

THE DEVIL IS IN THE TRADEMARK: A DISCUSSION OF THE SATANIC TEMPLE V. NETFLIX

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I. INTRODUCTION

*The Chilling Adventures of Sabrina*¹ (“*Sabrina*”) depicts the life of a sixteen-year-old witch who must choose between the worlds of witchcraft and human mortals.² With depictions of the occult, cannibalism, devil worship, and magic, the show takes a much darker turn than its early 1990s predecessor *Sabrina, the Teenage Witch*³ or its comic book origins.⁴ A statue of Baphomet, the demonic entity of Templar lore, regularly appears throughout the series in depictions of witchcraft and devil worship.⁵

The problem? According to The Satanic Temple (“the Temple”), the statue used in the series is an exact duplicate of their own copyrighted statue.⁶ The Satanic Temple argues that its statue, “Baphomet with Children,” (“Baphomet”) is not a depiction of devil worship as *Sabrina* may lead its viewers to believe, but rather a way to assert pluralism and equal status in a culture of religious freedom as enshrined in the First Amendment’s Free Exercise and Establishment Clauses.⁷ As a result of the appearance of Baphomet in *Sabrina*, The Satanic Temple sued Netflix and Warner Brothers (the producers of the *Sabrina* series)

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¹ *The Chilling Adventures of Sabrina*, (Warner Brothers 2018).

² *The Chilling Adventures of Sabrina*, IMDB, <https://www.imdb.com/title/tt7569592/> (Last visited Feb. 4, 2019).

³ IMDB, *supra* note 2.

⁴ *Sabrina the Teenage Witch*, IMDB, <https://www.imdb.com/title/tt0115341/> (last accessed Feb. 8, 2019); *Sabrina the Teenage Witch*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sabrina_the_Teenage_Witch (Last Accessed Feb. 1, 2019).

⁵ *Complaint*, United Federation of Churches, L.L.C. d/b/a The Satanic Temple v. Netflix, Inc. and Warner Bros. Entertainment, Inc., 2018 WL 5839467 (S.D.N.Y. Nov. 8, 2018) (No. 1:18-cv-10372). [hereinafter *Complaint*]; *see, e.g.*, Netflix, *Chilling Adventures of Sabrina [Official Trailer] – Netflix*, YOUTUBE (Oct. 8, 2018), <https://www.youtube.com/watch?v=ybKUX6thF8Q>.

⁶ *Complaint*, ¶¶ 51-59; Julia Jacobs, *Satanic Temple Sues Over Goat-Headed Statue in Sabrina Series*, N.Y. Times, A22 (Nov. 10, 2018) <https://www.nytimes.com/2018/11/09/us/satanic-temple-suing-netflix-sabrina.html>.

⁷ *Complaint*, ¶ 27; US Const. amend. I.

for copyright infringement, trademark dilution, and business reputational dilution and injury.⁸

Netflix and Warner Brothers have a significant history of vigorously defending their own works against copyright and trademark infringement.⁹ With the *Sabrina* lawsuit and a more recent suit involving *Black Mirror: Bandersnatch*,¹⁰ Netflix must now confront and address its own misuse and appropriation of copyrighted and trademarked creative works.¹¹

This note will discuss the founding and evolution of The Satanic Temple, the purpose and creative production of the statue “Baphomet with Children,” (Part II) and offer a short examination of the state of copyright law for religious iconography (Part III) before moving on to The Satanic Temple’s three claims against Netflix – copyright infringement, trademark infringement, and reputational dilution as well as the potential fair use defense (Part IV). Although Netflix and The Satanic Temple have now settled,¹² this note will discuss the likelihood of success on each of the Temple’s claims had the suit continued to trial (Part V) before concluding with a brief discussion of the settlement and any potential implications for religious copyright law.

⁸ See generally, *Complaint*.

⁹ *Complaint*, ¶ 2 (referencing Warner Bros, Inc. v. Gay Toys, Inc., 724 F.2d 327 (2d Cir. 1983)).

¹⁰ Sonia Rao, *Netflix sued by ‘Choose Your Own Adventure’ book publisher over Black Mirror: Bandersnatch*, (Jan. 11, 2019), https://www.washingtonpost.com/arts-entertainment/2019/01/12/netflix-sued-by-choose-your-own-adventure-book-publisher-over-black-mirror-bandersnatch/?utm_term=.5b70725180c2; *Complaint*, Chooseco LLC, v. Netflix, Inc., 2:19-cv-8 (D.Vt. Jan. 11, 2019).

¹¹ See, e.g., *Kessler v. Duffer, et al.*, BC700197 (Cal. Super. Ct. April 2, 2018); Sonia Rao, *‘Stranger Things’ creators deny accusation of stealing the show’s premise*, Washington Post, (Apr. 4, 2018), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/04/04/stranger-things-creators-deny-accusation-of-stealing-the-shows-premise/?utm_term=.401d87bd11bd.

¹² Lucien Greaves, *The Satanic Temple Amicably Settles Lawsuit Against Warner Brother & Netflix*, PATHEOS, (Nov. 21, 2018), <https://www.patheos.com/blogs/infernal/2018/11/the-satanic-temple-amicably-settles-lawsuit-against-warner-brother-netflix/>.

