

Barbara Fields, Inc. v. Atomic, Inc.,

Case No. 2023-GSR (C.D. Gilesead)

Pursuant to the Court’s Order, Plaintiff Barbara Films and Defendant Atomic, Inc. stipulate to the following facts:

Plaintiff Barbara Film’s script	Defendant Atomic, Inc.’s script
Title: <i>A Dog’s World</i>	Title: <i>Pets’ World</i>
a family-friendly computer-animated film	a family-friendly computer-animated film
Total length: 95 pages	Total length: 94 pages
Setting: friendly Maui town	Setting: friendly Colorado town
Protagonist: Stray dog Maisy, who teaches a pair of siblings about the meaning of family	Protagonist: Stray cat Gracie, who brings a struggling family together
Protagonist’s characteristics include: Maisy, a two-year old Schnauzer-Pug mix, loves to run around in circles, play with kids and cats.	Protagonist’s characteristics include: Gracie, a five-year old cat, is reserved and clever. Gracie loves to tease dogs.
Beginning of film: Introduction to family: Film begins with an introduction to the Fisher family. Adrienne is a divorced mom struggling to make ends meet while working overtime at the local diner and raising her two young kids, Blake and Claire. Adrienne’s ex-husband has recently remarried and does not want anything to do with his former family. Blake just turned thirteen and his seven-year-old sister idolizes him. Blake feels trapped at home by his ever-present sister and at school by his middle-school bullies.	Beginning of film: Introduction to Gracie: The movie begins with Gracie walking down the streets of town. Gracie can always rely on a kindly neighbor for food. Gracie’s favorite spot to hang out is underneath the white fir tree at 10 Forest Lane with the neighbor’s cat Jags.
Introduction to Maisy: Meanwhile, stray dog Maisy roams freely all-around town. Maisy enjoys playing with the Fisher’s neighbor’s cat, Leo. When Maisy is not visiting Leo, she can be found relying on kindly restaurant owners for food.	Introduction to family: Meanwhile, we are introduced to the occupants of 10 Forest Lane: Marianne, a recently widowed mother who is struggling to make ends meet, her ten-year-old son Drake, and her five-year-old daughter Blair.
Leo, the neighbor’s cat, is a humorous sidekick: Leo’s dialogue include: <ul style="list-style-type: none">• “Don’t blame me, I’m just a cat.” (Page 24).• “Do you expect me to go quietly into the night?” (Page 45)	Jags, the neighbor’s cat, is a humorous sidekick. Jags’ dialogue include: <ul style="list-style-type: none">• “Don’t blame me, I’m just a kitty cat.” (Page 23)• “Do you just expect me to go quietly into the night?” (Page 48)

