Of The Tribbles" — the sequel to "The Trouble With Tribbles" and "More Tribbles, More Troubles"!

\$75K— Every backer will get a download of David Gerrold's *Star Trek: New Voyages* episode "Blood And Fire"!

\$100K— Audiobook! Every backer will get a download of the audio version of *Oh, The Places You'll Boldly Go!* ...read by a *very* familiar voice...

\$125K— We ain't telling yet!

Thank you so much for all the support.

Update #3

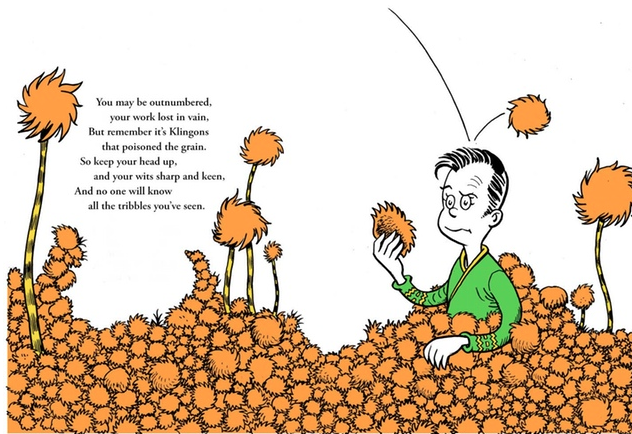
Sep 27 2016

Hey! We've made it! And we're going into the home stretch!

0 Comments Like 6 likes

Thanks to your support, the project will be funded, and will be out even faster than anticipated!

As a quick thank you, we're happy to show you a finished spread from the upcoming book... one that we feel offers a truly important life lesson.



Update #2

Sep 8 2016

Update #2 

Sep 8 2016

STAR TREK turns 50! (And we hit 60%, so here's another teaser!)

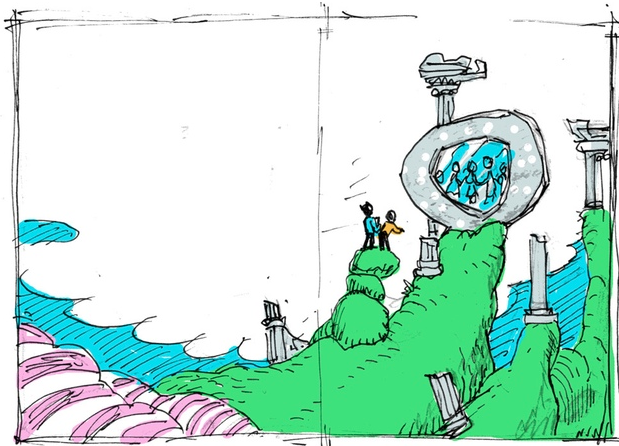
0 Comments  Like 12 likes

It was fifty years ago today that the first episode of *Star Trek*, "The Man Trap", premiered on NBC. (Ty notes that it premiered two days earlier in Canada, so according to him, we're late. We'd say it's a timey-wimey thing, but that's the other guy.)



Obviously, *Star Trek* has been a big part of all of our lives, and we all are celebrating today, each in our own ways.

To add our little bit to the celebration, and as a way of looking back in time, here's a preliminary sketch from Ty of what's coming up in the book...



Fifty years... only the beginning of living long and prospering.

And hey! Thanks to all of you who've gotten us to 60% of funding in less than ten days, and thanks to Kickstarter, who have dubbed us one of their "Projects We Love!"

Update #1 

Aug 31 2016

Fan mail from some flounder...?

0 Comments  Like 2 likes

We just got this mash note on our mash-up from [Vinnie Bartilucci](#):

*The man who told us 'bout when HARLIE was one
Woke up one fine morning, said "Let's have some fun!"*

*A Star Trek pastiche in the style of Ted Geisel
Something they'll not expect, or not even surmise'll!"*

*"But who'll be the artist?" The writer said "I know!
I'll get that Canadian that drew Stig's Inferno!"*

*He's drawn in so many styles, an artist chameleon,
He'll make it look great, and we'll all make a million!*

*(Or at least twenty thousand, but it's nice to have stretch goals
We'll see how they do when they count up the totals)*

He'll make it look great, and we'll all make a million!