II. THE SATANIC TEMPLE & BAPHOMET: A HISTORY

A. THE SATANIC TEMPLE

Officially founded in 2012,¹³ The Satanic Temple’s mission is “to encourage benevolence and empathy among all people, reject tyrannical authority, advocate practical common sense and justice, and be directed by the human conscience to undertake noble pursuits guided by the individual will.”¹⁴ In its brief existence, the Temple has worked to ensure that all religious traditions and beliefs are treated equally under the law.¹⁵

The Satanic Temple’s founders identify as atheistic Satanists – believing neither in a literal God nor a literal Satan, but rather viewing Satan and Satanism as representing a solidarity of the outsiders or those judged and excluded from the dominant culture rather than some personified, demonic tempter whose purpose is to destroy the souls of humankind.¹⁶ The Temple rejects the Judeo-Christian idea of Satan as the personification of evil and the source of wickedness. The Temple rejects both the traditional Satanism of the Church of Satan (i.e., LeVeyan Satanism¹⁷) as well as the occult and mystic Satanism like that displayed in *Sabrina*, which involves dark rituals and human or animal sacrifice. The Temple does not adhere to the Satanic

¹³ The Satanic Temple grew out of an idea to counter President George W. Bush’s push for faith-based organizations to engage in the provision of community services and was designed to meet all the Bush administration’s criteria for receiving funds, thus forcing the administration to confront the idea of giving federal money to Satanists. See, Mark Oppenheimer, *A Mischievous Thorn in the Side of Conservative Christianity*, N.Y. TIMES, <https://www.nytimes.com/2015/07/11/us/a-mischievous-thorn-in-the-side-of-conservative-christianity.html>. Pg. A17 (July 11, 2015).

¹⁴ *About Us*, SATANIC TEMPLE, thesatanictemple.com/aboutus.

¹⁵ See, e.g., Matt Miller, *Why the Satanic Temple is Opening Its Doors to American Muslims*, ESQUIRE, <https://www.esquire.com/news-politics/news/a39904/satanic-temple-founder-interview-muslims/> (Nov. 21, 2015).

¹⁶ Shane Bugbee, *Unmasking Lucien Greaves, Leader of the Satanic Temple*, VICE (Jul. 30, 2013) (defining the Temple’s Satanism as “an atheistic philosophical framework that views ‘Satan’ as a metaphorical construct by which we contextualize our works.”) https://www.vice.com/en_us/article/4w7adn/unmasking-lucien-greaves-aka-doug-mesner-leader-of-the-satanic-temple; FAQ, SATANIC TEMPLE, <https://thesatanictemple.com/pages/faq> (last visited Feb. 2, 2019) (hereinafter *Temple FAQ*).

¹⁷ *Temple FAQ*, *supra* note 16. See, e.g., Anton Szandor LaVey, *The Eleven Satanic Rules of the Earth*, CHURCH OF SATAN, <https://www.churchofsatan.com/eleven-rules-of-earth/> (last visited Feb. 2, 2019).

Bible.¹⁸ Lucien Greaves, the founder of The Satanic Temple, explained:

[The Temple's idea of] Satan, of course, bears no resemblance to the embodiment of all cruelty, suffering, and negativity believed in by some apocalyptic segments of Judeo-Christian culture. The word *Satan* has no inherent value. If one acts with compassion in the name of Satan, one has still acted with compassion. Our very presence as civic-minded socially responsible Satanists serves to satirize the ludicrous superstitious fears that the word *Satan* tends to evoke.¹⁹

The Satanic Temple grounds itself in the pursuit of knowledge and free will based on seven fundamental tenets:

- 1) One should strive to act with compassion and empathy towards all creatures in accordance with reason;
- 2) The struggle for justice is an ongoing and necessary pursuit that should prevail over laws and institutions;
- 3) One's body is inviolable, subject to one's own will alone;
- 4) The freedoms of others should be respected including the freedom to offend. To willfully and unjustly encroach upon the freedoms of another is to forgo one's own;
- 5) Beliefs should conform to one's best scientific understanding of the world;
- 6) People are fallible. If one makes a mistake, one should do one's best to rectify it and resolve any harm that might have been caused;
- 7) Every

¹⁸ *Temple FAQ*, *supra* note 16.

¹⁹ Bugbee, *supra* note 16.

tenet is a guiding principal designed to inspire nobility in action and thought. The spirit of compassion, wisdom and justice should always prevail over the written or spoken word.²⁰

The Satanic Temple is also a very politically conscious organization engaged in activism ranging from advocating for the abolishment of corporeal punishment in schools²¹ to challenging state abortion restrictions as violative of the sincere religious beliefs of doctors and women who belong to the Temple.²²

The Temple is most known for its fight for equal representation when religious monuments or religious educational programs are allowed or offered in the public space.²³ This includes its Baphomet statue as well as its after-school programming, “After School Satan,” and its “Snaketivity” display in the Illinois State Capitol the during the holidays.²⁴

²⁰ *Complaint*, ¶ 21.

²¹ *Id.* at ¶ 22.

²² Mark Oppenheimer, *supra* note 13; *see e.g.*, *Satanic Temple v. Nixon*, No. 4:15CV986 HEA, 2016 U.S. Dist. LEXIS 195117 (E.D. Mo. July 15, 2016), *aff'd* *Satanic Temple v. Parson*, 735 Fed. Appx. 900 (8th Cir. 2018) (upholding the district court’s dismissal under FED. R. CIV. P. 12(b)(6)). *See also*, *Press Release*, THE SATANIC TEMPLE, Satanists Leverage Hobby Lobby Ruling in Support of Pro-Choice Initiative (July 28, 2014), <https://perma.cc/XA5C-K2N2>; Kaili E. Matthews, *Reverse Hobby Lobby: The Satanic Temple’s fight against indoctrination abortion laws*, 19 RUT. J.L. & RELIGION 383 (2018). For a critique of The Satanic Temple’s interpretation of the intersection between religious beliefs and abortion rights, *see* Kara Lowenthal, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of Hobby Lobby’s Implications for State Law*, 9 HARV. L. & POL’Y REV. 89 (2015).