<ul style="list-style-type: none"> • “Hell hath no fury like a puppy scorned.” (Page 92). 	<ul style="list-style-type: none"> • “Hell hath no fury like a kitten scorned.” (Page 90).
<p>Kids meet Maisy: One day when Blake and Claire are walking home from school, they find Maisy playing with Leo and eating scraps from a diner takeout bag – the same diner where their mom works. Blake and Claire bond over their admiration for Maisy. The kids ask their mom if they can adopt Maisy. Adrienne initially refuses.</p>	<p>Kids meet Gracie: Drake and Blair first meet Gracie because she followed their mom home from work. The kids immediately want to bring Gracie inside, but Marianne refuses.</p>
<p>Kids’ incidents/dialogue includes:</p> <ul style="list-style-type: none"> • “Ugh, parents.” (Page 5) (expressing exasperation with parents) • “Having a pet is almost as good as getting a phone.” (Page 10) • Fight with a bully (Page 24), • “Well, I guess it’s better than being old.” (after getting punished for fight by teacher) (Page 32) • “Nothing’s fair.” (Page 36) 	<p>Kids’ incidents/dialogue includes:</p> <ul style="list-style-type: none"> • “Ugh, grown ups.” (Page 6) (expressing exasperation with mom) • “If you let us keep [Gracie], I’ll stop asking for an iPhone!” (Page 13) • “Rebellion!” (starting food fight at school) (Page 25) • “Well, at least we’re not old.” (after being sent to detention by elderly school teacher) (Page 34) • “Life’s just awful.” (Page 38)
<p>Kids take Maisy out for day of surfing (Page 45)</p> <ul style="list-style-type: none"> • While surfing, kids comment, “Should we put this on Youtube?” (Page 35) • After surfing, the kids take a nap on the beach with Maisy. One of the kids comments, “there’s nothing better than cuddling with a dog on the beach.” 	<p>Kids take Gracie out for a day of snowboarding (Page 45).</p> <ul style="list-style-type: none"> • While snowboarding, kids comment: “Should we post this on Tik Tok?” (Page 36) • After snowboarding, the kids look out at the snowy mountain with Gracie. One of the kids comments, “what a day!”
<p>Kids go out for a walk with Maisy, with sad music playing (Page 61)</p>	<p>Kids go out for a walk with Gracie, with sad music playing (Page 70)</p>
<p>Dramatic conflict: One night as Adrienne is closing down the local diner by herself, intruders break in from the rival restaurant. Just as the intruders are about to attack Adrienne, Maisy barks in and saves the day, with the assistance of her female friend Leo.</p>	<p>Dramatic conflict: Then, one weekend the kids are playing outside with Gracie while Marianne is inside cooking. Marianne shouts through the windows for her kids to get help because she thinks she is having a heart attack. While the kids are confused, Gracie jumps into action. She meows to call to her feline friend</p>

	<p>Jags. Jags then summons his owner, Taylor, who happens to be a medical doctor. Taylor runs over to 10 Forest Lane and finds Marianne has collapsed on the floor. Taylor checks for her pulse and finding none, starts performing CPR. As Marianne regains consciousness, she opens her eyes to see Drake, Blair, Gracie, Jags, and Taylor all in her kitchen. Marianne’s eyes linger on Taylor and it is love at first sight.</p>
<p>Finale: Adrienne brings Maisy home and tells her kids that Maisy is family because family always remembers to look out for each other. The movie concludes with the phrase from Claire, “We could all learn a thing or two from a dog.”</p>	<p>Finale: The movie flashes forward in time a year to the wedding of Marianne and Taylor. The now-adopted Gracie and Jags are flower cats at the wedding ceremony. The movie ends at the wedding reception with a toast from Gracie smiling and saying, “We have a lot to learn from our pets.”</p>

1 Dr. Samantha Younger, having been duly sworn, testified as follows:

2
3 EXAMINATION

4
5 *** LINES OMITTED ***

6
7 BY Ms. Mary Costa of Jones & Jones LLP

8 Q: Dr. Younger, what is your role at TalkABC?

9 A: I am the head of programming.

10 Q: How long have you been the head of programming at TalkABC?

11 A: For about four years -- since the end of 2019.

12 Q: Before we dive into the details of the function of TalkABC, at a
13 high level, what was the idea behind the creation of TalkABC?

14 A: TalkABC is based on an interconnected group of nodes that was
15 inspired by neurons in the human brain using the transformer
16 architecture model.

17 Q: What is the transformer architecture model?

18 A: It's a well-known model that was first introduced in a 2017 paper
19 called "Attention is All You Need."

20 The transformer architecture model is a type of neural network that
21 is well-suited for processing sequential data, such as text.

22 Q: Speaking of text, how was TalkABC's large language model trained?

23 A: TalkABC's large language model -- or LLM as we call it -- was
24 trained on a large dataset of text.

25 Q: How large was the dataset of text?

26 A: Quite large. Almost too many sources to count. I'd say in the
27 millions of books, articles, and webpages.

28 Q: What was the purpose of training the LLM?

29 A: Once trained, the LLM can be fine-tuned to a specific task.

30 Q: What tasks can TalkABC's LLM be used for?

31 A: TalkABC can be used for different tasks. We're still exploring all

1 its possibilities. The main thing it can be used for though is
2 text generation. TalkABC can generate text that is similar in
3 style and content to a given input.