*(Or at least twenty thousand, but it's nice to have stretch goals
We'll see how they do when they count up the totals)*


*Publication is hard, but it used to be harder
Cause now you can get it all done on Kickstarter!*

*Art by Ty Templeton, wrote by David Gerrold
(I'm not even involved; merely acting as herald)*

*Entertainment as fine as a Trekfan can get
Why haven't you pledged to buy a copy yet?*







Thanks, Vinnie!






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KICKSTARTER PBC
© 2016

English 

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Oh, The Places You'll Boldly Go! [Submitted by DLA Piper LLP (US)]

Date: Oct 7 2016

Sender

[Private]

DLA Piper LLP (US)

500 8th Street NW

Washington, DC 20004

US

Sent via online form

Recipient

Kickstarter, PBC

58 Kent Street

Brooklyn, NY 11222

USA

Re: [Oh, The Places You'll Boldly Go!](#)

Description of copyrighted material: Dr. Seuss Enterprises is the owner of the work "Oh The Places You'll Go," which is an illustrated children's book.

Description of infringing material: The infringing material use Dr. Seuss's intellectual property without Dr. Seuss's authorization in connection with an illustrated book.

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Oh, The Places You'll Boldly Go! is the subject of an intellectual property dispute and is currently unavailable.

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- Company Blog
- Engineering Blog
- The Creative
- Independent

KICKSTARTER PBC

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English 

BOOTH SWEET LLP

32R Essex Street Cambridge, MA 02139
T: 617.250.8602 | F: 617.250.8883 | www.boothsweet.com

Via Email

October 28, 2016

Ryan Compton
DLA Piper LLP
500 Eighth Street NW
Washington, DC 20004
enforcement@dlapiper.com
ryan.compton@dlapiper.com

Dear Mr. Compton,

I represent ComicMix LLC. From August 31 through September 30, 2016, ComicMix ran a Kickstarter campaign to raise funds for its *Oh, the Places You'll Boldly Go!* book project, which was promoted in Kickstarter's "Projects We Love" section. On October 7, 2016, you sent a notice to Kickstarter PBC, falsely claiming that the project infringes Dr. Seuss Enterprises' copyright in Dr. Seuss' *Oh the Places You'll Go!* Your unfounded infringement claim is directly and materially damaging my client. At your behest, Kickstarter removed the campaign's page from public view, impeding my client's ability to promote the project and solicit further sales. Andrews McMeel Publishing had agreed to publish the book and planned to rush it out for release in time for Christmas, but has pulled out entirely because of your notice. Also anticipating Christmas sales, one vendor ordered 5,000 copies of the book as long as printing and shipping are completed by November 11, but ComicMix expects to lose that order because, thanks to your notice, Kickstarter is withholding all \$29,575 that the campaign raised, so ComicMix cannot use that money to cover the printing costs as intended.

You had no legitimate grounds to interfere with the campaign and derail ComicMix's project. The new book is not a mere plagiaristic copy of any work protected by copyright, but a radical alteration that constitutes fair use under the Copyright Act. As the campaign page explained, "we firmly believe that our parody, created with love and affection, fully falls within the boundary of fair use," while it recognized that "there may be some people who believe that this might be in violation of their intellectual property rights." Your belief is unfounded. Notwithstanding a copyright owner's exclusive rights, "the fair use of a copyrighted work ... is not an infringement of copyright." 17 U.S.C. § 107. "As a statutory doctrine, however, fair use is not an infringement. ... [I]nstead, it is logical to view fair use as a right." *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016) (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996)). With no infringement at issue, your takedown notice is not

only invalid but also a violation of ComicMix’s fair use rights. You must cease and desist any further interference.

The statute sets out four factors to consider in determining fair use: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for the value of the copyrighted work. 17 U.S.C. § 107. Taken together, those factors support ComicMix’s fair use, in its book, of images repurposed and transformed from Dr. Seuss’ work.