²³ *Complaint*, ¶ 24-27.

²⁴ *Corrections*, AFTER SCHOOL SATAN, <https://afterschoolsatan.com/92-2/> (Last visited Feb. 7, 2019) [hereinafter *After School Satan*]; Benjamin Wood, *After School Satan Club launches at Vista Elementary School in Taylorsville*, THE SALT LAKE TRIBUNE, (Jan. 12, 2017), <http://archive.sltrib.com/article.php?id=4808299&itype=CMSID&fullpage=1>; Liam Stack, *Satan is in the Illinois Capitol. Because It’s the Holidays!*, N.Y. TIMES, (Dec. 6, 2018) <https://www.nytimes.com/2018/12/06/us/satan-statue-illinois-capitol.html>.

B. BAPHOMET & “BAPHOMET WITH CHILDREN”

The image of Baphomet has a long history connecting it to the occult and Satanism dating back to the 14th Century,²⁵ when it was initially associated primarily with the Knights Templar.²⁶ Classically depicted as a seated figure with large breasts, androgynous arms and torso, and the head of a goat,²⁷ Baphomet’s image has been incorporated into various mystical and occult traditions.²⁸ To members of The Satanic Temple, Baphomet is meant to represent a conciliation of opposites -- neither beast nor human, male nor female, angelic nor demonic, but simultaneously all of those.²⁹

“Baphomet with Children” was originally commissioned by the Temple with the intent to use it as a response to religious displays on public property. Its design and purpose are fundamental to the Temple’s assertion of the importance of religious pluralism and equal status in the midst of the growing debate over religious freedom.³⁰ It was unveiled in July 2015.³¹

The Temple made several original modifications the traditional depiction of Baphomet when designing their statue, including placing a male and female child of African-American and Caucasian descent respectively on either side of Baphomet, while looking up in reverence to Baphomet, and the use of a male torso – Iggy Pop’s torso, to be specific – rather than the traditional voluptuous female breasts.³² The statue gained notoriety when The Temple sought to place it alongside a monument of the Ten Commandments outside the Oklahoma State Capitol.³³ After the

²⁵ *Complaint*, ¶ 17.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Complaint*, ¶ 27.

³¹ See, e.g., David Trayner, *Satanic Temple unveils controversial Baphomet sculpture to cheers of ‘Hail Satan’*, THE INDEPENDENT, July 26, 2015, <https://www.independent.co.uk/news/world/americas/satanic-temple-unveils-baphomet-statue-detroit-10416754.html>; Leyland DeVito, *Inside the Satanic Temple’s Secret Baphomet Monument Unveiling*, VICE, July 27, 2015, https://www.vice.com/en_us/article/ppxk5k/inside-the-satanic-temple-secret-baphomet-monument-unveiling-666; David Fear, *‘Hail Satan?’ Review: In the Dark Lord (and Religious Freedom) We Trust*, ROLLING STONE, April 20, 2019, <https://www.rollingstone.com/movies/movie-reviews/hail-satan-movie-review-820737/>.

³² See generally, *Complaint* ¶¶ 3, 4, 17, 43, 49; Fear, *supra* note 31.

³³ Trayner, *supra* note 31; DeVito, *supra* note 31.

Oklahoma State Supreme Court ordered the removal of the Ten Commandments monument,³⁴ The Satanic Temple ended its quest to place Baphomet there and moved the statue to the Arkansas State Capitol building to continue its protest of Ten Commandments monuments in the public square.³⁵ The Satanic Temple has gained significant notoriety through this and other forms of its First Amendment activism.³⁶

The first season of the Netflix series, *The Chilling Adventures of Sabrina*, became available for streaming on October 26, 2018.³⁷ The series shows the Baphomet statue in at least four of the ten episodes³⁸ and it is included in scenes involving cannibalism and the forced occult worship.³⁹

III. COPYRIGHT LAW & RELIGIOUS ICONOGRAPHY

Deified works are not easily copyrightable.⁴⁰ Copyright law requires human authorship in order for a work to be subject to copyright protection.⁴¹ As such, while the Bible and other sacred texts as books may not be subject to copyright protection in and of

³⁴ Prescott v. Okla. Capitol Pres. Comm'n, 2015 OK 54 (Okla. June 30, 2015); Eugene Volokh, *Oklahoma Constitution prohibits public display of Ten Commandments monument*, WASH. POST, (July 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/01/oklahoma-constitution-prohibits-public-display-of-ten-commandments-monument/?utm_term=.a5995fa86dc6.

³⁵ Orsi, et al. v. Martin, No. 4:18cv343-JM, 2018 WL 2364330 (E.D. Ark. May 23, 2018); Avi Selk, *A satanic idol goes to Arkansas Capitol building*, WASH. POST, (Aug. 17, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/17/a-satanic-idols-3-year-journey-to-the-arkansas-capitol-building/?utm_term=.24b754ddeef3; see also Max Brantley, *Satanic Temple cleared to enter the 10 Commandments lawsuit*, ARK. TIMES, (Dec. 18, 2018) (discussing the ongoing litigation over the Ten Commandments monument at the Arkansas Capitol, where The Satanic Temple joined as interveners), <https://www.arktimes.com/ArkansasBlog/archives/2018/12/18/satanic-temple-cleared-to-enter-the-10-commandments-lawsuit>.