4 Q: Can TalkABC be used for dialogue generation?

5 A: Yes, it can, and it has been used for dialogue generation.

6 Q: Was TalkABC trained with the movie "A Dog's World" by Ms. Barbara
7 Fields?

8 A: Yes. TalkABC was trained with many, many movies.

9 Q: Was TalkABC trained with any other movie by Ms. Barbara Fields?

10 A: Yes.

11 Q: How many movies by Ms. Barbara Fields?

12 A: I believe all of Ms. Fields' films. About 20 movies.

13 Q: Why did Atomic train TalkABC with all of Ms. Barbara Fields
14 movies?

15 A: Ms. Fields is an outstanding writer and filmmaker. TalkABC could
16 learn a lot from Ms. Fields' work. But TalkABC was trained with
17 thousands of film scripts -- many well-known writers and films,
18 but also many little known writers and films. And as mentioned
19 before, TalkABC was trained on the millions of books, articles, and
20 webpages.

21 Q: Ms. Fields' films were copyrighted, correct?

22 A: Yes, I believe so.

23 Q: Did Atomic train TalkABC with other Barbara Films copyrighted
24 content?

25 A: Yes, Ms. Fields wrote numerous books on film history, film theory,
26 screenwriting, and other film topics. We trained TalkABC with Ms.
27 Fields' books as well.

28 Q: Did you train TalkABC with all of Ms. Fields' books?

29 A: Yes, I believe so.

30 Q: So, can TalkABC create text based on the style of Ms. Fields?

31 A: Yes.

1 Q: Can TalkABC create text based on the voice of Ms. Fields?
2 A: Yes.
3 Q: Was Pets' World created to be in the style of Ms. Fields?
4 A: Yes, I believe so.
5 Q: Is it fair to say that TalkABC's training involves directly copying
6 prior works like "A Dog's World"?
7 A: No, that's not fair to say. Absolutely not. TalkABC's LLM does
8 not directly copy. TalkABC functions like our brains. We use our
9 brains to read books and watch movies. We wouldn't say that the
10 knowledge we have in our brain means that we copied a book or a
11 movie. The same is true here.
12 Q: How does TalkABC generate its text?
13 A: That's a complex question. Like I mentioned TalkABC functions like
14 our own brains. Just as we don't fully understand how our brains
15 work, we don't fully understand how TalkABC generates its text.
16 Q: Out of curiosity, was TalkABC's trained with Shakespeare?
17 A: Yes.
18 Q: Has TalkABC created plays in the style of Shakespeare?
19 A: Yes.
20 Q: What kind?
21 A: Tragedies, comedies, and historical plays.
22 Q: Have you read TalkABC's Shakespearean plays?
23 A: Some of them?
24 Q: How are they?
25 A: I like them.
26 Q: Are they as good as Shakespeare?
27 A: I don't know. It's Elizabethan language. The stories, plots, and
28 characters are similar.
29 Q: Can TalkABC create a practically limitless amount of Shakespearean
30 works?
31 A: Yes, I suppose so.

1 Q: Can TalkABC create a practically limitless amount of films in the
2 style of Barbara Fields?

3 A: Yes, I suppose so.

4 Q: Can you remove Plaintiff's copyrighted content from TalkABC, so it
5 can be "forgotten" by the AI?

6 A: Not at the current time. It's like asking the human brain to
7 forget something that it learned. Another analogy is that it's
8 like trying to unscramble an egg. One option is a complete reset of
9 the large language model, which would involve retraining the model
10 from scratch. Second, we're hoping that tools will be developed so
11 that the AI can unlearn data. But we're at an early stage.

