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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CAROL BURNETT, an individual; WHACKO, INC., a California corporation,	)	Case No. CV 07-01723 DDP (RCx)
	)	
Plaintiff,	)	<b>ORDER GRANTING DEFENDANT'S MOTION TO DISMISS</b>
	)	
v.	)	[Motion filed on April 27, 2007]
	)	
TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation,	)	
	)	
Defendants.	)	

This matter comes before the Court on Twentieth Century Fox Film Corporation's ("Fox") motions to dismiss for failure to state a claim and special motion to strike pursuant to California's Anti-SLAPP statute. After reviewing the papers submitted by the parties, the Court grants the motion to dismiss, deny the special motion to strike as moot, and adopts the following order.

**I. BACKGROUND**

Family Guy is a half-hour, animated, comedy television program broadcast on primetime and geared toward an adult audience. Compl.

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27

1 ¶ 10. The show borrows heavily from popular culture, following the  
2 exploits of the Griffin family and friends in the fictional suburb  
3 of Quahog, Rhode Island. Id. ¶ 9. Family Guy routinely puts  
4 cartoon versions of celebrities in awkward, ridiculous, and absurd  
5 situations in order to lampoon and parody those public figures and  
6 to poke fun at society's general fascination with celebrity and pop  
7 culture. See, e.g., Ex. A.

8 On or about April 23, 2006, Fox aired an episode of "Family  
9 Guy" entitled "Peterotica." Id., ¶ 10. Near the beginning of the  
10 episode, the Griffin family patriarch, Peter Griffin, an "Archie  
11 Bunker"-like character, enters a porn shop with his friends. Id.  
12 ¶¶ 9, 10. Upon entering, Peter remarks that the porn shop is  
13 cleaner than he expected. Id., ¶ 10; Ex. A. One of Peter's  
14 friends explains that "Carol Burnett works part time as a janitor."  
15 Id. The screen then switches for less than five seconds to an  
16 animated figure resembling the "Charwoman" from the Carol Burnett  
17 Show, mopping the floor next to seven "blow-up dolls," a rack of  
18 "XXX" movies, and a curtained room with a sign above it reading  
19 "Video Booths." Id. As the "Charwoman" mops, a "slightly altered  
20 version of Carol's Theme from The Carol Burnett Show is playing."  
21 Id. ¶ 10. The scene switches back to Peter and his friends. Id.  
22 One of the friends remarks: "You know, when she tugged her ear at  
23 the end of that show, she was really saying goodnight to her mom."  
24 Id.; Ex. A. Another friend responds, "I wonder what she tugged to  
25 say goodnight to her dad," finishing with a comic's explanation,  
26 "Oh!" Id.

27 In response to this Family Guy clip, plaintiffs Carol Burnett  
28 and Whacko, Inc., filed this suit against defendant Fox for: (1)

1 copyright infringement; (2) violation of the Lanham Act, 15 U.S.C.  
2 § 1125; (3) violation of California's statutory right of publicity,  
3 Civil Code § 3344; and (4) common law misappropriation of name and  
4 likeness. Defendant now moves to dismiss plaintiffs' claims.  
5 Defendant also brings a special motion to strike Burnett's  
6 supplemental state law (claims) under California's anti-SLAPP  
7 statute, California Code of Civil Procedure § 425.16.

8  
9 **II. LEGAL STANDARD**

10 Dismissal under Rule 12(b)(6) is appropriate when it is clear  
11 that no relief could be granted under any set of facts that could  
12 be proven consistent with the allegations set forth in the  
13 complaint. Newman v. Universal Pictures, 813 F.2d 1519, 1521-22  
14 (9th Cir. 1987). The court must view all allegations in the  
15 complaint in the light most favorable to the non-movant and must  
16 accept all material allegations - as well as any reasonable  
17 inferences to be drawn from them - as true. North Star Int'l v.  
18 Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).

19 The scope of review on a motion to dismiss for failure to  
20 state a claim is generally limited to the content of the complaint.  
21 Pegasus Holdings v. Veterinary Centers of America, Inc., 38  
22 F.Supp.2d 1158, 1159-60 (C.D. Cal. 1998). The Court may, however,  
23 consider exhibits submitted or referenced in the complaint and  
24 matters that may be judicially noticed pursuant to Federal Rule of  
25 Evidence 201. Id. Indeed, "documents specifically referred to in  
26 a complaint, though not physically attached to the pleading, may be  
27 considered where authenticity is unquestioned." Daly v. Viacom,

28

1 Inc., 238 F.Supp.2d 1118, 1121-22 (N.D. Cal. 2002) (considering  
2 television program referenced in, but not attached to, complaint).

