

ESSAY

I. **Heavy's Rights**

The Mothership photograph is a pictorial work that is protected under copyright as it is an original work of authorship fixed in a tangible medium of expression under §102(a)(5). While not all photographs have sufficient original expression to warrant protection, *The Mothership* does, for it is “representative[] of the original conception[] of the author” (Sarony). It is sufficiently fixed, whether in print or digital form (London-Sire Records).

Heavy's rights only extend to his original expression in the photograph, covering artistic choices such as “framing, exposure, shutter speed, and movement options,” as well as his choice of film, angle, and aspect ratio (Leigh). He has no rights in the subject matter or background, nor in the “mood” that “flows naturally” from the storm (Leigh).

The Mothership may be considered a collective work, as it is comprised of three independently copyrightable photographs stitched together. His selection and arrangement of these works lack the requisite modicum of creativity for protection under Feist, for aligning them side by side as they appear in nature is more obvious than arranging a list alphabetically. Heavy may, however, have an argument for protection of his selection and arrangement if they create an image otherwise impossible to capture without utilizing his technique.

Heavy, therefore, has §106 rights, including (1) reproduction, (2) derivative works, (3) distribution, and (5) public display, in his original expression embodied in *The Mothership*.

II. **Heavy v. Netflix**

a. **Claims**

The *Stranger Things* concept art is either an unauthorized copy or, more likely, a derivative work. While a copy does not have to be exact to be a violation of §106(1) (Sheldon), the concept art has “sufficient nontrivial expressive variation to make it distinguishable from the underlying work in some meaningful way” (Schrock), and is in “permanent and concrete form” (Micro-Star). It is an illustration, rather than a photograph, and the illustrator has set the storm in a town, not an open landscape, adding elements such as cars, street lights, and a person, all absent from *The Mothership*.

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Regardless, the infringement analysis under Arnstein is the same. There is no direct evidence Netflix copied Heavy's work, but this should be investigated further in discovery. Circumstantial evidence of copying is unclear, as well. There is strong probative similarity between the storms in each work, as they fit together almost perfectly in the Petapixel image, suggesting copying. However, there is currently little evidence Netflix had access to *The Mothership*. This also should be further investigated in discovery. Heavy suggests Netflix had access through SHANZHEISTER, but this contention is likely insufficient without more. Even if a court were to find striking similarity between the two works, there would still need to be some evidence of access (Selle v. Gibb), or evidence precluding the possibility of independent creation (Gaste).

Assuming Netflix copied, Heavy would have a strong argument for improper appropriation of his protected expression. While the concept art does not replicate Heavy's creative choices in his photograph exactly, since it is an illustration, it closely replicates the resulting image created by Heavy's choices of framing, exposure, and shutter speed. There is comprehensive non-literal similarity, creating a similar "look and feel" in the two works (Steinberg), which Heavy could argue have the same aesthetic appeal to the ordinary observer (Peter Pan). Petapixel's side-by-side image and accompanying statement support this argument. There may also be some fragmented literal similarity between the cloud rings and rain patterns evident in Petapixel's image (Steinberg).

If Heavy can show access, he has a strong argument for infringement under *Arnstein* and can bring claims for violating his §106(1) and (2) rights. He would also have a §106(5) claim for the display of the concept art in *Beyond Stranger Things*, which was likely prominent and for more than a fleeting duration and would thus be deemed quantitatively substantial and not *de minimis* (Ringgold).

Further, if Netflix used the unauthorized concept art in *Stranger Things*, this would be a further violation of Heavy's §106(2) right, as the show would be a derivative work of the concept art, and his 106(4) public performance right, by transmitting the show to the public.

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Who to bring each claim against would be determined by who the author of the concept art is deemed to be. The concept art is likely a work for hire, and therefore Netflix is the legal author. Because it was created for use as part of an audiovisual work, it would constitute a work for hire under §101 so long as there is a valid, explicit, written and signed contract between Netflix and the illustrator. This is likely the case, as it is standard industry practice. Otherwise, we would have to determine if there is an employer-employee relationship between Netflix and the illustrator, and if the art was created within the scope.

As Netflix is likely the author, all claims should be brought against Netflix.

b. Defenses

Netflix will first argue there is no infringement. They can claim independent creation by showing direct evidence, such as concept art pre-dating Heavy's photograph, or by disproving access to *The Mothership* (Ty Inc.). This should be explored in discovery. Netflix can also show there is a common public domain antecedent: a real storm. They can argue they studied storms, modeled the concept art after a real storm, and any similarity between the works is because *The Mothership* is a photograph of a real storm (Herbert Rosenthal).

Further, Netflix can argue even if they copied their storm from *The Mothership*, there was no improper appropriation because they only copied the unprotectable subject matter of a photograph (Leigh) and Heavy's idea of a large foreboding storm (Nash). They have a strong argument under Leigh they did not copy Heavy's expression, as the angle and perspective is higher and closer to the storm in the concept art, the coloring is darker, and the setting is entirely different. Netflix can argue there is no comprehensive non-literal similarity, as the only observer to feel the two works had the same aesthetic appeal is Petapixel, a website focused on photography who could be considered an expert, rather than the actual intended audience for *The Mothership*.