³⁶ See, e.g., Mia Galuppo, *Sundance: Hail Satan? Director on Misconceptions about the Satanic Temple*, THE HOLLYWOOD REPORTER (Jan. 25, 2019), https://www.hollywoodreporter.com/amp/news/sundance-hail-satan-director-misconceptions-satanic-temple-1179202?__twitter_impression=true; Fear, *supra* note 31.

³⁷ *Complaint*, ¶ 38.

³⁸ IMDB, *supra* note 2; see also *Complaint*, ¶ 41.

³⁹ *Complaint*, ¶ 40.

⁴⁰ See generally, Jarrod Welsh, *Copyrighting God: New Copyright Guidelines do not Protect Diving Beings*, 17 RUTGERS J. LAW & RELIG. 121 (2015).

⁴¹ *Id.*

themselves, various iterations and translations can be copyrighted.⁴² In other words, the arrangement of the subject matter by divine entities or authors could be subject to copyright protections, but not the subject matter itself.⁴³

Religious organizations often use copyright as a way to maintain doctrinal purity or the religious coherency and consistency of the work they have authored.⁴⁴ The goal of such action is to prevent “dissemination that would perpetuate what the Church [or religious organization] would consider ecclesiastical error.”⁴⁵ While trademark law may be a better avenue for religious organizations to preserve their reputational stake in a given religious creative work of art, the use of copyright also serves to accomplish the goals of preventing misuse, negative associations and criticism, and confusion.⁴⁶ Religious organizations may feel that by enforcing their copyrights, they are protecting both “powers greater than commercial interests . . . [and] . . . what God [or, as here, Satan] wants his children to hear [or see].”⁴⁷

I. ACTIONABLE CLAIMS & DEFENSES

A. THE SATANIC TEMPLE’S CLAIMS

The Satanic Temple asserted three claims, each with a demand of \$50 million in damages.⁴⁸ First, the Temple alleged that by using its statue of Baphomet with Children in *The Chilling Adventures of Sabrina*, Netflix violated copyright laws and tarnished the reputation of The Satanic Temple by associating its statue of Baphomet with witchcraft, cannibalism, and dark satanic ritual.⁴⁹ Second, that Netflix violated the Lanham Trade-Mark Act,⁵⁰ which forbids the false representation of a registered mark to the consumer population in a way that is likely to cause

⁴² *Id.*

⁴³ Jarrod Welsh, *supra* note 40, at 125 n.11 (citing *Oliver v. Saint Germain Found.*, 41 F.Supp. 296, 299 (S.D. Cal. 1941)).

⁴⁴ David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMM. TECH. L. REV. 355, 366 (2010).

⁴⁵ *Worldwide Church of God v. Philadelphia Church of God (WCG), Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000).

⁴⁶ *See generally*, Simon, *supra* note 44, at 366-76.

⁴⁷ *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist (UCS)*, 829 F.2d 1152, 1163 (D.C. Cir. 1987).

⁴⁸ *Complaint*, ¶¶ 59, 67, 72.

⁴⁹ *Complaint*, ¶¶ 51-59.

⁵⁰ 15 U.S.C. § 1125(a).

confusion by blurring or dilution of the original mark or symbol.⁵¹ Third, that Netflix’s use of Baphomet with Children as an association with evil caused injury to the Temple’s reputation under New York state law.⁵² This note will discuss both the trademark dilution and state law claims together.

2. COPYRIGHT INFRINGEMENT

The Satanic Temple first alleged that Netflix had sufficient notice of the notoriety of its statue of Baphomet with Children that it could have and should have been aware that the material was protected by copyright.⁵³ Copyright is a “property right in an original work of authorship . . . fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.”⁵⁴ Copyright law protects unique expressions, but not ideas themselves.⁵⁵ Registration with the Copyright Office serves as sufficient proof to establish the prima facie elements of a copyright infringement claim.⁵⁶ The copyright owner must establish both substantial similarity and copying of the senior mark because “another who follows [the first] is not a tortfeasor unless he pirates his work.”⁵⁷

⁵¹ *Id.* See also *Complaint*, ¶¶ 60-67

⁵² *Complaint*, ¶¶ 68-72; N.Y. Gen. Bus. Law § 360-1 (Consol., Lexis Advance through 2019 released Chapters 1-8).

⁵³ *Complaint*, ¶ 36.

⁵⁴ *Copyright*, BLACK’S LAW DICTIONARY, (10th ed. 2014); see also, Jason E. Sloan, *An Overview of the Elements of a Copyright Infringement Cause of Action – Part I: Introduction and Copying*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/elements_of_a_copyright/.

⁵⁵ *What Does Copyright Protect?*, United States Copyright Office, <https://www.copyright.gov/help/faq/faq-protect.html> (Last Accessed Feb. 10, 2019).

⁵⁶ 17 U.S.C.A. § 411(a). The Satanic Temple registered its statue of Baphomet with Children with the United States Copyright Office and was granted registrations VA 2-116-092 and VA 0002124601; *Complaint*, ¶ 11; see also, United States Copyright Office, https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=va0002124601&Search_Code=REGS&PID=nCQ_oVnUpU5fGfbS4QDttZYedeAzb&SEQ=20190131102811&CNT=25&HIST=1.

⁵⁷ 1 NIMMER ON COPYRIGHT § 2.01[A][2] (internal citations omitted).