3 Leave to amend should not be granted where the complaint is  
4 futile. In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970,  
5 991 (9th Cir. 1999).

6 Federal district courts may exercise supplemental jurisdiction  
7 "over all other claims that are so related to claims in the action  
8 within such original jurisdiction that they form part of the same  
9 case or controversy . . . ." 28 U.S.C. § 1367(a). Courts "may  
10 decline to exercise supplemental jurisdiction over a claim under  
11 subsection (a) if . . . (3) the district court has dismissed all  
12 claims over which it has original jurisdiction . . . ." 28 U.S.C.  
13 § 1367(c)(3). See also Ove, 264 F.3d at 822 (upholding district  
14 court's refusal to exercise supplemental jurisdiction over state  
15 claims after dismissing federal claims, including dismissal of §  
16 1983 claim for failure to state a claim).

17  
18 **III. DISCUSSION**

19 **A. Plaintiffs' First Claim for Relief**

20 Plaintiffs' first claim of relief alleges that Fox infringed  
21 plaintiffs' copyrighted material. Defendant contends that even  
22 assuming *arguendo* that plaintiffs possess valid copyrights,  
23 plaintiffs' first claim of relief is barred as a matter of law by  
24 the doctrine of fair use.

25 The Copyright Act of 1976 protects the fair use of another's  
26 copyrighted work:

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1 ... [T]he fair use of a copyrighted work ... for purposes  
2 such as criticism [and] comment ... is not an  
3 infringement of copyright. In determining whether the  
4 use of a made work in any particular case is a fair use  
5 the factors to be considered shall include:\

- 6 (1) the purpose and character of the use, including  
7 whether such use is of a commercial nature or is for  
8 nonprofit educational purposes;
- 9 (2) the nature of the copyrighted work;
- 10 (3) the amount and substantiality of the portion used in  
11 relation to the copyrighted work as a whole; and
- 12 (4) the effect of the use on the potential market for or  
13 value of the copyrighted work. ...

14 17 U.S.C. § 107. The fair use doctrine calls for a "case-by-case  
15 analysis." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577

16 (1994). "The text [of 17 U.S.C. § 107] employs the terms  
17 'including' and 'such as' in the preamble paragraph to indicate the  
18 'illustrative and not limitative' function of the examples given."

19 Id. Courts must consider and weigh all four factors. Id. The  
20 Court may conduct a fair use analysis, as a matter of law, where  
21 the facts are presumed or admitted. See Harper & Row Publishers,  
22 Inc. v. Nation Enters., 471 U.S. 539 (1985); see also Fisher v.  
23 Dees, 794 F.2d 432, 435-36 (9th 1986) (finding fair use where the  
24 material facts were not at issue or were admitted; judgments  
25 pertaining to fair use "are legal in nature" and are to be made by  
26 the court).

### 27 1. The Purpose and Character of the Use

28 The first factor, the "purpose and character of the use,"  
addresses "whether the new work merely 'supercedes the objects' of  
the original creation, or instead adds something new, with a  
further purpose or different character, altering the first with new  
expression, meaning or message, in other words, whether and to what

1 extent the new work is 'transformative.'" Campbell, 510 U.S. at 579  
2 (internal citations omitted).

3 Among the various forms of "transformative use" is that of  
4 parody. See id. A parody is a "'literary or artistic work that  
5 imitates the characteristic style of an author or a work for comic  
6 effort or ridicule,' or as a 'composition in prose or verse in  
7 which the characteristic turns of thought and phrase or class of  
8 authors are imitated in such a way as to make them appear  
9 ridiculous.'" Id. at 580. "[P]arody has an obvious claim to  
10 transformative value" because "[l]ike less ostensibly humorous  
11 forms of criticism, it can provide social benefit, by shedding  
12 light on an earlier work, and, in the process, creating a new one."  
13 Id. at 579. "For purposes of copyright law, the nub of the  
14 definitions, and the heart of any parodist's claim to quote from  
15 existing material, is the use of some elements of a prior author'  
16 composition to create a new one, that, at least in part, comments  
17 on that author's works." Id. at 580.