12 Q: So to unlearn Plaintiff's copyrighted content, TalkABC would
13 need to a complete reset, so that it could be retrained from
14 scratch?

15 A: Yes.

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*** LINES OMITTED ***

1 Mr. Joseph Lorre, having been duly sworn, testified as follows:

2
3 EXAMINATION

4
5 *** LINES OMITTED ***

6
7 BY Mr. Duke Wolfson of Jones & Jones LLP

8 Q: Mr. Lorre, what is your current job title?

9 A: I am the project manager for the upcoming film "Pets' World."

10 Q: Have you done work on other films?

11 A: Nope, this is my first one.

12 Q: Is it fair to say then that you're not a filmmaker?

13 A: Yes, that's fair.

14 Q: Have you written any screenplays?

15 A: Nope, not a screenwriter either.

16 Q: Are you a part of any of entertainment union, including the Writers
17 Guild of the United States, Media Actors Guild, or the Directors
18 Guild of the United States?

19 A: No union card for me. I'm not a member of any of those unions.

20 Q: What job did you have prior to becoming the project manager for
21 "Pets' World"?

22 A: Before this I was exclusively creating content on my podcast "More
23 Popcorn Please."

24 Q: Are you still creating content for your podcast?

25 A: Yes, but not as regularly. Now, I release an episode once a month.
26 Before I was releasing them at least once a week.

27 Q: What is your podcast "More Popcorn Please" about?

28 A: On my podcast I review movies new, old -- doesn't matter as long as
29 I can watch it with a freshly popped bag of popcorn.

30 Q: Before you started your podcast, what job did you have?

31 A: I was a full-time student at USC -- University of Southern
California.

1 I graduated in 2019, then immediately dove into my podcast.

2 Q: What did you major in at USC?

3 A: I majored in computer science and film studies.

4

5 *** LINES OMITTED ***

6

7 Q: Now let's get to your work on "Pets' World" and how you used
8 TalkABC.

9 A: Okay.

10 Q: Did you use TalkABC while making "Pets' World"?

11 A: Yes.

12 Q: How did you use TalkABC while making "Pets' World"?

13 A: I used TalkABC to create the screenplay.

14 Q: How did you use TalkABC to create the screenplay for "Pets' World"?

15 A: I instructed TalkABC to generate a screenplay, including the text
16 and the dialogue in the style of some of my favorite filmmakers.

17 Q: Which filmmakers did you instruct TalkABC to generate text,
18 Including dialogue, in the style of?

19 A: My favorite filmmaker Barbara Fields and three other filmmakers
20 that are also big in computer animated films -- Davis Johnson, Beth
21 Zucker, and Taylor Harris.

22 Q: So, you admit that you instructed TalkABC to generate a screenplay,
23 including the text and the dialogue in the style of Barbara Fields?

24 A: Yes -- well, in the style of Barbara Fields and three other
25 filmmakers.

26 Q: Is it fair to say that "Pets' World" is similar to Ms. Fields'
27 work?

28 A: Sort of. The overall tone, structure, and feel of "Pets' World"
29 is intended to be similar to Ms. Fields' movies. I would call
30 "Pets' World" an homage to her work.

31 Q: Are the characters in "Pets' World" similar to characters from Ms.

1 Fields' work?

2 A: Yes, fairly similar. Again, the overall feel of "Pets' World"
3 characters is supposed to resemble Ms. Fields' movies. The
4 characters have a similar warmth, intelligence, and vulnerability.
5 But in my view, that's just trying to make the characters three
6 dimensional.

