

Yes, Copyright Can Protect Monstrous Mountains

May 11, 2022 – The TMCA

by Ryan Meyer

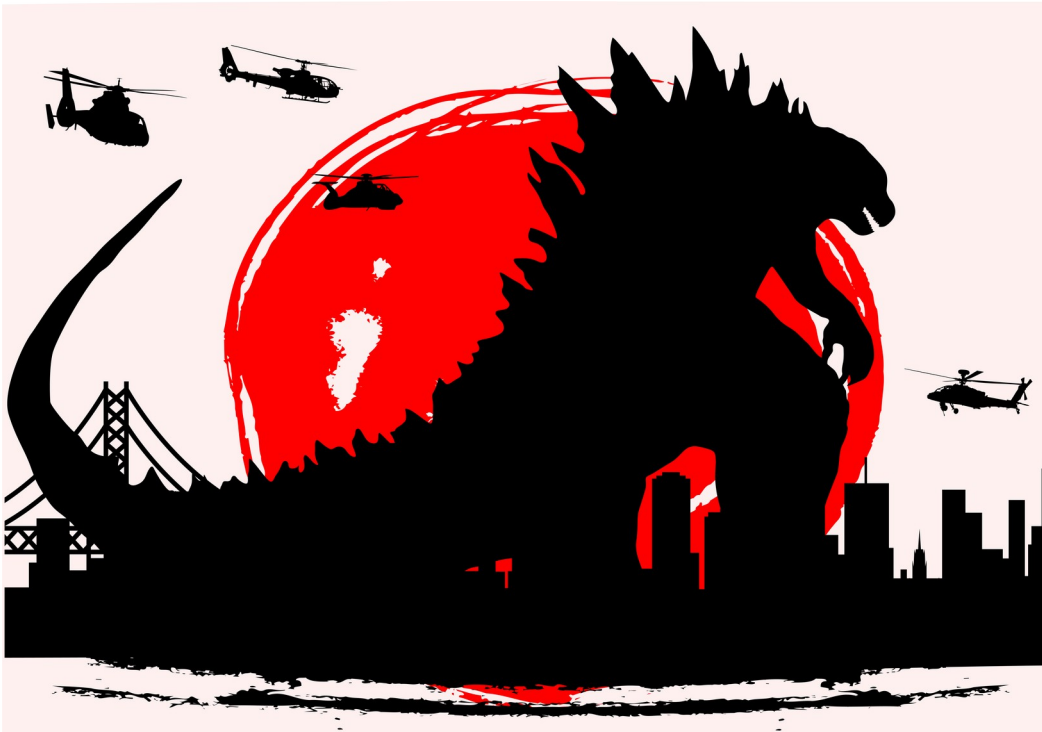


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Typically, Godzilla and other kaiju (Japanese for “strange beast” and also referring to a genre of fiction involving giant monsters) use their armored skin, massive size, and superpowers to protect themselves against almost anything, including human armies, natural disasters, and other kaiju. Perhaps the most powerful non-physical weapon/defense in a kaiju’s arsenal is copyright law. The Honorable Percy Anderson of the Central District of California recently confirmed that copyright can protect even kaiju who are monstrous mountains in *Summit Kaiju LLC v. Legend Pictures, LLC*, CV 21-9779 PA (ASx) (C.D. Cal. Apr. 12, 2022).

Summit Kaiju (“Summit”) hired an artist to create concepts for new kaiju that would live within Godzilla’s fictional universe. One such kaiju is named “Batholith,” which is “a living mountain kaiju made in part of stone.” Summit registered its copyright in Batholith’s “Character Design” with the U.S. Copyright Office on July 7, 2017. That same month, Summit announced Batholith at the Annual Godzilla Festival and began publicizing Batholith through social media.

In 2014, three years before Batholith’s public unveiling, Legend Pictures (“Legend”) began developing a film titled “Godzilla: King of the Monsters” as well as a novelization of the film. Legend originally planned to license an assortment of Kaiju from Toho Co. Ltd., the Japanese film company best known for creating Godzilla. Unfortunately, Legend discovered that it could not afford Toho’s terms. Realizing that the show must go on, Legend resolved to find its kaiju elsewhere. Thus, on or about July 2018, Legend either created a new kaiju – Titanus Methuselah (“Methuselah”). Or, according to Summit, Legend simply copied Batholith and renamed it as Methuselah. Despite the fact that development of Legend’s film began before Batholith was created, there does not currently appear to be any suggestion that Batholith was created after Titanus was created.