18 In Campbell, the Supreme Court found that hip-hop band 2-Live  
19 Crew's rendition of "Pretty Woman" was a parody because it targeted  
20 the original song and commented "on the naivete of the original of  
21 an earlier day, as a rejection of its sentiment that ignores the  
22 ugliness of street life and the debasement that it signifies." Id.  
23 at 583. Relying on Campbell in Mattel, Inc. v. Walking Mountain  
24 Productions, 353 F.3d 792, 802 (9th Cir. 2003), the Ninth Circuit  
25 remarked: "No doubt, 2-Live Crew could have chosen another song to  
26 make such a statement. Parody only requires that 'the plaintiff's  
27 copyrighted work is at least in part the target of the defendant's  
28 satire,' not that the plaintiff's work be the irreplaceable object

1 for its form of social commentary." Id. (internal citations  
2 omitted) (emphasis added).

3 In their opposition to the motion to dismiss, plaintiffs argue  
4 that Family Guy's use of the Charwoman in the Peterotica episode  
5 "does not constitute parody in the strict legal sense" and thus  
6 cannot be considered "transformative." (Pls. Opp. at 7). In  
7 support of this argument, plaintiffs assert that the target of the  
8 Family Guy parody was not the Charwoman character as such, but  
9 Carol Burnett herself. In fact, the Family Guy characters explain  
10 that the porn shop is clean because "Carol Burnett works part-time  
11 as a janitor" and make reference to Carol Burnett's signature ear  
12 tug. Plaintiffs point out that the Charwoman never tugged her ear  
13 in The Carol Burnett Show; rather, Carol Burnett playing herself  
14 tugged at her ear in the closing segment of the show as a salute to  
15 her grandmother. Furthermore, plaintiffs assert that the act of  
16 placing the Charwoman in the role of a janitor in an erotic store  
17 is neither "absurd" nor "transformative" because "one could easily  
18 imagine a charwoman cleaning the floor of a porn shop." (Pls. Opp  
19 at 8).

20 Secondly, plaintiffs argue that a comparison of the Family  
21 Guy's Charwoman and Burnett's Charwoman demonstrates that the  
22 Family Guy version is virtually a literal copy of Burnett's, see  
23 Denton Decl. ¶ 2; Exh. A, which is another indication that the use  
24 of the Charwoman is not "sufficiently transformative." (Pls. Opp.  
25 at 8). In sum, the crux of plaintiffs' argument is that the target  
26 of the "Family Guy's crude joke" appears to be Burnett, her family,  
27 and her wholesome image as opposed to the Charwoman. (Pls. Opp. at  
28 7).

1           However, as the Supreme Court has pointed out, the correct  
2 inquiry is not whether the use of the material constitutes parody  
3 in a "strict legal sense." Rather, the "threshold question when  
4 fair use is raised in defense of parody is whether a parodic  
5 character may reasonably be perceived" and "[w]hether ... parody is  
6 in good taste or bad taste does not and should not matter to fair  
7 use." See Campbell, 510 U.S. at 582. As defendant correctly  
8 notes, it is immaterial whether the target of Family Guy's "crude  
9 joke" was Burnett, the Carol Burnett Show, the Charwoman, Carol's  
10 Theme Music or all four. The eighteen-second clip of the animated  
11 figure resembling the "Charwoman," mopping the floor next to "blow-  
12 up dolls," a rack of "XXX" movies, and "video booths" in a porn  
13 shop is clearly designed to "imitate[] the characteristic style of  
14 an author or a work for comic effort or ridicule," and is executed  
15 in such a manner that "the characteristic turns of thought and  
16 phrase or class of authors are imitated in such a way as to make  
17 them appear ridiculous." Campbell, 510 U.S. at 580; see also  
18 Lucasfilm Ltd. v. Media Market Group, Ltd., 182 F.Supp.2d 897, 901  
19 (N.D. Cal. 2002) (denying injunctive relief to block pornographic  
20 version of "Star Wars" because a "parodic character may reasonably  
21 be perceived"). Criticism of figures as universally recognized as  
22 Carol Burnett "will not always be reasoned or moderate," and may  
23 come in the form of "vehement, caustic, and sometimes unpleasantly  
24 sharp attacks." Hustler Magazine v. Falwell, 485 U.S. 46, 51  
25 (1988). Here, Family Guy put a cartoon version of Carol  
26 Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd  
27 situation in order to lampoon and parody her as a public figure.  
28 Therefore, the Court finds that a parodic character may reasonably

1 be perceived in the Family Guy's use of the Charwoman because it is  
2 a "literary or artistic work that broadly mimics an author's  
3 characteristic style and holds it up to ridicule." See Dr. Seuss  
4 Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401  
5 (9th Cir. 1997) (quoting American Heritage Dictionary definition of  
6 parody). The episode at issue put a cartoon version of Carol  
7 Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd  
8 situation in order to lampoon and parody her as a public figure.  
9 Accordingly, the Court finds this factor weighs in favor of fair  
10 use.