3. TRADEMARK DILUTION & INJURY TO BUSINESS REPUTATION

The Satanic Temple next alleged that Netflix used Baphomet in a way that falsely designates its original purpose and meaning; is misleading; and creates both the implied and express impression that the Temple's Baphomet with Children is a symbol of evil, forced devil worship, cannibalism, and murder.⁵⁸ As the Supreme Court has explained, "The protection of trade-marks is the law's recognition of the psychological effect of symbols."⁵⁹ A trademark symbolizes the reputation established by its owner, and as such the owner is entitled to prevent the use or misuse of that mark by others.⁶⁰ Misrepresenting a trademark in a way that is likely to cause mistake or confusion; misrepresent the nature, character or activities associated with the mark; or that deceives as to the affiliation, connection, or association of the gives rise to potential civil liability.⁶¹

A claim of dilution can only be made if the two marks are "very" or "substantially" similar,⁶² which creates a "downstream mental association" where the mental association flows from the famous (or senior) mark to the junior mark.⁶³ This includes both exact replicas as well as marks that bear a substantial similarity to the original, senior mark.⁶⁴ However, substantial similarity alone is insufficient for a claim of trademark dilution. A plaintiff

⁵⁸ *Complaint*, ¶¶ 63-65.

⁵⁹ *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

⁶⁰ *Jewelers of America, Inc. v. Amirghanyan* 115 F.R.D. 274, 277 (S.D.N.Y. 1987).

⁶¹ 15 U.S.C. § 1125.

⁶² *Mead Data Ctr., Inc. v. Toyota Motor Sales, Inc.*, 875 F.2d 1026, 1028-29 (2d Cir. 1989).

⁶³ Thomas R. Lee, *Demystifying Dilution*, 84 B.U.L. REV. 859, 890 (2004) (discussing *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449 (4th Cir. 1999), where the court reasoned that if a consumer heard "The Greatest Show on Earth," and associated it with both the Ringling Brothers circus and Utah's skiing and tourism industry ("The Greatest Snow on Earth"), there would potentially be actionable claims of dilution by blurring.)

⁶⁴ *Mead Data*, 875 F.2d at 1029 (holding that marks must be "very" or "substantially" similar for a viable claim of dilution) (citing *Comm. Fed. Savings and Loan Ass'n v. Orondorff*, 678 F.2d 1034 (11th Cir. 1982) (external citations omitted)).

must demonstrate that their trademark possesses a distinctive quality capable of dilution and that a likelihood of dilution exists.⁶⁵

A classic example of an insufficient likelihood of dilution is *Mead Data Centers, Inc. v. Toyota Motor Sales*.⁶⁶ Mead Data, the owners of Lexis Nexis, filed suit against Toyota when the company announced their intention to build its luxury car brand, Lexus.⁶⁷ Mead Data argued that there was substantial similarity (identical pronunciation) between Lexis and Lexus that would likely result in confusion and the weakening of its trademark power if Toyota was permitted to build its Lexus line.⁶⁸ The court disagreed, and held that there was a distinct enough markets to differentiate the two brands thus decreasing the likeliness of any trademark dilution by blurring or confusion.⁶⁹

The contested mark must inherently identify, not merely describe, the specific source to be protected.⁷⁰ In order to succeed in a claim of trademark dilution, a plaintiff must demonstrate 1) that its mark is famous; 2) that the Defendant is making use of the mark in commerce; and 3) that the defendant's use began after the mark became famous.⁷¹

In determining whether a mark is likely to cause dilution by blurring, a court evaluates whether the distinctiveness of the famous mark is impaired using the follow factors: 1) the degree of inherent or acquired distinctiveness of the mark; 2) the duration and extent of the use of the mark in connection with the goods or services with which the mark is used; 3) the duration and extent of advertising and publicity of the mark; 4) the geographical extent of the trading area in which the mark is used; 5) the channels of trade for the goods or services with which the mark is used; 6) the

⁶⁵ *Mead Data*, 875 F.2d at 1030 (citing *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.*, 42 N.Y.2d 538, 545 (1977)).

⁶⁶ *Mead Data*, 875 F.2d at 1026 (2d Cir. 1989)

⁶⁷ *Id.* at 1027-28.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1030-31; 15 U.S.C.S. § 1125(c) (“Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, *regardless of* the presence or absence of actual or likely confusion, of competition, or of actual economic injury”) (emphasis added); *see generally*, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:20.50 (5th ed.).

⁷⁰ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992).

⁷¹ *Visa Int'l Sev. Ass'n v. JSL Corp.*, 533 F.Supp. 2d 1089, 1094 (D. Nev. Dec. 27, 2007).

degree of recognition of the mark in the trading areas and channels of trade used by the mark's owner and the person against whom the injunction is sought; 7) the nature and extent of use of the same or similar marks by third parties; and 8) whether the mark is federally registered.⁷²

Similar to its claim of trademark dilution, the Temple also raised state law claims that Netflix's use of its Baphomet with Children statue injured its business reputation and diluted the distinctive quality of the statue as a unique mark.⁷³ New York dilution law provides for injunctive relief when a likelihood of injury to business reputation or the dilution of the distinctive quality of a mark or trade name exists.⁷⁴ The New York dilution statute was intended to protect against weakening an established or senior mark's value or power "through its unauthorized use by others upon dissimilar products"⁷⁵ because such use puts the original mark – essentially the reputation of the owner – in the hands of the offender, causing an irreparable injury.⁷⁶

4. NETFLIX'S POTENTIAL FAIR USE DEFENSE

Fair use arises as a defense to copyright infringement generally when there is a copying of themes or ideas, but not the exact expression of those ideas.⁷⁷ The purpose of the fair use defense is to permit the court to avoid the rigid application of copyright laws when it would otherwise frustrate the purpose of

⁷² 15 U.S.C. § 1125(c)(2)(B); *see also*, Visa Int'l. 533 F.Supp. 2d at 1094-94. Kathleen B. McCabe, *Dilution-by-Blurring: A Theory Caught in the Shadow of Trademark Infringement*, 68 *FORDHAM L. REV.* 1827, 1842-43 (2000) (describing dilution by blurring as occurring when a junior mark creates an association in the consumer's mind between the junior user's good and the senior holder of the mark). Interestingly, the Temple's complaint does not allege that it holds any trademark registrations for Baphomet with Children.