The first factor concerns the nature of the alleged infringing work. Its commercial character is “‘not conclusive,’ but rather a fact to be ‘weighed along with other[s] in fair use decisions[.]’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 & n. 32 (1984)). “The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, *Folsom v. Marsh*, [9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841)] ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Id.* at 579. “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.*

ComicMix’s book is wholly transformative of Dr. Seuss’ work. Before you suppressed it, the Kickstarter page to support the book project noted, “*Oh, The Places You’ll Boldly Go!* is a parody mash-up from the mind that brought you ‘The Trouble With Tribbles’ that brings together two of the most beloved creations in history in a joyous celebration that will inspire you to join the high fliers who soar to high heights!” Though called a parody, the book may be more accurately described as a pastiche. It is a mash-up drawn in the vein of Dr. Seuss’ work while transposing Seuss-like images into the *Star Trek* universe, making extensive allusions to specific episodes of the television series. In the process, it reveals and highlights many surprising similarities between those two seemingly disparate imaginary spheres. Dr. Seuss’ *Oh, the Places You’ll Go* depicts an audacious traveler exploring alien landscapes, encountering unusual creatures, taking flight and confronting challenges. The child-like figure cutting a path through his dreamlike world is analogized, in the new book, with the adult *Star Trek* crew and all they encountered on their mission, described in the series’ familiar opening narration: “Space, the final frontier. These are the voyages of the starship Enterprise. Its five-year mission: to explore strange new worlds, to seek out new life and new civilizations, to boldly go where no man has gone before.” (Of course, the new book title mashes up that narration with Dr. Seuss’ title.) ComicMix’s recombinant work amplifies the thematic resonances between Dr. Seuss and *Star Trek*, embracing and winking to both with a light, parodic touch. The book pays direct tribute to the creators of its source material (the dedication page reads, “for Gene [Rodenberry] and Ted [Geisel, a/k/a Dr. Seuss] who went before”), commenting on and giving new life to both sources.

“Among the best recognized justifications for copying from another’s work is to provide comment on it or criticism of it.” *Author’s Guild v. Google Inc.*, 804 F.3d 202, 215 (2d Cir. 2015). But commentary about the source material is not required. “A taking from another author’s work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification.” *Id.* “The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.” *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). “Instead, ... to qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message.’” *Id.* (quoting *Campbell*, 510 U.S. at 579). Thus, “the critical inquiry is whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.” *TCA TV Corp. v. McCollum*, No. 16-134-cv, slip op. at 26 (2d Cir. Oct. 11, 2016). ComicMix’s détournement adds something new and transformative. “It is not simply a quotation or a republication.” *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013) (finding fair use). “[A]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent.” *Id.* at 1177. “From the earliest days of the [fair use] doctrine, courts have recognized that when a second author uses another’s protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer.” *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1259 (2d Cir. 1986). This first factor weighs strongly in support of ComicMix’s fair use.

The second factor considers the nature of the original work. Dr. Seuss’ work is indisputably creative, but this factor is less significant when “the creative work of art is being used for a transformative purpose.” *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)). The fact that all of the new book’s source material was already published further mitigates any significance of this factor. *Seltzer*, 725 F.3d at 1178. “Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.” *Id.* (quoting *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003)).

The third factor weighs the amount of the original work used. Even full reproduction “does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image.” *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives*, 448 F.3d at 613); accord *Seltzer*, 725 F.3d at 1179 (finding use of most of original work “not excessive in light of its transformative purpose”). And the new book has not taken any source material unaltered. The artist, Ty Templeton, drew each of the new book’s images by hand, alluding to Dr. Seuss’ style while transforming the images in the new context of *Star Trek*. This factor should not weigh against fair use.