11

## 12 2. The Nature of the Copyrighted Work

13 The second § 107 factor is "the nature of the copyrighted  
14 work." This factor calls for recognition that some works are  
15 closer to the core of intended copyright protection than others,  
16 with the consequence that fair use is more difficult to establish  
17 when the former works are copied. See Stewart v. Abend, 495 U.S.  
18 207, 237-238 (1990) (contrasting fictional short story with factual  
19 works); Harper & Row, 471 U.S. at 563-564 (contrasting  
20 soon-to-be-published memoir with published speech); Sony Corp. of  
21 America v. Universal City Studios, Inc., 464 U.S. 417, 455, n. 40  
22 (1984) (contrasting motion pictures with news broadcasts); Feist  
23 Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S.  
24 340, 348-351 (1991) (contrasting creative works with bare factual  
25 compilations); 3 M. Nimmer & D. Nimmer, Nimmer on Copyright §  
26 13.05[A][2] (1993) (hereinafter Nimmer) However, as the Supreme  
27 Court announced in Campbell, and both plaintiffs and defendant  
28 recognize in their briefs, the second factor "is not much help in

1 resolving ... parody cases, since parodies almost invariably copy  
2 publicly known, expressive works...." Campbell, 510 U.S. at 586.  
3 Accordingly, the Court does not accord great weight here to the  
4 second factor in the fair use analysis.

5  
6 3. The Amount and Substantiality of the Amount Used

7 The third factor asks whether "the amount and substantiality  
8 of the portion used in relation to the copyrighted work as a  
9 whole," § 107(3) ... are reasonable in relation to the purpose of  
10 the copying. Campbell, 510 U.S. at 586. Here, attention turns to  
11 "the persuasiveness of a parodist's justification for the  
12 particular copying done, and the enquiry will harken back to the  
13 first of the statutory factors, for, as in prior cases, [the  
14 Supreme Court] recognize[d] that the extent of permissible copying  
15 varies with the purpose and character of the use.... The facts  
16 bearing on this factor will also tend to address the fourth, by  
17 revealing the degree to which the parody may serve as a market  
18 substitute for the original or potentially licensed derivatives."  
19 Id.

20 In explaining the application of the third factor, the Court  
21 in Campbell, stated that "[w]hen parody takes aim at a particular  
22 original work, the parody must be able to "conjure up" at least  
23 enough of that original to make the object of its critical wit  
24 recognizable.... What makes for this recognition is quotation of  
25 the original's most distinctive or memorable features, which the  
26 parodist can be sure the audience will know. Once enough has been  
27 taken to assure identification, how much more is reasonable will  
28 depend, say, on the extent to which the song's overriding purpose

1 and character is to parody the original or, in contrast, the  
2 likelihood that the parody may serve as a market substitute for the  
3 original. But using some characteristic features cannot be  
4 avoided." Campbell, 510 U.S. at 588. In relation to its  
5 discussion of the third factor, the Court relied on Fisher v. Dees,  
6 794 F.2d at 438-39 (9th Cir. 1986) and Elsmere Music, Inc. v. NBC,  
7 623 F.2d 252, 253 (2d Cir. 1980).

8 In Elsmere, cast members of the comedy television program  
9 "Saturday Night Live" sang an eighteen-second parody of "I Love New  
10 York" using the words "I Love Sodom" repeated three times, and the  
11 court found fair use, noting the brief use of the material and that  
12 "the repetition of the copied material served both to ensure viewer  
13 recognition and to satirize the frequent broadcasting of the  
14 original." Elsmere, 623 F.2d at 253. In Fisher, the Ninth Circuit  
15 concluded that a twenty nine-second song parody on a forty-minute  
16 comedy album, which copied the first bars of an underlying song  
17 with parodic alterations to the opening lyrics, took "no more from  
18 the original than necessary to accomplish reasonably its parodic  
19 purpose." Fisher, 794 F.2d at 439.