Summit filed a Complaint for direct and indirect copyright infringement that includes images of kaiju allegedly showing “not only substantial, but also striking” similarities resulting in public confusion. This confusion allegedly caused Summit to have problems developing merchandise and media for Batholith. Summit contended that Legend’s designers had access to Batholith through at least the 2017 Godzilla Conference and Summit’s Batholith blitz on various social media accounts, some of which were followed by Legend’s designers.

Legend moved to dismiss the Complaint for failure to state a claim for copyright infringement, arguing that Summit cannot establish that Batholith is protected by copyright or that Methuselah is substantially similar to Batholith. To prevail on a copyright infringement claim, the plaintiff must establish (1) ownership of a valid copyright and (2) copying of original elements of the copyrighted work. Legend argued that Summit could not meet either requirement because Batholith could not be protected by copyright and the two monsters are not substantially similar.

Analyzing the first requirement, Judge Anderson recognized that characters cannot be protected by copyright per se, because the Copyright Act does not specifically list them as copyrightable subject matter. Summit’s copyright in Batholith was, therefore, limited to the artistic rendition of Batholith in a visual form, rather than the concept of such a character. However, there is a long history of extending copyright protection to graphically-depicted characters if a character is particularly distinctive. Under *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015), courts in the Ninth Circuit permit copyright protection of a character if (1) the character has physical as well as conceptual qualities, (2) it is sufficiently delineated to be recognizable as the same character whenever it appears and displays consistent, identifiable character traits and attributes, and (3) the

character is especially distinctive and contains unique elements of expression.

Applying the *Towle* test to Batholith, Judge Anderson first found that Summit sufficiently alleged that Batholith has physical as well as conceptual qualities – i.e., the images of Batholith combined with a succinct explanation that Batholith is “a living mountain kaiju made in part of stone” suffice to meet this requirement. Second, the Court found that Batholith was recognizable wherever it appears and has consistent, identifiable character traits and attributes. Specifically, Batholith “consistently presents as a rampaging mountain kaiju made in part of stone and set in the Godzilla universe,” and images of Batholith consistently show it as a giant quadrupedal mountain monster with a tail. Third, Judge Anderson determined that Batholith is especially distinctive and contains unique elements of expression because it is not merely a stock character. It is a four-legged living mountain made partly of stone within the Godzilla universe, it has a distinctive name, and it also has its own stories. Accordingly, Summit plausibly alleged ownership of a valid copyright.

The second requirement of a copyright claim, substantial similarity, has two components: (1) copying and (2) unlawful appropriation. The Court found that there were enough similarities between Basolith and Methuselah for reasonable minds to differ as to whether those similarities are substantial. Summit alleged more than trivial similarities, and those differences could be further analyzed and developed by experts. Thus, Summit alleged sufficient similarities between the two monsters to survive a motion to dismiss.

Since Legend’s motion to dismiss Summit’s direct and indirect infringement claims were based on the same arguments, Judge Anderson denied the motion to dismiss in its entirety.

It is certainly easier to survive a motion to dismiss than to prevail at trial or on summary judgment. The Court’s opinion here was reserved and even-handed. Clearly Judge Anderson thinks that Summit’s case is strong enough to move beyond the pleading stage. However, nothing in his opinion suggests that victory for Summit is a foregone conclusion. Based on the content of the Complaint and the evidence mentioned in Legend’s motion to dismiss, Summit might have a difficult time proving infringement.

Assuming that Summit meant to put its best foot forward when it filed its Complaint, the comparative pictures of Batholith and Methuselah show, to my lay person’s eye (full disclosure, while not a kaiju expert, I have seen and enjoyed several Godzilla movies), vague, but not substantial similarities. Here is an image of Batholith from the Complaint:



For comparison, here is the first picture of Methuselah in the Complaint (blue circle):



The similarities between the two kaiju are hazy at best. If not for the text of the Complaint and the blue circle, I would have guessed pile of rubble before living mountain kaiju. None of the images of Methuselah used in the Complaint show more than blurry, ambiguous details. This is because, as Legend's motion to dismiss explains, "Methuselah appears in the Film for approximately twenty seconds and is never seen clearly." Unless Summit is able to find better images of Methuselah during discovery, proving substantial similarity will be a challenge.