

No. 21-10515

**IN THE
United States Court of Appeals
For the Eleventh Circuit**

CARACOL TELEVISION S.A.,

Appellant,

v.

TELEMUNDO TELEVISION STUDIOS, LLC,
TELEMUNDO INTERNACIONAL, LLC, and
TELEMUNDO NETWORK GROUP, LLC,

Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

No. 18-cv-23443

APPELLANT'S INITIAL BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Because oral argument would help this Court in its decision on this record, the Appellant requests oral argument.

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF JURISDICTION.....	3
STATEMENT OF THE ISSUES.....	4
STATEMENT OF THE CASE.....	8
I. IN A SHOW CALLED <i>EL CARTEL</i>, CARACOL CREATED A TELEVISION CHARACTER NICKNAMED “EL CABO.”.....	8
II. FOUR YEARS LATER, TELEMUNDO TELEVISION STUDIOS, LLC AND CARACOL AGREED TO CO- CREATE AND CO-PRODUCE A DIFFERENT SHOW, <i>EL SEÑOR DE LOS CIELOS</i>.....	10
A. In the Co-Production Agreement, Telemundo Television and Caracol Defined Their Relationship.....	10
B. Caracol and Telemundo Internacional Contemporaneously Executed the Distribution Agreement.....	13
C. Caracol and Telemundo Television Successfully Produced the Series.....	14
D. Caracol Granted Telemundo Television Permission To Create Season 2 on Its Own.....	14
III. TELEMUNDO TELEVISION RAN AMOK AND CREATED SEASONS 3, 4, 5, 6, AND 7, AS WELL AS A SPINOFF, WITHOUT CARACOL’S APPROVAL.....	17

IV.	TELEMUNDO TELEVISION, TELEMUNDO INTERNACIONAL, AND TELEMUNDO NETWORK GROUP, LLC INFRINGED ON CARACOL’S COPYRIGHT OF <i>EL CARTEL</i>	18
V.	CARACOL SUED FOR COPYRIGHT INFRINGEMENT AND BREACH OF CONTRACT.....	19
VI.	THE DISTRICT COURT GRANTED SUMMARY JUDGMENT AGAINST CARACOL.....	20
	SUMMARY OF THE ARGUMENT.....	23
	ARGUMENT.....	27
I.	THE LETTER AGREEMENT DID NOT TRANSFER ALL RIGHTS TO THE SERIES FROM CARACOL TO TELEMUNDO TELEVISION.....	27
A.	Florida Law Controls and, Under Florida Law, the Plain Language Governs.....	28
B.	Caracol’s Interpretation of the Letter Agreement Gives Meaning to Every Section, Clause, and Word.....	29
C.	Telemundo Television’s Interpretation Renders Most of the Letter Agreement Superfluous.....	33
i.	The district court’s interpretation pretended “use” and “own” were synonymous and excised seven words from section 3 of the Letter Agreement.....	34

ii.	The district court treated the words “Sequel” and “Series” interchangeably, but the Letter Agreement gave them distinct definitions.....	35
iii.	The district court wholly ignored the only sentence speaking about Telemundo Television’s ownership as well as other sections of the Letter Agreement.....	36
iv.	The district court’s reading modified entire sections of the Co-Production Agreement and Distribution Agreement.....	38
D.	Even if the Letter Agreement Were Ambiguous, Caracol Must Prevail Because Copyright Law Requires a Clear Intent To Transfer.....	40
E.	Even if Florida Law’s Parol Evidence Rule Applied, a Genuine Dispute Exists on that Issue.....	41
II.	THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNTS II THROUGH IV.....	44
A.	Even if Counts II Through IV Necessarily Depend on Count I (and They Do Not), the District Court Erred in Granting Summary Judgment on Those Counts.....	44
B.	Besides, Counts II, III, and IV Do Not Depend on Count I.....	45
i.	Count IV seeks damages for copyright infringement of <i>El Cartel</i> , not the Series.....	45

ii.	The district court confusingly concluded that the Letter Agreement prevented a breach of the Letter Agreement.....	49
iii.	Count II is based on a breach of the Co-Production Agreement, and no one argued that the Letter Agreement modified the Co-Production Agreement.....	51
III.	NO ALTERNATIVE BASES EXIST FOR AFFIRMANCE.....	52
A.	The Telemundo Entities Butcher the Statute of Limitations.....	53
B.	Waiver and Equitable Assignment Are Inapplicable.....	58
C.	El Cabo Is Obviously Protectible.....	60
	CONCLUSION.....	63
	CERTIFICATE OF COMPLIANCE.....	64
	CERTIFICATE OF SERVICE.....	65