⁷³ N.Y. C.L.S. Gen. Bus. § 360-1 (Consol., Lexis Advance through 2019 released Chapters 1-16); *see generally*, 1 New York Commercial Litigation Guide §§ 16.15-16.16 (2018); *Complaint*, ¶¶ 69-72.

⁷⁴ N.Y. C.L.S. Gen. Bus. § 360-1, *supra* note 73.

⁷⁵ *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1028 (2d Cir. 1989) (internal citations omitted).

⁷⁶ *Audemars Piguet Holding S.A. v. Swiss Watch Intern., Inc.*, 46 F.Supp. 3d 255, 287 (S.D. N.Y. 2014); *see also* *Benatello's Pizza, Inc. v. Hansen Foods, LLC*, 173 F.Supp.3d 790, 802 (W.D. Wis. 2016) (stating that "[a] trademark is essentially the embodiment of the owner's reputation and reputation[...] flow[s] automatically from the likelihood of confusion and loss of control over one's trademark).

⁷⁷ 4 NIMMER ON COPYRIGHT § 13.05.

copyright laws – that is to foster creativity.⁷⁸ When considering whether fair use is available to a defendant as an affirmative defense, the court makes determinations of fact and law dependent on four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; (4) the effect upon the plaintiff's potential market.⁷⁹ The subsequent discussion will focus primarily on the purpose and character of the use and the amount and substantiality of the portion used. The nature of the copyrighted work is usually an insignificant factor and tends to favor granting more protections against copying for creative works than for works that are merely informational or functional.⁸⁰ The issue of the amount and substantiality of the portion used is relatively brief analysis because the statutes are nearly identical,⁸¹ but will nevertheless be addressed.

5. PURPOSE & CHARACTER OF THE USE

When considering the purpose and character of the use of copyrighted material by an alleged infringer, courts generally look to see if the use is of a commercial nature, or for nonprofit or educational purposes.⁸² When such use is for criticism or comment,⁸³ news reporting or teaching,⁸⁴ or scholarship and research,⁸⁵ a finding of fair use is generally appropriate.⁸⁶ Reproduction of a copyrighted work for use merely for its intrinsic purpose may not be considered fair use.⁸⁷ The Supreme Court has determined that, “[e]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privileged

⁷⁸ *Id.*

⁷⁹ *Id.* See, e.g., *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F.Supp. 686 (S.D.N.Y. 1974, *aff'd*, 500 F.2d 1221 (2d Cir. 1974) (internal citations omitted). The fourth factor is the most amorphous and could easily be the subject of an entire article. For a general discussion of the difficulties surrounding judicial interpretation of market effect, see generally, David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 *Stan. Tech. L. Rev.* 359 (2014).

⁸⁰ 4 NIMMER ON COPYRIGHT § 13.05[A][2].

⁸¹ *Complaint*, ¶ 43.

⁸² 4 NIMMER ON COPYRIGHT § 13.05[A][1][a].

⁸³ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (holding that parody may be evaluated as comment or criticism).

⁸⁴ 4 NIMMER ON COPYRIGHT § 13.05[E][3][c].

⁸⁵ 17 U.S.C. § 107.

⁸⁶ *Id.*

⁸⁷ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 452 (1984).

that belongs to the owner of the copyright.”⁸⁸ Courts “may consider whether the alleged infringing use was primarily for public benefit or commercial gain”⁸⁹ and may depend on the characteristics of the particular commercial use.⁹⁰

6. THE AMOUNT & SUBSTANTIALITY OF THE USE

The amount and substantiality of use relates back to the issue of substantial similarity⁹¹ and requires both quantitative and qualitative substantiality.⁹² “The more of a copyrighted work that is taken, the less likely the use is to be fair.”⁹³ Fair use is unavailable when an entire work has been reproduced.⁹⁴

IV. THE TEMPLE’S THEORETICAL LIKELIHOOD OF SUCCESS

It is the position of the author that, had the claims continued to trial, The Satanic Temple likely could have proven each of its claims.⁹⁵ Netflix could have argued that their use of the statue does not affect the commercial market of the Temple and that there is no dilution when Baphomet already has an extensive history tied to the occult, upon which *Sabrina* capitalizes. However, because of the substantial similarity of the two statues, a fair use defense would likely been unavailable. The weakest claim for the Temple would likely have been their federal and state dilution claims because Netflix could have argued that Baphomet with Children has not yet gained a distinctiveness in the market that would allow for dilution of its power as a mark.

⁸⁸ *Id.* at 451.

⁸⁹ *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

⁹⁰ *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992) (internal citations omitted).

⁹¹ *See supra* Section IV.A.1.

⁹² 4 NIMMER ON COPYRIGHT § 13.05[A][3].

⁹³ *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109-10 (2d Cir. 1998).