“The fourth factor asks what effect the allegedly infringing use has ‘on the potential market for or value of the copyrighted work.’” *Seltzer*, 725 F.3d at 1179 (quoting 17 U.S.C. § 107(4)). “Where the allegedly infringing use does not substitute for the original and serves a ‘different market function,’ such factor weighs in favor of fair use.” *Id.* (quoting *Campbell*, 510 U.S. at 591). As a pastiche, *Oh, the Places You’ll Boldly Go!* does not perform the same market

function as any Dr. Seuss works. It depends on a reader's intimate knowledge of storylines, characters, dialogue, costumes, props, and other minutiae from *Star Trek*, making visual and textual references to the series on every page, as Dr. Seuss never would. By the same token, it relies on and appeals to readers already fully familiar with *Oh, the Places You'll Go*. The new book does not substitute for the Dr. Seuss original, but supplements it, in a complementary market of readers who have already consumed Dr. Seuss. The books will not compete for the same readers at the same time. Nor will this new book supplant the original in any other "traditional, reasonable, or likely to be developed markets." *Id.* (quoting *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997)). There was no market for a Seussian *Star Trek* book until my client created it. "It seems more reasonable to speculate that the Book would, if anything, enhance the value of the copyrighted work; it is difficult to see any decrease in its value." *Time Inc. v. Bernard Geis Assocs.*, 293 F.3d 130, 146 (S.D.N.Y. 1968) (finding fair use in book making unauthorized use of the copyrighted Zapruder pictures); accord *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000). The new book likewise stands to spark significant renewed attention to Dr. Seuss' work, spurring new business. The new book should inspire readers who have not yet read the original to rectify the matter. It poses no risk of a harmful market-substitution effect but only potential benefits for your client, so the fourth factor weighs in favor of fair use as well.

Courts considering fair use may not treat the four factors "in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578. In that analysis, the four factors are not equally significant. The second and third factors have little weight. *See Authors Guild*, 804 F.3d at 220 ("courts have hardly ever found that the second factor in isolation played a large role in explaining a fair use decision"). The first and fourth factors are by far the most important. The first factor is often called the "heart of the fair use inquiry," *Cariou*, 714 F.3d at 705 (quoting *Blanch v. Koons*, 467 F.3d , 251 (2d Cir. 2006)). Transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright ... and the more 'transformative' the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at 579. "Although 'transformativeness' is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis." *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00-3802, 2001 WL 1111970, at *3 (S.D.N.Y. Sept. 20, 2011). And the fourth factor has been called "undoubtedly the single most important element of fair use." *Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). The centrally important first and fourth factors both heavily favor construing the new book as a fair use, and case law construing the four factors in tandem supports our understanding that the new book exemplifies fair use and is wholly legal.

Your decision to issue a takedown notice to Kickstarter, despite this fair use, violated 17 U.S.C. § 512(f). "[T]he statute requires copyright holders to consider fair use before sending a takedown notification" and to "form[] a subjective good faith belief that the use was not authorized by law." *Lenz*, 815 F.3d at 1148. A proper takedown notice must declare that the appropriated material is not "authorized by the copyright owner, its agent, or *the law*." 17 U.S.C.

§ 512(c)(3)(A)(v) (emphasis added). Your notice told Kickstarter that my client’s work is “without Dr. Seuss’s authorization,” but it does not show that you sufficiently considered fair use (i.e., authorization by law) beforehand. You have sent three letters to my client, on September 28, October 7, and October 25, 2016, none of which mention fair use. Your first letter mentioned “the parody defense,” contending that it does not apply on the grounds that my client’s work “fails to make any comment related to the original work *Oh the Places You’ll Go*[.]” While the new work has undeniable parodic elements, parody is only one safe harbor within the realm of fair use; a wide range of non-parodic works qualify, including works that never “comment on the original or its author.” *Cariou*, 714 F.3d at 706. Your evaluation of the degree of parody in the new book was not a sufficient consideration of fair use overall. And your assertion that *Oh, the Places You’ll Boldly Go!* “fails to make any comment related to the original work” was not just wrong. It was based on nothing more than a hunch. You denounced as infringing a work that you had not yet seen, so you had no opportunity to assess the work as a whole. The new book was not yet finished at the time of your takedown notice, so you had no basis to contend that it was not a fair use. Your notice was a knowing, material misrepresentation in violation of Section 512(f). Highly illogical.