7 Q: Did you intend for "Pets' World" characters to be similar to Ms.
8 Fields' characters?

9 A: Yes.

10 Q: Can you distinguish "Pets' World" from a Barbara Fields movie?

11 A: I don't know. I worked on "Pets' World," so I think of it as the
12 work that I created with TalkABC.

13 Q: How much dialogue did you write?

14 A: None.

15 Q: How many characters did you create?

16 A: I provided instructions, but I didn't create the characters.

17 Q: Are you planning to get screenwriting credit for "Pets' World"?

18 A: I don't really know how screenwriting credit works, so I can't
19 answer the question. I don't have a plan about credit, so I guess
20 the answer is no.

21 Q: How long did you work on the Pets' World script?

22 A: About three days.

23 Q: As a movie fan, how's the "Pets' World" script?

24 A: I think it's good.

25 Q: Does Atomic have video footage for Pets' World?

26 A: Not yet. We were planning to start producing video footage.

27 Q: You testified that this is your first film. How were you planning
28 to create video footage?

29 A: We were planning to start with Atomic's AI tools that can create
30 video footage based on text prompts.

31 Q: What's the status of the production of video footage?

1 A: It's on hold due to the lawsuit.

2 Q: Was Plaintiff Barbara Films' copyrighted materials used in the
3 development of Atomic's AI video tools?

4 A: Yes, I believe so.

5 Q: Can Atomic's AI video tools be used to create video footage in
6 the style of a filmmaker?

7 A: My understanding is that's the goal. We want to be able to use AI
8 to create video footage based on the look or feel of a visual
9 artist. We're not there yet. But we're making good progress.

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11 *** LINES OMITTED ***

12
13 BY Katie Crawford of Smith & Smith LP

14 Q: One more question before you go, Mr. Lorre. You mentioned that
15 the overall tone, structure, and feel of "Pets' World" is intended
16 to be similar to Ms. Fields' movies. Would you say you'd also find
17 those same similarities in many other movies?

18 A: Of course. The basic plot mechanics are the same. You don't have
19 to be a film studies grad to recognize that. You have the
20 exposition, like the common character trope of a lost or stray
21 animal. Then, some conflict, like a troubled family that needs
22 help. Next, comes a rising action, a climax, a falling action, and
23 a resolution with a nice happy ending. These are common genre
24 tropes you'll find in almost every family-friendly animated movie.

25 Q: No further questions.

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF GILESEAD**

BARBARA FILMS, INC.,

Plaintiff,

v.

ATOMIC, INC.

Defendant

C. A. No. 1:23-2023-GSR

**MEMORANDUM ORDER GRANTING
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

This is a copyright and patent infringement suit between Plaintiff Barbara Films, Inc. (“Plaintiff” or “Barbara”) and Defendant Atomic, Inc. (“Defendant” or “Atomic”). Barbara Films’ founder and Chief Executive Officer is the filmmaker Barbara Fields, who wrote and directed many motion pictures, including the hit computer animated feature film, *A Dog’s World*.

Barbara alleges, *among other things*, that Atomic engaged in copyright infringement by training Atomic’s Artificial Intelligence tool, “TalkABC,” with Barbara’s copyrighted materials. After training TalkABC with Barbara’s copyrighted screenplays and other materials, Atomic used TalkABC to create a competing movie screenplay, *Pets’ World*.

Barbara moved for a preliminary injunction based on the copyright infringement claim. Plaintiff’s motion is not based on its patent infringement claim.

II. LEGAL STANDARD

A plaintiff seeking preliminary injunctive relief must establish that: (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008)

A court must find that “a certain threshold showing” is made on each of the four required elements. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Under the Ninth Circuit’s sliding scale approach, a preliminary injunction may issue if (1) there are “serious questions going to the merits,” (2) if “a hardship balance [also] tips sharply towards the [movant],” (3) “there is a

likelihood of irreparable injury,” and (4) “that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The goal of a preliminary injunction is to maintain the status quo, which is “the last uncontested status which preceded the pending controversy.” *GoTo.com, Inc. v. Walt Disney Corp.*, 202 F.3d 1199 (9th Cir. 2000) (citations omitted).

