

**Brown v. Netflix, Inc.**

**No. 19 Civ. 1507 (ER), 2020 U.S. Dist. Lexis 92739 (S.D.N.Y. May 27, 2020)**

Year	2020
Court	United States District Court for the Southern District of New York
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 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 filed a joint motion to dismiss the claims against Netflix and Apple, and for judgment on the pleadings regarding the claims against Amazon.
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 court found that the Defendants’ use of the Song was fair use and granted the motion to dismiss and motion for judgment on the pleadings. The first factor, the purpose and character of the use, favored fair use. Although the Song and reference to “fish sticks” was unaltered, the court found the use transformative because the dance routine depicting “mature themes” serves a “new and different function” from the Song, which “communicates a light-hearted children’s story” about school lunch. Whether the film was commercial or documentary was disputed, but the court held that even if it were entirely commercial the first factor would weigh in favor of fair use. The second factor, the nature of the copyrighted work, was neutral and of limited usefulness because although the work was creative, the use was transformative. The third factor, the amount and substantiality of the portion used, weighed in favor of fair use because the portion used was “neither quantitatively nor qualitatively excessive.” The repeated use of the chorus—the heart of the Song— was permissible to fulfill the transformative purpose of communicating the “reverse mermaid” transformation. The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, weighed decisively in favor of fair use. Comparing the different audiences for the Song, intended for children, and the film, containing mature themes, the court determined that “it is unlikely that parents would purchase the film for their minor children so they could hear the excerpt of the Song.” Because the court found that the Defendants’ use of the Song was fair use and there was no underlying direct infringement, the claims for secondary copyright infringement were also resolved in Defendants’ favor.
Tags	Music; Film/Audiovisual
Outcome	Fair use found

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