

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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|----------------|---|---------------------|
| CHOOSECO LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. 2:19-cv-08 |
| |) | |
| NETFLIX, INC., |) | |
| |) | |
| Defendant. |) | |

OPINION AND ORDER

Plaintiff Chooseco, a Vermont-based publishing company, has brought multiple claims against Defendant Netflix for its alleged use of Chooseco's word mark CHOOSE YOUR OWN ADVENTURE in the dialogue of its film *Black Mirror: Bandersnatch*. Chooseco's Amended Complaint includes actions for trademark infringement, unfair competition, false designation of origin, dilution under the Lanham Act and unfair competition under Vermont common law. Now before the Court is Netflix's motion to dismiss Chooseco's complaint for failure to state a claim upon which relief can be granted. For the reasons set forth below, Defendant's motion to dismiss is **denied**.

Factual Background

I. Chooseco's Books and Trademarks

Chooseco is the current publisher of CHOOSE YOUR OWN ADVENTURE books. ECF No. 14 at ¶ 11. The book series employs an interactive narrative structure that allows "the reader [to] act[] as the story's protagonist and make[] choices to determine

the narrative's plot and ending." *Id.* at ¶ 13. Each choice the reader makes leads to a different page in the book, creating "multiple potential endings at various points." *Id.*

CHOOSE YOUR OWN ADVENTURE books "are one of the bestselling children's series of all time," with over 265 million copies sold, and were "widely read in the 1980s and 1990s." *Id.* at ¶ 14. Their popularity remains, with more than 620,000 copies printed for distribution in the United States within the last year alone. *Id.* Currently, Chooseco's target demographic for these books "is primarily children and young adults between seven and fourteen years old." *Id.* As one of its main marketing strategies, Chooseco attempts to tap into the nostalgia of "adults who read the books when they were young" to entice them into buying CHOOSE YOUR OWN ADVENTURE books for their children. *Id.*

Chooseco owns a federally registered trademark for the word mark CHOOSE YOUR OWN ADVENTURE. *Id.* at ¶ 1. This mark covers various types of media including books and movies. *Id.* at ¶ 16. For example, Chooseco has licensed the mark for a board game and currently has an option contract with Twentieth Century Fox to develop an interactive film series based on the books. *Id.* at ¶ 18. In addition, Chooseco owns and operates a website that provides interactive games and has partnered with Audible to release interactive audiobooks. *Id.* at ¶¶ 19-20.

Chooseco has also consistently used certain elements in its trade dress for CHOOSE YOUR OWN ADVENTURE books. *Id.* at ¶ 12. Historically, the books featured an illustration surrounded by a double frame with two separate colors. *Id.* The books now in print display a frame with only one color but retain the same shape. *Id.* However, Chooseco has not registered its trade dress.

Beginning in 2016, Netflix attempted to purchase a license to use the word mark CHOOSE YOUR OWN ADVENTURE in connection with various films and cartoons. *Id.* at ¶ 21. Netflix and Chooseco never reached an agreement regarding the license. *Id.* In fact, “[o]n at least one occasion before the release of *Bandersnatch*, Chooseco sent a written cease and desist request to Netflix asking Netflix to stop using the CHOOSE YOUR OWN ADVENTURE mark in its marketing efforts for a different program.” *Id.* at ¶ 22.

II. Netflix and *Black Mirror*: *Bandersnatch*

“Netflix is a popular media . . . company that primarily offers subscription-based digital video streaming services.” *Id.* at ¶ 23. Its streaming library includes *Black Mirror* – “a speculative fiction anthology series that examines the relationship between humans and technology.” *Id.* at ¶ 25. On December 28, 2018, Netflix released *Bandersnatch* as a part of this series. *Id.* at ¶ 26. Both *Black Mirror* as a whole and *Bandersnatch* itself contain “dark and violent themes” and are

intended for mature audiences. *Id.* at ¶ 35.

Bandersnatch is an interactive film that employs a branching narrative technique allowing its viewers to make choices that affect the “plot and ending of the film.” *Id.* at ¶ 26. Viewers essentially control the protagonist, Stefan Butler. ECF 18-1 at 4. *Bandersnatch* chronicles Butler’s attempts to develop a videogame based on a fictitious book, also titled “Bandersnatch.” *Id.*

The pivotal scene at issue in this litigation occurs near the beginning of the film. ECF No. 14 at ¶ 33. Butler’s father remarks that Jerome F. Davies, the author of the fictitious book in the film, must not be a very good writer because Butler keeps “flicking backwards and forwards.” *Id.* at ¶ 31. Butler responds: “No, it’s a ‘Choose Your Own Adventure’ book. You decide what your character does.” *Id.* at ¶ 31-32. Of note, the subtitles for the film couch the phrase in quotation marks and capitalize the first letter of each word. *Id.* at ¶ 31. Chooseco claims that Netflix “provides its own closed-captioning and subtitle services.” *Id.* at ¶ 33. Netflix neither confirms nor denies this point in either its motion to dismiss or its reply memorandum. See ECF Nos. 18-1, 25.

To promote *Bandersnatch*, Netflix employed a similar, although not exact, trade dress as that used by CHOOSE YOUR OWN ADVENTURE books in multiple marketing campaigns. ECF No. 14 at ¶

42. For example, Netflix created a website for Tuckersoft, the fictional videogame company where Butler developed his videogame. *Id.* at ¶ 43. This website displays multiple fictional videogame covers that have a “double rounded border element.” *Id.* at ¶ 44. A few of these fictional video game covers also appear in the film itself. *Id.* at ¶ 45. In addition, Netflix used images of the videogame covers while promoting *Bandersnatch* in the United Kingdom. *Id.* at ¶ 47. It created “several ‘pop up’ storefronts that were designed to resemble a 1980's videogame store that appears in the film.” *Id.* Netflix used images of the covers in these stores and on posters hung “on public streets around the same time that the pop up storefronts were viewable.” *Id.* Finally, Netflix used the cover for the *Bandersnatch* videogame as one of a few thumbnails for the film on its website. *Id.* at ¶ 46.

III. Chooseco's Claims and Netflix's Motion to Dismiss

Chooseco's Amended Complaint contains four claims for relief based on Netflix's alleged use of the word mark CHOOSE YOUR OWN ADVENTURE. Its first cause of action is for federal trademark infringement under 15 U.S.C. § 1114. Chooseco alleges that “Netflix has adopted and is using CHOOSE YOUR OWN ADVENTURE and an element of its trade dress in a manner that is likely to cause confusion, and is causing confusion . . . among the general purchasing public as to the origin and affiliation of Netflix

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