TABLE OF AUTHORITIES

Caselaw

<i>Am. Agronomics Corp. v. Ross</i> , 309 So. 2d 582 (Fla. Dist. Ct. App. 1975) (per curiam).....	42
<i>Am. United Life Ins. v. Martinez</i> , 480 F.3d 1043 (11th Cir. 2007).....	28
<i>Barnett v. Destiny Owners Ass’n</i> , 856 So. 2d 1090 (Fla. Dist. Ct. App. 2003).....	41
<i>Beach Towing Servs. v. Sunset Land Assocs.</i> , 278 So. 3d 857 (Fla. Dist. Ct. App. 2019) (per curiam).....	36–37
<i>Blue v. Lopez</i> , 901 F.3d 1352 (11th Cir. 2018).....	8
<i>Branscombe v. Jupiter Harbour, LLC</i> , 76 So. 3d 942 (Fla. Dist. Ct. App. 2011).....	42
<i>*Brownstein v. Lindsay</i> , 742 F.3d 55 (3d Cir. 2014).....	32–33, 47–49
<i>Bucacci v. Boutin</i> , 933 So. 2d 580 (Fla. Dist. Ct. App. 2006).....	29
<i>*Cambridge Literary Props. v. W. Goebel Porzellanfabrik GmbH & Co.</i> , 510 F.3d 77 (1st Cir. 2007).....	54
<i>Citigroup v. Amodio</i> , 894 So. 2d 296 (Fla. Dist. Ct. App. 2005).....	28
<i>Compulife Software v. Newman</i> , 959 F.3d 1288 (11th Cir. 2020).....	45, 58

<i>Discover Prop. & Cas. Ins. v. Beach Cars of W. Palm,</i> 929 So. 2d 729 (Fla. Dist. Ct. App. 2006).....	29
<i>Effects Assocs. v. Cohen,</i> 908 F.2d 555 (9th Cir. 1990).....	40, 59
<i>Everly v. Everly,</i> 958 F.3d 442 (6th Cir. 2020).....	57–58
<i>Fantastic Fakes v. Pickwick Int’l,</i> 661 F.2d 479 (5th Cir. Unit B Nov. 1981).....	48
<i>Ferguson Enters. v. Astro Air Conditioning & Heating,</i> 137 So. 3d 613 (Fla. Dist. Ct. App. 2014).....	50
<i>First Cap. Income & Growth Funds v. Baumann,</i> 616 So. 2d 163 (Fla. Dist. Ct. App. 1993) (per curiam).....	41
<i>*Gaiman v. McFarlane,</i> 360 F.3d 644 (7th Cir. 2004).....	11, 53–54, 61–62
<i>Gilmour v. Gates, McDonald & Co.,</i> 382 F.3d 1312 (11th Cir. 2004) (per curiam).....	59
<i>Goodman v. Lee,</i> 78 F.3d 1007 (5th Cir. 1996).....	54
<i>Harris v. Garner,</i> 216 F.3d 970 (11th Cir. 2000) (en banc).....	57
<i>Hurt v. Leatherby Ins.,</i> 380 So. 2d 432 (Fla. 1980).....	28
<i>Jacobsen v. Katzer,</i> 535 F.3d 1373 (Fed. Cir. 2008).....	48
<i>Kipp v. Kipp,</i> 844 So. 2d 691 (Fla. Dist. Ct. App. 2003).....	40, 51

<i>Kwan v. Schlein</i> , 634 F.3d 223 (2d Cir. 2011).....	55
<i>LaFarge Corp. v. Travelers Indem.</i> , 118 F.3d 1511 (11th Cir. 1997) (per curiam).....	41
<i>Lightfoot v. Henry Cnty. Sch. Dist.</i> , 771 F.3d 764 (11th Cir. 2014).....	59–60
<i>Merchant v. Levy</i> , 92 F.3d 51 (2d Cir. 1996).....	55
<i>Morton v. Kirkwood</i> , 707 F.3d 1276 (11th Cir. 2013).....	8
<i>Murley v. Wiedamann</i> , 25 So. 3d 27 (Fla. Dist. Ct. App. 2009).....	34
<i>Nat’l Home Cmtys. v. Friends of Sunshine Key</i> , 874 So. 2d 631 (Fla. Dist. Ct. App. 2004).....	60
<i>Papa’s-June Music v. McLean</i> , 921 F. Supp. 1154 (S.D.N.Y. 1996).....	41
<i>Petrella v. Metro-Goldwyn-Mayer</i> , 572 U.S. 663 (2014).....	46
<i>Photographic Illustrators v. Orgill, Inc.</i> , 953 F.3d 56 (1st Cir. 2020).....	48
<i>Saturday Evening Post v. Rumbleseat Press</i> , 816 F.2d 1191 (7th Cir. 1987).....	47–48
<i>Se. Floating Docks v. Auto-Owners Ins.</i> , 82 So. 3d 73 (Fla. 2012).....	28

<i>Sorrels v. NCL (Bah.) Ltd.</i> , 796 F.3d 1275 (11th Cir. 2015).....	8, 27
<i>Stein v. Reynolds Secs.</i> , 667 F.2d 33 (11th Cir. 1982).....	48
<i>United States v. Stein</i> , 881 F.3d 853 (11th Cir. 2018) (en banc).....	42
<i>Univ. of Miami v. Frank</i> , 920 So. 2d 81 (Fla. Dist. Ct. App. 2006).....	28–29
<i>Watts v. Goetz</i> , 311 So. 3d 253 (Fla. Dist. Ct. App. 2020).....	35
<i>Webster v. Dean Guitars</i> , 955 F.3d 1270 (11th Cir. 2020).....	53, 55
<i>Weinstein Co. v. Smokewood Entm’t Grp.</i> , 664 F. Supp. 2d 332 (S.D.N.Y. 2009).....	40
<i>Woods v. Resnick</i> , 725 F. Supp. 2d 809 (W.D. Wisc. 2010).....	40–41
<i>Zuill v. Shanahan</i> , 80 F.3d 1366 (9th Cir. 1996).....	55