⁹⁴ *Id.*; 4 NIMMER ON COPYRIGHT § 13.05[A][3] at n.209.2.

⁹⁵ It was not within the scope of this note to dissect the sincere ideological beliefs of members of The Satanic Temple. An analysis of The Satanic Temple’s entitlement to Title VII protections on the basis of religious beliefs is ripe for analysis in subsequent notes, as is a commentary on the issues raised in the Temple’s ongoing litigation in Arkansas and Arizona. *See, e.g.*, Orsi, et al. v. Martin, No. 4:18cv343-JM, 2018 WL 2364330 (E.D. Ark. May 23, 2018); Shortt et al. v. City of Scottsdale, et al., 2018 WL 4896996 (D.Ariz 2018).

A. COPYRIGHT INFRINGEMENT

Given the extensive history of the image of Baphomet, the Temple's statue would likely be classified as a derivative work – a contribution of original material to a pre-existing work that transforms or adapts the pre-existing work.⁹⁶

The Satanic Temple has asserted that Baphomet with Children is the “most politically charged sculpture of our time.”⁹⁷ Because of the controversy and coverage surrounding the statue's use in First Amendment cases, Netflix had reasonable notice that the statue was a unique work of art and may be subject to copyright.⁹⁸ While the image of Baphomet has a long history,⁹⁹ the depiction of Baphomet with Children at the heart of the lawsuit is unique to The Satanic Temple.¹⁰⁰ Unlike the Temple's use of Baphomet's image and subsequent modification which could be considered a derivative work, because of the near-identical nature of the *Sabrina* statue, any claims of derivative work and fair use by Netflix would likely be unavailable.¹⁰¹

B. TRADEMARK DILUTION AND DAMAGE TO BUSINESS

REPUTATION

Baphomet with Children is arguably a very distinctive iteration of the historical depiction of Baphomet.¹⁰² The extensive publicity surrounding its creation, its appearance in Oklahoma and subsequent move to Arkansas would seem to suggest that the statue has had extensive publicity since its creation in 2014.¹⁰³ This publicity leads inevitably to the association of Baphomet with Children to The Satanic Temple.¹⁰⁴ However, the generic image of Baphomet has been around for centuries and has been generally associated with traditional Satanism, like the Church of Satan.¹⁰⁵

⁹⁶ 1 NIMMER ON COPYRIGHT § 3.03[A].

⁹⁷ *Complaint*, ¶ 54.

⁹⁸ *Id.*

⁹⁹ See discussion *supra* Section III.

¹⁰⁰ *Complaint*, ¶ 35.

¹⁰¹ See *infra* Section V.C.

¹⁰² *Complaint*, ¶ 35.

¹⁰³ *Complaint*, at ¶¶ 30-34.

¹⁰⁴ See, e.g., *Complaint*, at ¶ 40.

¹⁰⁵ See, e.g., *The History of the Sigil of Baphomet and its Use in the Church of Satan*, THE CHURCH OF SATAN, <https://www.churchofsatan.com/history-sigil-of-baphomet/>. (last visited February 15, 2019).

Given the relative youth of The Satanic Temple, the history behind the image of Baphomet, and the Temple's counterintuitive emphasis on atheistic Satanism and humanism,¹⁰⁶ Netflix could plausibly have argued that the statue has not yet acquired distinctiveness in the market,¹⁰⁷ thus precluding a dilution claim. While the Temple has used Baphomet to advance its First Amendment activism, it cannot escape the near-immediate association of its icon with the practices of traditional occult Satanism that have been impressed through popular culture.¹⁰⁸

The substantial similarity between the Temple's statue and the *Sabrina* statue could impact the perception of the Temple as one associated with Satanic rituals, damaging the "psychological effect"¹⁰⁹ of the mark as a statement on religious pluralism.

Where *Mead Data* found a distinct enough difference between the trademark name "Lexis" and "Lexus" to avoid tarnishing the affirmative associations the trademark "Lexis" had come to convey or engender,¹¹⁰ with its use of Baphomet with Children, Netflix directly implicates the affirmative associations The Satanic Temple has sought to cultivate and does so in a way that would likely cause the casual Netflix viewer to associate the statue with the practices of occult Satanism.¹¹¹ The similarity of the statues could reasonably cause dilution by confusion and damage the reputation of The Satanic Temple by tying it to Satanic practices which the Temple rejects wholesale.

Similarly, unlike *Mead Data*, The Satanic Temple could have argued that there was not significant enough difference in Netflix's Baphomet statue such that the casual observer would know to differentiate the Satanism of *Sabrina* from the work the Temple does to promote discourse about the place of religion in the public square.

¹⁰⁶ See, *supra* Section II.

¹⁰⁷ See, *supra* Section IV.A.2.

¹⁰⁸ *Id.*

¹⁰⁹ *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

¹¹⁰ *Mead Data*, 875 F.2d at 1031-32.

¹¹¹ See, *e.g.*, *Tri-Star Pictures, Inc. v. Unger*, 14 F.Supp.2d 339 (S.D.N.Y. 1998) (holding that a famous movie title had acquired secondary meaning and was entitled to protection from trademark infringement); *c.f.*, *Mead Data*, 875 F.2d 1026 (2d Cir. 1989) (dismissing trademark infringement between Lexis and Toyota's luxury brand, Lexus).