III. DISCUSSION

A. Likelihood of Success on the Merits

1. Copyright Infringement

To prevail on a copyright infringement claim, a plaintiff must demonstrate “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). See also *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

Plaintiff’s ownership of a valid copyright in Ms. Fields’ screenplays and books, including the screenplay and film *A Dog’s World*, is undisputed. The inquiry turns thus on whether Defendants copied protected expressions from *A Dog’s World* or Plaintiff’s other copyrighted material.

Plaintiff presents two related theories. First, Barbara alleges that Atomic took Barbara’s copyrighted content, in particular, to train TalkABC’s large language model (“LLM”). Atomic disputes that training TalkABC with Plaintiff’s copyrighted material violates copyright law.

The Court finds that there are “serious questions” whether Atomic copied Plaintiff’s copyrighted content by training TalkABC with Plaintiff’s copyrighted materials. See *Assoc. Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 540-41 (S.D.N.Y. 2013) (finding that defendant’s scraping copyrighted news articles constituted copyright infringement). Here, Atomic obtained copies (e.g., e-book versions) of Plaintiff’s copyrighted screenplays, including *A Dog’s World*, as well as Plaintiff’s treatises on screenwriting and film theory.

Second, Plaintiff Barbara contends that Atomic’s script and planned movie, *Pets’ World*, infringes Barbara’s copyright.

In order to establish copying, Plaintiff must either provide “evidence of direct copying” or they must show that “Defendants had ‘access’ to [Plaintiff’s] copyrighted material and that the two works at issue are ‘substantially similar.’” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (citing *Funky Films*, 462 F.3d at 1076).

As for direct copying, Plaintiff alleges that Atomic engaged in a form of direct copying by training TalkABC’s large language model (“LLM”) with Plaintiff’s copyrighted material. In preliminary discovery, Defendant conceded that TalkABC’s LLM analyzed vast amounts of Plaintiff’s copyrighted material, and that TalkABC learned the patterns and connections between Plaintiff’s copyrighted words and phrases. Defendant further conceded that learning these patterns and

connections enabled TalkABC to generate new content—including the *Pets’ World* screenplay—in a style similar to Ms. Fields and Barbara Films’ motion pictures.

As for the creation of the *Pets’ World* script, Atomic’s corporate witness testified that TalkABC analyzed *all* of Ms. Fields and Barbara Films’ content. In addition, Atomic conceded that its project management team provided human instructions for TalkABC to create a script in with the “mood,” “feel,” and “structure” of a Barbara Films movie. *See Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018). After doing so, TalkABC generated the initial script. Atomic project managers then prompted TalkABC to keep refining the script. *Cf. Jacobsen v. Katzer*, 535 F.3d 1373, 1379 Fed. Cir. 2008) (“Katzer/Kamind also admits that portions of the DecoderPro software were copied, modified, and distributed as part of the Decoder Commander. Accordingly, Jacobsen has made out a prima facie of copyright infringement.”).

Defendant Atomic disputes that it directly copied *A Dog’s World* or any Plaintiff’s other copyrighted material. Atomic asserts that training TalkABC—even in the writing and other creation of *Pets’ World*—is not direct copying. Rather, Atomic contends that training an LLM with copyrighted material is like having the LLM *read* the material—not *copy* the material.

The Court acknowledges that this is a largely open question. In arguably similar circumstances, courts have determined that storing a “cached” copy of copyrighted materials does not constitute direct copyright infringement. *See, e.g., Field v. Google, Inc.* 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (“Without the user’s request, the copy would not be created and sent to the user, and the alleged infringement at issue would not occur. The automated, non-volitional conduct by Google in response to a user’s request does not constitute direct infringement under the Copyright Act.”). However, “caching” a copy of copyrighted works may be substantially different than training a LLM with copyrighted works.

Accordingly, while the Court is skeptical that an AI-powered language model would engage in direct copying, the Court is persuaded that there are serious questions going to this issue.