Lastly, Netflix can argue they did not infringe because a dark stormy vortex is common in science fiction and horror movies when an evil force is descending upon a town, and thus constitutes *scenes a faire* (Gaiman). This is likely their weakest argument. However, much of the

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appeal of *Stranger Things* is its use of highly recognizable characters, themes, and elements from 1980's horror and science fiction, which helps bolster this argument.

Were Netflix found to be infringing, they could also argue fair use (§107), but the factors weigh against them. The concept art is commercial, as its purpose is the creation of a show for Netflix, weighing against fair use but not precluding it (Betamax). Their use is somewhat transformative, as it is an illustration and not a photograph and is being used to inform an audiovisual work, rather than for display or sale to the public. However, under Author's Guild this would likely be viewed not as a transformative use, but as a derivative work, as it is recasting Heavy's protected expression, and would therefore weigh against fair use.

The nature of Heavy's work is creative, which also weighs against fair use, even if a photograph is not as close to the core of copyright as a painting (Acuff-Rose). The amount and substantiality of Heavy's work Netflix used also weighs against Netflix. Quantitatively, they lifted the entire storm, comprising most of *The Mothership*, and dropped it into their work. Qualitatively, the storm is certainly the "heart and soul" of *The Mothership* (Harper & Row).

Lastly, while there is no evidence the storyboard is being sold to the public or displayed in a museum charging an entry fee, and watching *Stranger Things* likely would not impact Heavy's ability to sell *The Mothership*, Netflix's use may affect Heavy's ability to license the work for use as a dramatic backdrop in a pivotal scene of another audiovisual work. Were Netflix's fair use argument to prevail, it could have a deleterious effect on photographers who could similarly license their works for such uses (Acuff-Rose). Therefore, Netflix's fair use defense would likely fail.

III. **Heavy v. SHANZHEISTER**

a. **Direct Infringement – Claims and Defenses**

Heavy can bring a claim against SHANZHEISTER for direct infringement of 106(1), as *The Mothership* was copied as an electronic file to their server, where it was fixed in a tangible medium for a sufficiently non-transitory duration to allow the service to analyze the photograph and assign it additional keywords (London-Sire Records). SHANZHEISTER likely would concede copying, as they admit as much in their description of their product. Since they

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copied the entire photograph to a digital server, they clearly engaged in improper appropriation (Author's Guild).

However, under Author's Guild, SHANZHEISTER would have a strong fair use defense. While the nature of their use is commercial, as they run advertisements, this does not preclude fair use. Further, their use is highly transformative and does not supersede Heavy's work in the market. Rather, SHANZHEISTER has created a search function allowing users to find photographs suiting their needs. This type of information about a work is not protected by copyright (Author's Guild). SHANZHEISTER employs more safeguards than Google Books Project does, as it destroys the copy after assigning keywords, and does not show snippets.

The amount and substantiality taken also weighs in SHANZHEISTER's favor. While they copy the entirety of the work, they do not show their users any of it. Further, there is likely no deleterious effect on the market for the photos SHANZHEISTER finds. The photographers are not well known, and the service may actually increase their market. There is also no protected market for the license of such information about one's works (Author's Guild).

b. Secondary Infringement – Claims and Defenses

Heavy could also bring claims against SHANZHEISTER for contributory and vicarious infringement. The requisite direct infringement may have been committed by Netflix, as discussed above, by SHANZHEISTER's users, or by the websites SHANZHEISTER directs users to. If it were, SHANZHEISTER could further argue their use is fair use.

Assuming direct infringement, it is unclear if Heavy would be able to establish SHANZHEISTER had the requisite knowledge to be liable for contributory infringement. SHANZHEISTER has a substantial non-infringing use, finding photographs to use for non-infringing purposes, and thus a court will not impute constructive knowledge. Actual knowledge of infringement by its users or hosting websites must be shown (Napster). It is also unclear whether SHANZHEISTER would be found to be inducing infringement (Grokster). Their product description does not explicitly call for infringement or advertise such a use, but it walks a fine line and may be found to suggest infringement. This should be investigated during discovery by looking at internal communications and advertising to glean intent (Grokster). SHANZHEISTER

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would likely be found to be materially contributing by providing a forum and system to facilitate infringement (Napster). However, without clear evidence of inducement or actual knowledge, a contributory infringement claim would likely fail.

It is also unclear if Heavy could establish vicarious infringement. Proving SHANZHEISTER had the right and ability to control infringement by its users would be difficult. While they could patrol their service and take down all links to unauthorized copyrighted works, this would be unnecessary if the websites were hosting photos lawfully and users were using the photos lawfully. It is unclear there is enough infringement that SHANZHEISTER should be patrolling, and unclear if they even could.

Further, while SHANZHEISTER has a direct financial benefit in increasing users on its site and increasing ad sales, it is not clear its user base is growing *because* of infringement SHANZHEISTER might be facilitating. There would need to be evidence users are gravitating toward the site because of the infringing activity (Fonovisa), and not because they just want to look at lawfully posted photos for inspiration or enjoyment, otherwise this claim would fail.

Word Count: 1995