20 Here, plaintiffs argue that Fox took more of the Charwoman  
21 character's image and Carol's theme music than was necessary to  
22 place that image in the minds of viewers. Plaintiffs stress that  
23 the Family Guy Charwoman is a "near verbatim copy of Burnett's  
24 Charwoman" and analogize the present case to Walt Disney  
25 Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), wherein  
26 the panel concluded that it was not necessary, and hence not fair  
27 use, for adult comic book authors to copy Disney characters in  
28

1 their entirety to place the characters in the minds of their  
2 readers. Id. at 757-58.

3 This argument is unpersuasive. The Charwoman, the Carol  
4 Burnett Show theme music, and the jokes told about Burnett's family  
5 appear on screen for approximately eighteen seconds. As in  
6 Elsmere, Fisher, and Campbell, Family Guy took "no more from the  
7 original than necessary to accomplish reasonably its parodic  
8 purpose." Fisher, 794 F.2d at 439. Although Family Guy could have  
9 used more than just a "fleeting evocation," see Fisher, 794 F.2d at  
10 439, and an "[e]ven more extensive use would still have been fair  
11 use," Elsmere, 623 F.2d at 253, n.1, Family Guy "conjures up" the  
12 "Charwoman" and "Carol's theme" for less than five seconds.  
13 Compare Ex. A with Fisher, 794 F.2d at 439 (29-second song parody)  
14 and Elsmere, 482 F.Supp. At 743-47 (18-second song parody). As the  
15 defendant correctly notes, there is no requirement that "parodists  
16 take the *bare minimum* amount of copyright material necessary to  
17 conjure up the original work." Suntrust Bank, 268 F.3d 1257, 1273  
18 (11th Cir. 2001) (emphasis added). Here, Family Guy takes just  
19 enough of the imagery and accompanying theme music to make this  
20 crude depiction of the Charwoman character "recognizable" to  
21 viewers. Accordingly, the third factor weighs in favor of fair  
22 use.

23

24 4. The Effect of the Use on the Potential Market

25 The fourth fair use factor is "the effect of the use upon the  
26 potential market for or value of the copyrighted work." 17 U.S.C.  
27 § 107(4). This factor requires the Court to consider "the extent  
28 of market harm caused by the particular actions of the alleged

1 infringer," as well as "whether unrestricted and widespread  
2 conduct of the sort engaged in by the defendant ... would result in  
3 a substantially adverse impact on the potential market' for the  
4 original." Campbell, 510 U.S. at 590. This factor requires the  
5 court to weigh "the benefit the public will derive if the use is  
6 permitted [against] the personal gain the copyright owner will  
7 receive if the use is denied." Dr. Seuss Enterprises, 109 F.3d at  
8 1403.

9 In Fisher, the Ninth Circuit admonished that "[i]n assessing  
10 the economic effect of the parody, the parody's critical impact  
11 must be excluded. Through its critical function, a 'parody may  
12 quite legitimately aim at garroting the original, destroying it  
13 commercially as well as artistically.' Copyright law is not  
14 designed to stifle critics." Fisher, 794 F.2d at 436. The Ninth  
15 Circuit clarified the inquiry in parody cases as being "not its  
16 potential to destroy or diminish the market for the original..."  
17 but rather its potential to fulfill "the demand for the original."  
18 Id. The panel held that "infringement occurs when a parody  
19 supplants the original in markets the original is aimed at, or in  
20 which the original is, or has reasonable potential to become,  
21 commercially valuable." Id.

22 In Fisher, the Ninth Circuit found that the danger of  
23 commercial substitution was unlikely where defendants created a  
24 twenty nine-second recording concerning a woman who sniffs glue,  
25 which parodied the famous jazz standard "When Sunny Gets Blue," a  
26 lyrical song concerning a woman's feelings about lost love. In  
27 holding that the parody had no cognizable economic effect on the  
28 original, the Court stated it was unconvinced that "consumers

1 desirous of hearing a romantic and nostalgic ballad such as the  
2 composers' song would be satisfied to purchase the parody instead."  
3 Furthermore, "those fond of parody" were not "likely to consider  
4 'When Sunny Gets Blue' a source of satisfaction." Id.

