

Brown v. Netflix, Inc.
855 F. App'x 61 (2d Cir. 2021)

Year	2021
Court	United States Court of Appeals for the Second Circuit
Key Facts	This case involves the use of eight seconds of the song <i>Fish Sticks n' Tater Tots</i> (the “Song”) in a two minute and eighty-seven second burlesque dance routine that appears in the documentary film <i>Burlesque: Heart of the Glitter Tribe</i> (the “Film”). The chorus of the Song consisting of the lyrics “fish sticks n’ tater tots” repeats five times in the dance routine, during which the dancer—costumed as a “reverse mermaid” with the head of a fish and legs of a woman—steps behind a sign that says “hot oil” to change into brown leggings, remove the fish head, and emerge transformed into fish sticks. The rest of the dance routine music consists of other songs. Amazon.com, Inc., Netflix, Inc., and Apple, Inc. (collectively, “Defendants”) offered the film for online streaming on their platforms. Plaintiffs, Tamita Brown, Glen Chapman, and Jason Chapman, the creators of the Song, sued the Defendants for copyright infringement. Defendants jointly moved to dismiss the claims against Netflix and Apple, and for judgment on the pleadings regarding the claims against Amazon. The district court found the Defendants’ use of the Song was fair use and resolved the claims for direct and secondary infringement in their favor. Plaintiffs appealed.
Issue	Whether use of the chorus of a children’s song to accompany a burlesque dance routine as it appears in a documentary film is a fair use.
Holding	The appellate court held that the Defendants’ use of the Song was fair use and affirmed the district court’s judgment. The first factor, the purpose and character of the use, favored fair use because the Defendants’ use of the Song, captured as the accompaniment to a filmed burlesque performance, was merely “incidental” to the Film’s purpose as a documentary that provided “commentary on the burlesque art form” by combining performances with topical discussions of “gender, sexuality, and the artistic process.” Because the use fit into one of the illustrative examples listed in the preamble to the section of the Copyright Act that discusses fair use, the court concluded Defendants were “entitled to a presumption in favor of fair use” with regard to the first factor. The court rejected Plaintiff’s argument that it was “premature” to conclude on a motion to dismiss that the Film was a documentary and not a “scripted creative work.” The court did not squarely address the second factor, the nature of the copyrighted work, other than to acknowledge the district court found the factor favored neither party. The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, weighed in favor of fair use because the portion used was minimal and encompassed only eight seconds of the entire 190-second song. Moreover, the repeated use of the chorus—the heart of the Song—was “reasonably necessary” to serve the documentary purpose of showing the performance “as it happened” and Defendants were not obligated to use the “shortest possible snippet.” Finally, the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, also weighed in favor of fair use. The court concluded that it was unlikely the Film would usurp the market for the three-minute Song because the Film only contained an eight-second portion of the Song’s chorus. In addition, even assuming that a licensing market for the Song as dance or background music existed, the “brief use of a small portion of the Song as a component of an event recorded for documentary purposes” did not “fall within the traditional or well-developed market for the Song.”
Tags	Music; Film/Audiovisual
Outcome	Fair use found

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