In the alternative, the Court considers whether Atomic had “access” to Plaintiff’ copyrighted material and whether the “two works at issue are ‘substantially similar.’” *Bernal*, 788 F. Supp. 2d at 1052. *See also Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1052, 1084 (9th Cir. 2022).

There is no dispute that Atomic had “access” to Plaintiff’s copyrighted material, including the script for *A Pet’s World*. Atomic concedes that TalkABC’s LLM analyzed the *Pet’s World* script, Ms. Fields’ other scripts, Ms. Fields’ film and screenwriting books, and other copyrighted Barbara Films content.

The Court turns to substantial similarities. The court acknowledges that the generic plot is not protectable. *See, e.g., Rickets v. CBS Corp.*, 439 F. Supp. 3d 1199, (C.D. Cal. 2020) (“a well-trodden rags to riches’ story arc ... is not protectable.”) (citations omitted). That said, the “presence of so many generic similarities” and the “common patterns arise” help Plaintiff satisfy the test. *See Camhe v. Dreamworks, LLC*, 2009 WL 10668462 (C.D. Cal. May 14, 2009).

Here, in view of the Parties' joint submission regarding the film scripts and Defendant's admissions in depositions, the Court is persuaded that there are "serious questions" as to substantial similarity.

The Court next turns to Atomic's fair use argument.

2. Fair Use

"[T]he 'fair use' doctrine ... [is] an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021) (citation omitted). The fair use doctrine is a "guarantee of breathing space within the confines of copyright," *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), and it is a "backstop" that "counterbalance[s] the exclusive rights of a copyright," *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 450 (9th Cir. 2020). "[T]he fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107.

When addressing fair use courts analyze the following non-exhaustive factors:

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

17 U.S.C. § 107.

These four factors are analyzed and weighed "in light of the purposes of copyright." *Dr. Seuss*, 983 F.3d at 451 (quoting *Campbell*, 510 U.S. at 578). That analysis is "flexible" and "may well vary depending upon context." *Google*, 141 S. Ct. at 1197. For decades, courts have used the concept of "transformation" to define and identify that creativity in fair use cases. *See Campbell*, 510 U.S. at 578–79.

First Factor: Purpose and Character of the Use

The first fair use factor examines "the purpose and character of the use." 17 U.S.C. § 107(1). Under this factor, we consider whether the infringing work is transformative and whether it is commercial. *See Dr. Seuss*, 983 F.3d at 451–52.

Here, Defendant admits that it has used Plaintiff's copyrighted work in a commercial manner. *See Meltwater U.S. Holdings*, 931 F. Supp. 2d at 551-52.

Atomic contends that its use of Plaintiff's works in the creation of *Pet's World* is transformative. Atomic argues that while its script describes a similar plot within the same genre, the use of TalkABC transforms the purpose and character of the use of Plaintiff's works. But given the many

similarities between Plaintiff and Defendant’s stories and scripts, Atomic’s material does not meaningfully transform Plaintiff’s copyrighted works. To be transformative, the infringing use must bring about a much starker change in expression. The Court acknowledges that TalkABC apparently has the ability to further transform Plaintiff’s copyrighted work. But Atomic admits that TalkABC created a competing script, *Pets’ World*, that bears significant similarities to Plaintiff’s copyrighted script, *A Dog’s World*.

Based on the present posture, the first factor favors Plaintiff.

Second Factor: Nature of the Copyrighted Work

The second fair use factor concerns “the nature of the copyrighted work.” 17 U.S.C. § 107(2). When assessing the copyrighted work’s nature, we consider “the extent to which it is creative and whether it is unpublished.” *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012). *See Meltwater U.S. Holdings*, 931 F. Supp. 2d at 557 (“Works of fiction are ‘closer to the core of intended copyright protection’”) (citation omitted).

Here, *A Pet’s World* is a creative, fictional work. It resulted from many technical and artistic decisions. In addition, *A Pet’s World* was commercially released, and it received considerable commercial and critical success.