5 Here, as in Fisher, the Court finds that commercial  
6 substitution is not likely in this case. Defendant is correct that  
7 the market demand for a non-parodic use of the Charwoman would not  
8 be fulfilled by a use that has the character in front of "blow-up"  
9 dolls and "XXX movies." Arguing that the fourth factors weighs  
10 against fair use, plaintiffs raise the issue that the Family Guy's  
11 use of the Charwoman inflicts harm on the good will and reputation  
12 associated with the copyrighted work. However, a "parody may quite  
13 legitimately aim at garroting the original, destroying it  
14 commercially as well as artistically." Id. Indeed,  
15 "'[d]estructive' parodies play an important role in social and  
16 literary criticism and thus merit protection even though they may  
17 discourage or discredit an original author." Id.

18 Accordingly, the Court finds that the four factors of § 107  
19 weigh strongly in favor of a finding of fair use and that  
20 plaintiffs' first claim of relief for copyright infringement should  
21 be dismissed without leave to amend. Ordinarily, "[d]ismissal  
22 without leave to amend is improper unless it is clear that the  
23 complaint could not be saved by any amendment." Polich v.  
24 Burlington Northern, Inc.,  
25 942 F.2d 1467, 1472 (9th Cir. 1991). However, leave to amend  
26 should not be granted when plaintiffs could not allege any  
27 additional facts which might cure defects in the complaint. See In  
28 re VeriFone Sec. Litig., 11 F.3d 865, 872 (9th Cir.1993) (denying

1 leave to amend when plaintiffs failed to allege additional facts  
2 which might cure defects in complaint). Here, it is clear that the  
3 complaint can not be saved by any amendment. See Polich, 942 F.2d  
4 at 1472; see also In re Silicon Graphics, 183 F.3d at 991 (9th Cir.  
5 1999) (leave to amend should not be granted where the complaint is  
6 futile). Accordingly, the Court grants defendant's motion to  
7 dismiss plaintiffs' first claim for relief without leave to amend.

8

9 B. Plaintiffs' Second Claim for Relief

10 Plaintiffs' second claim for relief for violation of the  
11 Lanham Act, 15 U.S.C. § 1125, alleges that defendant's use of the  
12 Charwoman is "likely to cause confusion, or to cause mistake, or to  
13 deceive the public as to the affiliation, connection, or  
14 association of Ms. Burnett with Fox or the 'Family Guy' program, or  
15 is likely to cause confusion as to the origin, sponsorship, or  
16 approval of the 'Family Guy' program, and such use by Fox has  
17 caused dilution of the distinctive quality of the "Charwoman" mark.  
18 Compl., ¶ 20. Defendant urges the Court to dismiss this claim on  
19 several grounds. The Court grants defendant's motion to dismiss  
20 plaintiffs' second claim for relief both because it finds no  
21 likelihood that viewers would be confused by defendant's use of the  
22 Charwoman character and because defendant's parodic work is  
23 considered noncommercial speech and, therefore, not subject to any  
24 trademark dilution claim.

25

26 I. Likelihood of Confusion

27 A trademark claim exists under the Lanham Act "where the  
28 public interest in avoiding consumer confusions outweighs the

1 public interest in free expression." Mattel, 353 F.3d at 807  
2 (quoting Rodgers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989))  
3 Some parodies will constitute an infringement, some will not. But  
4 the cry of 'parody!' does not magically fend off otherwise  
5 legitimate claims of trademark infringement or dilution. There are  
6 confusing parodies and non-confusing parodies. All they have in  
7 common is an attempt at humor through the use of someone else's  
8 trademark." 4 J. Thomas McCarthy, McCarthy on Trademarks and  
9 Unfair Competition § 31:153 (2007). A non-infringing parody is  
10 merely amusing, not confusing. Dr. Seuss Enterprises, 109 F.3d at  
11 1394.

12 "Where a defendant uses a variation on plaintiff's mark merely  
13 to make a clever turn of a phrase, resolution of the likely  
14 confusion issue may be quite different. If the difference in  
15 wording or appearance of the designation together with the context  
16 and overall setting is such as to convey to the ordinary viewer  
17 that this is a joke, not the real thing, then confusion as to  
18 source, sponsorship, affiliation or connection is unlikely." See  
19 McCarthy at § 31:153. Furthermore, the more distasteful and  
20 bizarre the parody, the less likely the public is to mistakenly  
21 think that the trademark owner has sponsored or approved it:

22  
23 Indeed, the more outrageous and offensive the parody, the less  
24 likely confusion will result. ... [T]rademark owners, like  
25 public figures, who seek the public spotlight must accept the  
26 concomitant risk of public ridicule in the form of parody.

