

13-694-cv  
*Keeling v. Hars*

In the  
**United States Court of Appeals**  
for the **Second Circuit**

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AUGUST TERM 2014  
No. 13-694-cv

JAIME KEELING,  
*Plaintiff-Counter-Defendant-Appellee,*

v.

EVE HARS,  
*Defendant-Appellant,*

NEW ROCK THEATER PRODUCTIONS, LLC, A NEW YORK LIMITED  
LIABILITY COMPANY,  
*Defendant-Counter-Claimant,*

ETHAN GARBER,  
*Defendant.\**

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Appeal from the United States District Court for the  
Southern District of New York

No. 1:10-cv-9345—Thomas P. Griesa, *Judge*

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\* The Clerk of Court is directed to amend the official caption in this case to conform with the above.

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SUBMITTED: JUNE 26, 2015  
DECIDED: OCTOBER 30, 2015

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Before: CABRANES, LIVINGSTON, and DRONEY, *Circuit Judges*.

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The primary question presented is whether an unauthorized work that makes “fair use” of its source material may itself be protected by copyright.

We hold, for substantially the reasons stated by the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*), that, if the creator of an unauthorized work stays within the bounds of fair use and adds sufficient originality, she may claim protection under the Copyright Act, 17 U.S.C. § 103, for her original contributions. We also reject defendant’s challenges to the District Court’s jury charge. The District Court’s January 11, 2013 judgment is therefore **AFFIRMED**.

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STEVEN PARADISE, Vinson & Elkins LLP,  
New York, NY, *for Plaintiff-Counter-  
Defendant-Appellee*.

EVE HARS, *pro se*, Los Angeles, CA, *for  
Defendant-Appellant*.

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JOSÉ A. CABRANES, *Circuit Judge*:

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### **BACKGROUND**

Plaintiff-Appellee Jaime Keeling is the author of *Point Break Live!* (“PBL”), a parody stage adaptation of the 1991 Hollywood action movie *Point Break*, starring Keanu Reeves and Patrick Swayze. In the film, Reeves plays a rookie FBI agent who goes undercover to infiltrate a gang of bank-robbing surfers led by Swayze’s character. The Keeling-authored PBL parody parallels the characters and plot elements from *Point Break* and relies almost exclusively on selected dialogue from the screenplay. To this raw material, Keeling added jokes, props, exaggerated staging, and humorous theatrical devices to transform the dramatic plot and dialogue of the film into an

irreverent, interactive theatrical experience. For example, in Keeling's *PBL* parody, *Point Break*'s death-defying scene in which Reeves's character must pick up bricks, blindfolded, in a swimming pool takes place, instead, in a kiddie pool. Massive waves in the film are replaced by squirt guns in the *PBL* parody. A central conceit of the *PBL* parody is that the Keanu Reeves character is selected at random from the audience and reads his lines from cue cards, thereby lampooning Reeves's reputedly stilted performance in the movie. Keeling added to the effect that the audience was watching the making of the film by creating a set of film-production characters in the *PBL* parody, including a director, cinematographer, and production assistants. Keeling possesses no copyright or license with regard to the *Point Break* motion picture.

Defendant-Appellant Eve Hars, proceeding *pro se* on appeal, owns production company New Rock Theater Productions, LLC ("New Rock"). In 2007, Keeling executed a production agreement with Hars, pursuant to which New Rock would stage a two-month production run of *PBL* from October through December 2007. During that time period, Hars conferred with an entertainment attorney and the holder of the copyright to the Hollywood screenplay for *Point Break*, and eventually Hars came to believe that Keeling did not lawfully own any rights to the *PBL* parody play. Accordingly, after its initial two-month run, Hars sought to renegotiate the terms of the contract upon its expiration and, in effect, continue to produce *PBL* without further payment to Keeling. Keeling refused renegotiation, threatened suit, and registered a

copyright in *PBL*, without first obtaining permission from the copyright holders of the original *Point Break*. Keeling's asserted copyright in *PBL* became effective on January 4, 2008. Hars and New Rock continued to stage performances of *PBL* for four years thereafter without payment to or authorization from Keeling.

In December 2010, Keeling brought suit against Hars, New Rock, and New Rock investor Ethan Garber, asserting claims for copyright infringement, breach of contract, and tortious interference with contract. In the District Court proceedings, all parties were represented by counsel. After the District Court denied defendants' motion to dismiss, *see Keeling v. New Rock Theater Prods., LLC*, No. 10 Civ. 9345 (TPG), 2011 WL 1899762, at \*1 (S.D.N.Y. May 17, 2011), defendants asserted counterclaims seeking, *inter alia*, a declaration that Keeling's *PBL* copyright registration was invalid. Upon completion of discovery, defendants moved for summary judgment, arguing primarily that *PBL*, an unauthorized derivative work, was not entitled to copyright protection as a matter of law. The District Court denied defendants' successive motions for summary judgment, ruling that a parody that makes "fair use" of another copyrighted work may contain sufficient originality to merit copyright protection itself. *See Keeling v. New Rock Theater Prods., LLC*, No. 10 Civ. 9345 (TPG), 2011 WL 6202796 (S.D.N.Y. Dec. 13, 2011); *Keeling v. New Rock Theater Prods., LLC*, No. 10 Civ. 9345 (TPG), 2012 WL 5974009 (S.D.N.Y. Nov. 29, 2012). The District Court also rejected defendants' argument that a script heavily reliant on theatrical devices, as was *PBL's*, could not lawfully constitute

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