

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.; BEATRICE PARDO, in her capacity as successor co-
trustee of the Reuben B. Klamer Living Trust; PAUL GLASS, in his
capacity as successor co-trustee of the Reuben B. Klamer Living
Trust; 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.

No. 21-1957

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, Appellees

v.

HASBRO, INC.,

Defendant, Appellant.

BEATRICE PARDO, in her capacity as successor co-trustee of the Reuben B. Klamer Living Trust; PAUL GLASS, in his capacity as successor co-trustee of the Reuben B. Klamer Living Trust; 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; IDA MAE ATKINS,

Defendants.

No. 21-1958

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, Appellees

v.

BEATRICE PARDO, in her capacity as successor co-trustee of the Reuben B. Klamer Living Trust; PAUL GLASS, in his capacity as successor co-trustee of the Reuben B. Klamer Living Trust,

Defendants, Appellants

HASBRO, INC., 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; IDA MAE ATKINS,

Defendants.

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

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

Before

Kayatta, Lipez, and Thompson, Circuit Judges.

Patricia L. Glaser, with whom Erica J. Van Loon, Joshua J. Pollack, Nixon Peabody LLP, Thomas P. Burke Jr., and Glaser Weil Fink Howard Avchen & Shapiro LLP were on brief, for defendants-appellants Beatrice Pardo and Paul Glass.

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

David A. Cole, with whom John T. Moehringer and Cadwalader, Wickersham & Taft LLP were on brief, for plaintiffs-appellees.

June 22, 2023

LIPEZ, Circuit Judge. In this copyright action involving ownership rights to the classic board game, The Game of Life, conveyed more than six decades ago, the prevailing defendants seek attorney's fees from the unsuccessful plaintiffs. The district court denied fees for the trial-level proceedings, and the defendants claim on appeal that the court abused its discretion in doing so. The defendants also moved in this court for appellate attorney's fees. The Copyright Act of 1976 permits the award of reasonable fees and costs to a prevailing party, see 17 U.S.C. § 505, and the Supreme Court has endorsed a set of nonexclusive factors to be considered by courts in evaluating whether to award fees, see Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 & n.19 (1994). After carefully considering those factors and other aspects of the record, we affirm the district court's decision to deny fees and, primarily for the same reasons, decline to award fees for the appeal.

I.

As detailed in our opinion on the merits, this case arose from a long-running dispute between Reuben Klammer, a toy developer who originated the idea for The Game of Life, and Bill Markham, a game designer whom Klammer asked to design and build the game prototype. See Markham Concepts, Inc. v. Hasbro, Inc., 1 F.4th 74, 77-78 (1st Cir. 2021), cert. denied, 142 S. Ct. 1414 (2022). The game was a huge success, and for decades following its debut

in 1960, Markham and Klamer clashed over who should receive primary credit for its creation. In general, Markham "felt that he was not given proper public recognition for his role" and that the royalty he received was "unfairly low." Id. at 78-79.

Markham died in 1993. This case was brought by his successors-in-interest against Klamer, who has since died,¹ and others (including Hasbro, Inc., the company that now holds rights to The Game of Life) in an attempt, inter alia, to renegotiate the original assignment of rights in the game.² As the district court observed, the plaintiffs' copyright claim "boiled down to two dispositive questions: did Bill Markham create the [p]rototype (such that he could fairly be considered its author); and was the [p]rototype a work made for hire?" Markham Concepts, Inc. v. Hasbro, Inc., No. 15-419 WES, 2021 WL 5161772, at *1 (D.R.I. Nov.

¹ Klamer died in September 2021, after we issued our merits decision but before the district court ruled on the fee requests. In Klamer's place, this action has been pursued by the co-trustees of the Reuben B. Klamer Living Trust. For convenience, we refer to Klamer when discussing arguments made in his briefs and motions. The Markham parties are Markham's widow, daughter, and Markham Concepts, Inc.

² The litigation originally was brought by the Markham parties primarily as a contract action against Hasbro seeking reinstatement of their royalty payments, which had stopped because of an issue with an escrow arrangement. They subsequently amended their complaint to add additional causes of action against Klamer and other defendants, including the copyright claim adjudicated by the district court and addressed in our merits decision. See Markham Concepts, 1 F.4th at 77. The escrow issue was resolved, and the parties stipulated to dismissal of the non-copyright claims.

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