27 M.K. Cantwell, Confusion, Dilution and Speech: First Amendment  
28 Limitations on the Trademark Estate: An Update, 94 Trademark Rptr.  
547, 582-583 (2004); see Universal City Studios, Inc. v. Nintendo  
Co., 746 F.2d 112, 223 U.S.P.Q. 1000 (2d Cir. 1984) (holding no

1 likely confusion between defendant's "comical, farcical, childlike  
2 and nonsexual" DONKEY KONG video game character and plaintiff's  
3 famous movie character KING KONG, who was "a ferocious gorilla in  
4 quest of a beautiful woman"; court observed that "the fact that  
5 DONKEY KONG so obviously parodies the KING KONG theme strongly  
6 contributes to dispelling confusion on the part of consumers");  
7 Universal City Studios v. Casey & Casey, 622 F. Supp. 201, 228  
8 U.S.P.Q. 195 (S.D. Fla. 1985), aff'd without op., 792 F.2d 1125  
9 (11th Cir. 1986) (no preliminary injunction against merchandise  
10 showing two cartoon mice characters identified as MIAMI MICE, as  
11 not likely to cause confusion with television series MIAMI VICE);  
12 Universal City Studios v. T-Shirt Gallery, 634 F. Supp. 1468, 230  
13 U.S.P.Q. 23 (S.D.N.Y. 1986) (strength of the parody "highlights the  
14 differences" and "should dispel any confusion"); See Lucasfilm Ltd.  
15 v. Media Market Group, Ltd., 182 F. Supp. 2d 897, 179 A.L.R. Fed.  
16 659 (N.D. Cal. 2002) (animated pornographic movie entitled  
17 STARBALLZ found to be a parody of STAR WARS movies and not in  
18 violation of the federal anti-dilution laws. "Parody is a form of  
19 non-commercial, protected speech which is not affected by the  
20 Federal Trademark Dilution Act."); Mattel, 353 F.3d 792 (9th Cir.  
21 2003), on remand to, 2004 Copr. L. Dec. P 28824, 2004 WL 1454100  
22 (C.D. Cal. 2004) (Artistic photographs parodying BARBIE doll in  
23 incongruous situations are neither dilution nor trademark  
24 infringement of the word mark BARBIE or the doll trade dress. "Any  
25 reasonable consumer would realize the critical nature of this  
26 [accused] work and its lack of affiliation with Mattel. Critical  
27 works are much less likely to have a perceived affiliation with the  
28 original work.").

1 The Court finds that defendant's use of the Charwoman  
2 character in this case creates no likelihood of confusion. Family  
3 Guy is a cartoon comedy show known for its lampooning of  
4 celebrities and pop culture. The eighteen second clip featuring  
5 the Charwoman can be fairly classified as distasteful and bizarre,  
6 even outrageous and offensive. However, the nature of the use does  
7 not explicitly mislead the viewer as to affiliation, connection,  
8 association with, or sponsorship or approval by plaintiffs. As the  
9 Ninth Circuit stated in Mattel, Inc. v. MCA Records, Inc., 296 F.3d  
10 894, 903 (9th Cir. 2002):

11

12 If we see a painting titled 'Campbell's Chicken Noodle Soup,'  
13 we're unlikely to believe that Campbell's has branched into  
14 the art business. Nor, upon hearing Janis Joplin croon 'Oh  
15 Lord, won't you buy me a Mercedes-Benz?,' would we suspect  
16 that she and the carmaker had entered into a joint venture....  
17 [M]ost consumers are well aware that they cannot judge a book  
18 solely by its title any more than by its cover."

19 MCA, 296 F.3d at 900. Likewise, in this case, no reasonable viewer  
20 would mistake the Charwoman or Carol Burnett as anything other than  
21 the target of a Family Guy parody. Accordingly, the Court grants  
22 defendant's motion to dismiss the second claim for relief with  
23 respect to the likelihood of confusion claim.

24

25 ii. Trademark Dilution

26 Plaintiffs' second claim for relief also alleges that Fox's  
27 use of the Charwoman character "has caused dilution of the  
28 distinctive quality of the 'Charwoman' mark." Compl., ¶ 20.