Third Factor: Amount and Substantiality of the Portion Used

The third factor considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). This inquiry is concerned with “the quantitative amount and qualitative value of the original work used in relation to the justification for that use.” *Dr. Seuss*, 983 F.3d at 456. This factor weighs against fair use if the infringer publishes “the heart” of an “individual copyrighted picture” without justification. *Monge*, 688 F.3d at 1178.

Atomic argues that this favors fair use because Plaintiff’s copyrighted materials were only some of the materials considered in the creation of *Pet’s World*. TalkABC’s large language model is based on millions of books and publications. But Atomic admits that the LLM includes Plaintiff’s copyrighted materials. In addition, *Pets’ World* bears significant qualitative similarities to Plaintiff’s film, *A Dog’s World*.

Atomic’s use of Barbara’s copyrighted materials lacked any valid justification. “This factor circles back to the first factor because ‘the extent of permissible copying varies with the purpose and character of the use.’” *Dr. Seuss*, 983 F.3d at 456 (quoting *Campbell*, 510 U.S. at 586–87).

Because Atomic copied without justification, the third factor weighs against fair use.

Fourth Factor: Market Effect

The fourth factor considers “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). This factor encompasses both (1) “the extent of market

harm caused by the particular actions of the alleged infringer,” and (2) ““whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market’ for the original” and “the market for derivative works.” *Dr. Seuss*, 983 F.3d at 458 (quoting *Campbell*, 510 U.S. at 590).

In order “to negate fair use,” Barbara “need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.” *Monge*, 688 F.3d at 1182 (quoting *Harper & Row*, 471 U.S. at 568).

The harm to the market for Plaintiff’s copyrighted material would be immense. There is no dispute that a market exists for Barbara’s copyrighted films, books, and other materials. If Atomic’s AI is used to create competing films or screenplays in a widespread and unrestricted fashion, Atomic’s conduct would cannibalize Plaintiff’s market.

Therefore, because Atomic’s AI use, if widespread, could severely damage the market for Barbara’s copyrighted works, the fourth factor weighs against fair use.

Balancing

Balancing the four statutory factors, the Court finds that Atomic is not entitled to a fair use defense.

B. Irreparable Harm

The Court finds that Plaintiff is likely to suffer irreparable harm if the Court does not grant preliminary relief. Barbara Films has devoted substantial resources into developing their films, screenplays, brands and products since 1986. After training TalkABC with Plaintiff’s copyrighted materials, Atomic can create a practically limitless amount of competing written materials.

Plaintiff’s potential damage to goodwill constitutes an irreparable injury. *Cisco Sys., Inc. v. Shenzhen Usource Tech. Co.* No. 5:20-CV-04773-EJD, 2020 WL 5199434, at *8 (N.D. Cal. Aug. 17, 2020) (noting intangible injuries such as loss of goodwill through sale of counterfeited products can constitute irreparable harm).

C. Balance of Equities

The Court finds the balance of the equities favor Barbara. In infringement cases, “[w]here the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense ‘merits little equitable consideration.’” *Triad Sys. Corp. v. Se. Exp. Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995).

D. Public Interest

The Court finds that it is in the public interest to issue a preliminary injunction. Public policy strongly supports stopping infringement.

* * *

In summary, the Court finds that Barbara has met all four requirements for preliminary injunctive relief.

IV. CONCLUSION

The Court hereby GRANTS Plaintiff's motion for preliminary injunction order and orders as follows:

1. Defendant is enjoined from further production of *Pets' World* or any other project based on Plaintiff's copyrighted materials.
2. Defendant is enjoined from permitting TalkABC to respond to queries requesting responses in the look or feel of Barbara Fields or Barbara Films, Inc.

Dated: May 9, 2023

/s/ Nicole Thompson
UNITED STATES DISTRICT JUDGE