Your letters have raised the specter of not just copyright infringement but also trademark infringement and unfair competition. Those concerns are illusory. Two disclaimers are given on the book’s copyright page, the usual place for such information. The first, in a larger-size typeface than any other publishing information on the page: “This is a work of fair use, and is not associated with or endorsed by CBS Studios or Dr. Seuss Enterprises, L.P.” The second: “Copyright Disclaimer under section 107 of the Copyright Act 1976, allowance is made for ‘fair use’ for purposes such as criticism, comment, news reporting, teaching, scholarship, education, research, and parody.” The Kickstarter campaign page likewise explained that the book is “a parody mash-up” and “within the boundary of fair use,” dispelling any question that it was licensed or authorized. The campaign page did not mention Dr. Seuss at all. The book’s cover, spine, and title page all name the author and illustrator, but not Dr. Seuss. The book only mentions Dr. Seuss in the first disclaimer and, on the same page, the dedication to “Gene and Ted.” There is no likelihood that any consumer would confuse the book with any of Dr. Seuss Enterprises’ trademarked goods, so there can be no cognizable trademark or unfair competition injury. While the title *Oh the Places You’ll Go* is referenced in the new book’s title, that reference is not mere trademark use but an expressive, artistic, creative use entitled to First Amendment protections that must be balanced against any trademark rights. *See Parks v. LaFace Records, Inc.*, 329 F.3d 437, 449 (6th Cir. 2003). Specifically, the new book’s title, by employing the famous *Star Trek* “boldly go” split infinitive, steers consumers away from any confusion by pointing them toward the defining characteristics of the new work’s creative combination. This direct artistic relevance minimizes any trademark concerns. *See id.* at 452-58 (*construing and applying Rogers v. Grimaldi*, 875 F.2d 994, 999-1000 (2d Cir. 1989)).

We will be serving a counter-notification to Kickstarter requesting that it restore the campaign page in its entirety. Our hope is that, on reflection, Dr. Seuss Enterprises will recognize that the book and the campaign do not violate or infringe on any of its intellectual property

rights. If your client accedes to the campaign's prompt reinstatement, and you cease any further interference on your client's behalf, we will have no need to pursue any claims against it for tortious interference, unfair business practices, or violations of Section 512(f).

Please feel free to contact me to discuss the matter. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Booth". The signature is written in a cursive, slightly slanted style.

Dan Booth

cc: James K. Stewart
james.stewart@dlapiper.com



United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

DR. SEUSS ENTERPRISES, L.P.,

Plaintiff,

V.

Civil No. 16cv2779-JLS (BGS)

COMICMIX LLC; GLENN
HAUMAN; DAVID JERROLD
FRIEDMAN a/k/a DAVID
GERROLD; and TY TEMPLETON,

Defendant.

FILED AS SEALED DOCUMENT # 15

on 1/9/2017



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on 1/9/2017

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16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **DR. SEUSS ENTERPRISES, L.P.,**

19 Plaintiff,

20 v.

21 **COMICMIX LLC; GLENN**
22 **HAUMAN; DAVID JERROLD**
23 **FRIEDMAN a/k/a DAVID**
24 **GERROLD; and TY TEMPLETON,**

25 Defendants.

Case No. 3:16-cv-02779-JLS-BGS

**COMICMIX LLC'S CORPORATE
DISCLOSURE STATEMENT**

Assigned to Hon. Janis L. Sammartino
United States District Judge

26 Pursuant to Federal Rule of Civil Procedure 7.1, defendant ComicMix LLC
27 (“ComicMix”), by and through its undersigned counsel, certifies that it is a private
28 non-governmental entity organized and with a principal place of business in the state
of Connecticut. ComicMix has no parent corporation and no publicly held
corporation owns 10% or more of DSE’s stock.

1 Respectfully submitted,

2 DATED: December 16, 2016

3
4 BOOTH SWEET LLP

D'EGIDIO LICARI & TOWNSEND, APC

5
6 /s/ Dan Booth

/s/ Michael Licari

7
8 Dan Booth
9 *Pro Hac Vice Pending*

Michael Licari
Local Counsel

10 *Attorneys for Defendant ComicMix LLC*

11
12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on this December 19, 2016 I electronically filed the
14 foregoing document by using the Court's ECF system, thereby causing a true copy
15 thereof to be served upon counsel of record for each party to have appeared to date,
16 as identified on the Notice of Electronic Filing.

17
18 /s/ Michael Licari