Dilution may occur where use of a trademark "whittle[s] away  
... the value of a trademark" by "blurring their uniqueness and  
singularity" or by "tarnishing them with negative associations."

1 MCA, 296 F.3d at 903 (internal citations omitted). However,  
2 "[t]arnishment caused merely by an editorial or artistic parody  
3 which satirizes plaintiff's product or its image is not actionable  
4 under an anti-dilution statute because of the free speech  
5 protections of the First Amendment...." 4 McCarthy, supra, §  
6 24:105, at 24-225. A dilution action only applies to purely  
7 commercial speech. MCA, 296 F.3d at 904. Parody is a form of  
8 noncommercial expression if it does more than propose a commercial  
9 transaction. See id. at 906. Under MCA, Fox's artistic and  
10 parodic work is considered noncommercial speech and, therefore, not  
11 subject to a trademark dilution claim.

12 Accordingly, the Court grants defendant's motion to dismiss  
13 without leave to amend as to plaintiffs' second claim for relief  
14 under the Lanham Act.

15  
16 C. Plaintiffs' State Law Claims for Relief

17 Plaintiffs' also bring a third claim for relief alleging  
18 violation of California's statutory right of publicity, Civil Code  
19 § 3344 and a fourth claim for relief for common law  
20 misappropriation of name and likeness.

21 In addition to their motion to dismiss for failure to state a  
22 claim upon which relief can be granted, defendant has also filed a  
23 special motion to strike plaintiffs' state law claims for relief  
24 under California's anti-SLAPP statute, Code of Civil Procedure §  
25 425.16.

26 As discussed above, the Court dismisses plaintiffs' first and  
27 second claims for relief without leave to amend. Without these  
28 federal claims, there is no federal subject matter jurisdiction.

1 Federal district courts may exercise supplemental jurisdiction  
2 "over all other claims that are so related to claims in the action  
3 within such original jurisdiction that they form part of the same  
4 case or controversy . . . ." 28 U.S.C. § 1367(a). Courts "may"  
5 decline to exercise supplemental jurisdiction over a claim under  
6 subsection (a) if . . . (3) the district court has dismissed all  
7 claims over which it has original jurisdiction . . . ." 28 U.S.C.  
8 § 1367(c)(3). See also Ove, 264 F.3d at 822 (upholding district  
9 court's refusal to exercise supplemental jurisdiction over state  
10 claims after dismissing federal claims, including dismissal of §  
11 1983 claim for failure to state a claim). Accordingly, this Court  
12 declines to exercise supplemental jurisdiction pursuant to 28  
13 U.S.C. 1367(c)(3) over the two remaining state law claims. They  
14 are, therefore, dismissed and defendant's special motion to strike  
15 is denied as moot.

16

17 **III. CONCLUSION**

18 Carol Burnett is an icon in American culture as is her  
19 character the "Charwoman." The Court has no doubt that she is, and  
20 rightly so, well known, respected, and beloved by a large segment  
21 of the American public based upon her persona and her outstandingly  
22 successful entertainment career. The Court fully appreciates how  
23 distasteful and offensive the segment is to Ms. Burnett. Debasing  
24 the "Charwoman" and also making Ms. Burnett's parents participants  
25 in a crude joke is understandably disheartening to Ms. Burnett, her  
26 family, and many fans. To some extent this dispute is indicative  
27 of just how far the "new media" has come from the "old media." The  
28 old media harkens back to days when crude jokes and insensitive,

1 often mean spirited, programing was perhaps found in live night  
2 club performances but was not present on television. In the new  
3 media, any self imposed restraint essentially has been eliminated.  
4 Public figures, such as Ms. Burnett, are frequent targets of  
5 parodies and crude innuendo. As Ms. Burnett well knows, it takes  
6 far more creative talent to create a character such as the  
7 "Charwoman" than to use such characters in a crude parody. Perhaps  
8 Ms. Burnett can take some solace in that fact.

9       However, the law, as it must in an open society, provides  
10 broad protection for the defendant's segment. Therefore, the Court  
11 grants defendant's motion to dismiss plaintiff's complaint without  
12 leave to amend. The Court further denies defendant's special  
13 motion to strike as moot.


14

15 IT IS SO ORDERED.

16

17 Dated: 6-1-07

18

  
DEAN D. PREGERSON  
United States District Judge

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