C. FAIR USE DEFENSE

Commercial use is generally construed very broadly,¹¹² and given the nature of Netflix's business model, it is likely that a court would find that the nature and character of its use of Baphomet with Children constituted a commercial use.¹¹³

Netflix may have been able to argue that their use of a statue similar to Baphomet with Children was a parody, and not an exact copy of The Satanic Temple's statue. Conversely, Netflix could have argued that the depiction of Baphomet in *Sabrina*, is a typical depiction and that The Satanic Temple's Baphomet was not an original work. When The Satanic Temple announced they were seeking legal action, Netflix asserted that any similarities were simply coincidence and that "there [are] hundreds and hundreds of iterations of [Baphomet]...with his people around him and its more of...a father figure kind of thing...[The *Sabrina* statute is] no different from...any other of the mass amounts of iterations of [Baphomet] that have been around."¹¹⁴ This may be the strongest argument Netflix has for fair use – that the use of Baphomet as strongly associated with Satanism pre-dates any use by the Temple – and is a similar argument that could be made to weaken the dilution claim.

Despite the statement of the *Sabrina* producer that "there [are] hundreds and hundreds of iterations of [Baphomet]...with his people around him..."¹¹⁵ the statue in *Sabrina* appears nearly identical to the Temple's Baphomet with Children.¹¹⁶ Below are photographic comparisons of Baphomet with Children ("A"), as designed, commissioned, and created by The Satanic Temple and statue of Baphomet from *Sabrina* ("B").¹¹⁷ The most visible difference between the statues is the chest piece with the snakes

¹¹² 4 NIMMER ON COPYRIGHT § 13.05([A][1][a], note 104 (referencing several cases that illustrate the breadth of commercial use).

¹¹³ See, e.g., Berkeley Lovelace, Jr., *Netflix has 'the best long-term business mode because of its relationship with consumers*, CNBC, (May 9, 2018) <https://www.cnbc.com/2018/05/09/netflix-has-the-best-long-term-business-model-chamath-palihapitiya.html> (Last Accessed Feb. 10, 2019).

¹¹⁴ Diana Tourjee, *Satanic Temple Claims Netflix's "Sabrina" Illegally Copied Baphomet Statue*, VICE, (Oct. 29, 2018), https://broadly.vice.com/en_us/article/zm9pe3/satanic-temple-claims-netflixs-sabrina-illegally-copied-baphomet-statue.

¹¹⁵ *Id.*

¹¹⁶ See, e.g., Pl. Ex. C, United Fed'n of Churches, L.L.C. d/b/a The Satanic Temple v. Netflix, Inc. and Warner Bros. Entertainment, Inc., 2018 WL 5839467 (S.D.N.Y. Nov. 8, 2018) (No. 18-10372).

¹¹⁷ *Id.*

wrapping around a pole. A court could reasonably find such substantial qualitative similarity between the two statues as to reject fair use on the grounds of substantiality of the use by Netflix.

A



B



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V. CONCLUSION

Two weeks after the suit was announced, Lucien Greaves, the founder of the Temple, announced that the suit had “amicably settled” for an undisclosed amount. Greaves condemned Netflix’s use of Baphomet with Children, calling its use an “appropriat[ion] [of the Temple’s] copyrighted monument design [in order] to

¹¹⁸ *Id.*

promote their asinine Satanic Panic fiction.”¹¹⁹ The settlement included an agreement that acknowledges the unique elements of The Satanic Temple’s Baphomet with Children in the credits of *Sabrina* which have been already filmed.¹²⁰

As the Satanic Temple gains greater visibility and prominence, Baphomet with Children may lose some of its power as a unique mark.¹²¹ The Temple sued to prevent the association of its statue of Baphomet with dark Satanism, but it may be almost impossible for the Temple to retroactively cure any association viewers of the *Sabrina* series may have already made. Together with the already long held association of Baphomet with traditional Satanism, the brand of the Temple will likely weaken over time. As such, the Temple may already be experiencing reputational and business dilution stemming from Netflix’s use of and lawsuit over Baphomet with Children.¹²²

The Satanic Temple would likely reject the idea that the Baphomet lawsuit will have or has had any implications for the future of copyright law among religious organizations. The author, however, views the lawsuit as having – at a minimum – useful insights and application to the limits of the fair use defense. When announcing the settlement with Netflix, Lucien Greaves wrote, “[s]o ends one of the most overpublicized of copyright claims. Press can now stop pretending this was unique and momentous, or even interesting. So, too, hopefully ends the parade of stupidity from online amateur legal experts.”¹²³

While this author disagrees that the Baphomet suit was uninteresting, he nevertheless hopes authorship of this note has provided both a satisfactory discussion of The Satanic Temple and their important work on First Amendment issues and a thorough intellectual exercise in understanding and applying copyright and trademark law.

¹¹⁹ *Satanists settle lawsuit with Netflix over goat-headed statue*, CNN, Nov. 22, 2018, <https://www.cnn.com/2018/11/22/entertainment/satanic-temple-netflix-lawsuit-scli-intl/index.html>.

¹²⁰ Lucien Greaves, *The Satanic Temple Amicably Settles Lawsuit Against Warner Brother & Netflix*, PATHEOS, (Nov. 21, 2018), <https://www.patheos.com/blogs/infernal/2018/11/the-satanic-temple-amicably-settles-lawsuit-against-warner-brother-netflix/>.

¹²¹ See generally, Harold R. Weinberg, *Is the Monopoly Theory of Trademarks Robust or a Bust?*, 13 J. INTEL. PROP. L. 137, 174-76 (2005) (discussing the generic trademark doctrine, as applied to word marks).

¹²² Greaves, *supra* note 119 (remarking on the substantial coverage of the lawsuit rather than the Temple’s primary work on the First Amendment).

¹²³ *Id.*