

United States Court of Appeals For the First Circuit

No. 19-1927

MARKHAM CONCEPTS, INC.; LORRAINE MARKHAM, individually and in her capacity as trustee of the Bill and Lorraine Markham Exemption Trust and the Lorraine Markham Family Trust; SUSAN GARRETSON,

Plaintiffs, Appellants,

v.

HASBRO, INC.; REUBEN KLAMER; DAWN LINKLETTER GRIFFIN; SHARON LINKLETTER; MICHAEL LINKLETTER; LAURA LINKLETTER RICH; DENNIS LINKLETTER; THOMAS FEIMAN, in his capacity as co-trustee of the Irvin S. and Ida Mae Atkins Family Trust; ROBERT MILLER, in his capacity as co-trustee of the Irvin S. and Ida Mae Atkins Family Trust; MAX CANDIOTTY, in his capacity as co-trustee of the Irvin S. and Ida Mae Atkins Family Trust,

Defendants, Appellees,

IDA MAE ATKINS,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. William E. Smith, U.S. District Judge]

Before

Thompson, Lipez, and Kayatta,
Circuit Judges.

Robert M. Pollaro, with whom David Cole, John T. Moehringer, and Cadwalader, Wickersham & Taft LLP were on brief, for

appellants.

Joshua C. Krumholz, with whom Courtney L. Batliner, Mark T. Goracke, Patricia K. Rocha, Holland & Knight LLP, and Adler Pollock & Sheehan P.C. were on brief, for appellee Hasbro, Inc.

Patricia L. Glaser, with whom Erica J. Van Loon, Joshua J. Pollack, Thomas P. Burke Jr., Lathrop GPM LLP, and Glaser Weil Fink Howard Avchen & Shapiro LLP were on brief, for appellee Reuben Klamer.

Christine K. Bush, Ryan M. Gainor, David B. Jinkins, Hinckley, Allen, & Snyder LLP, and Thompson Coburn LLP on brief for appellees Max Candiotty, Thomas Feiman, Dawn Linkletter Griffin, Laura Linkletter Rich, Dennis Linkletter, Michael Linkletter, Sharon Linkletter, and Robert Miller.

June 14, 2021

LIPEZ, Circuit Judge. "The Game of Life" is a classic family board game, introduced in 1960 by the Milton Bradley Company to great success. This case involves a long-running dispute between Rueben Klamer, a toy developer who came up with the initial concept of the game, and Bill Markham, a game designer whom Klamer approached to design and create the actual game prototype. Eventually, their dispute (which now involves various assignees, heirs, and successors-in-interest) reduced to one primary issue: whether the game qualified as a "work for hire" under the Copyright Act of 1909. If it did, Markham's successors-in-interest would not possess the termination rights that would allow them to reassert control over the copyright in the game. After considering the evidence produced at a bench trial, the district court concluded that the game was, indeed, such a work. Plaintiff-appellants, who all trace their interest in the game to Markham, challenge that determination. We affirm.

I.

We begin with a summary of the facts, as found by the district court. In 1959, Bill Markham, an experienced game designer and the head of a California-based product development company, was approached by Rueben Klamer, a toy developer with extensive industry contacts. Klamer had just visited Milton Bradley's Massachusetts headquarters, where he had been asked to develop an idea for a product that would commemorate the company's

1960 centennial. While searching for inspiration in the company's archive, he discovered a copy of the company's first board game: "The Checkered Game of Life," created by Milton Bradley himself in 1860. The original game was intended to instill its youthful players with lessons about vice and virtue. Klamer saw potential in an updated version, modified to reflect contemporary American society and values. On the trip back to California, Klamer developed the concept, even scribbling some thoughts on the flight home. Klamer was more of an ideas person, though, and he needed help developing the concept and creating a working prototype that could be pitched to Milton Bradley. Klamer chose Markham's firm partly because of two talented artists who worked there: Grace Chambers and Leonard Israel.

Markham and his team started work on the project in the summer of 1959. To ensure that a product launch coincided with Milton Bradley's 1960 centennial, they rushed to produce a prototype in just a few weeks. Markham and Klamer together contributed key features of the game: play would advance along a track winding through a three-dimensional game board, with a spinner determining how far players would move on each turn (thereby progressing through various "life milestones"). Klamer visited Markham's firm once or twice per week to offer feedback on the development of the physical game board and the box cover. Chambers built most of the prototype board. She constructed

houses, mountains, and the elevated track out of balsa wood, cardboard, and paper. Israel focused on the art for the prototype's box cover. He produced various sketches, Markham and Klamer chose the one they liked best, and Chambers integrated it into a box cover. As the game took shape, Markham, Klamer, Chambers, and Israel would all play the prototype together, suggesting (and vetoing) various rules and refinements. Sue Markham, Bill's wife and a copywriter by trade, memorialized the agreed-upon changes in what became the prototype's rulebook.

After approximately six weeks, the prototype was ready. At a meeting at Chasen's (a famous Hollywood restaurant), Klamer and Markham pitched it to a group of Milton Bradley executives. Also present was an associate of Klamer's, Art Linkletter, a well-known radio and television personality. Klamer and Linkletter were co-founders of a company called Link Research Corporation, which developed products and used Linkletter's celebrity to promote them. Part of the pitch was that Linkletter could help market the game. The pitch worked. The Milton Bradley executives liked the game and thought that it had commercial potential.

The parties subsequently entered into two agreements regarding rights to the game. The first was a license agreement between Link Research and Milton Bradley. It gave Milton Bradley the exclusive right to make and sell the game and noted that Link Research "ha[d] had . . . [the game] designed and constructed."

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