Statutes

17 U.S.C. § 103.....	33
17 U.S.C. § 204.....	59
17 U.S.C. § 507.....	53
FLA. STAT. § 95.11.....	56

Other Authorities

FED. R. CIV. P. 56.....27

INTRODUCTION

In this lawsuit, one of the Appellees, Telemundo Television Studios, LLC, and the Appellant jointly created a television show titled *El Señor de los Cielos*. Telemundo Television wanted to create a second season and requested the Appellant's permission to do so. They executed a written agreement. That agreement granted Telemundo Television the right to "use" the television show to create the second season. Another provision granted it the right to "own" the second season. Though neither provision granted it the right to "own" the television show, the district court—at Telemundo Television's urging—held that those two provisions meant the same thing. Strangely, according to the district court, both provisions meant what neither actually stated: Telemundo Television owned the television show. The district court's interpretation is simply unsupportable by the plain language of the relevant agreement.

Not done there, the district court held that parol evidence supported Telemundo Television's interpretation. But in so holding, the district court ignored the Appellant's evidence. Indeed, in support of its interpretation, Caracol Television S.A. provided testimony from the

person who signed the relevant agreement, language from contemporaneous documents, and Caracol's own subsequent course of conduct. The district court's order omitted any mention of this evidence when it concluded no genuine dispute existed over the signatories' intent.

Then, without analyzing any of the elements of or factual support for the remaining claims, the district court hastily concluded that every claim raised by the Appellant must fail because its interpretation of the relevant agreement was incorrect. This conclusion too was in error. One count, for instance, dealt with copyright infringement based on the Appellees' infringement of a totally separate and distinct television show that Caracol created on its own years before *El Señor de los Cielos* existed. The district court never explained how an agreement concerning *El Señor de los Cielos* and a sequel to that show could bar a copyright-infringement claim based on a different show. Of course, no explanation exists, and reversal is ultimately required on the district court's entire order.

STATEMENT OF JURISDICTION

Count IV of the Amended Complaint alleged copyright infringement under the Copyright Act, so the district court had subject-matter jurisdiction under 28 U.S.C. § 1338. Supplemental jurisdiction under 28 U.S.C. § 1367 existed over the remaining claims. On January 25, 2021, the district court entered an order that granted summary judgment in the Appellees' behalf and dismissed the entirety of the Appellant's claims. On February 17, 2021, the Appellant filed its notice of appeal, and the district court entered a separate final judgment on March 4, 2021. Because the notice of appeal is "treated as filed on the date of and after the entry" of final judgment, FED. R. APP. P. 4(a)(2), the notice of appeal is considered timely and vests this Court with appellate jurisdiction over a final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Under governing state law, when a contract uses different words, courts should give those different words different meanings. The contract defines the terms “Series” and “Sequel” differently. The contract grants Telemundo Television the right to “use” the “Series” and the right to “own” the “Sequel” in perpetuity. Did the district court err when it read this contract as granting Telemundo Television the right to “own” the “Series” in perpetuity?

2. Assume that the language to the contract above is ambiguous. Under Florida law, courts can then look at parol evidence to determine the signatories’ intent. A federal court cannot grant summary judgment on that issue unless there is no genuine dispute as to the signatories’ intent. The Appellant and the Appellees provided conflicting parol evidence. Can a district court grant summary judgment on this issue by ignoring one of the signatories’ evidence?

3. A district court grants summary judgment in a defendant’s favor as to Count I. The district court concludes that none of the other claims can survive if Count I fails. The district court’s conclusion that Count I failed was incorrect. Given the incorrect conclusion as to Count

I, is the district court's conclusion that all other claims necessarily failed correct?

4. In 2008, Caracol created a television show. Later, Caracol and Telemundo Television jointly created a wholly different television show. In Count I, Caracol and Telemundo Television dispute whether, under a written agreement, Caracol assigned (to Telemundo Television) all of its rights to the television show they jointly created. In Count IV, Caracol alleges that Telemundo Television used copyrighted elements of the 2008 television show without permission. Did the district court err when it concludes that Caracol cannot sue for copyright infringement of the 2008 television show because, according to the court, Caracol lost Count I when it assigned its right to the jointly created show?

5. In Count III, Caracol sued for an accounting under an agreement that provides it the right to receive statements and an accounting of profits. No party disputed the provision or breach of the provision. In their motion for summary judgment, the Appellees do not mention Count III except in a footnote. Does the district court err in granting summary judgment on Count III without analyzing the

agreement's relevant language because it believed Caracol should lose on Count I?

6. No dispute exists that two parties co-authored and thus co-own a copyright. Later, the parties sign an agreement. One party contends that agreement assigned it the other party's copyright interest. The Copyright Act's statute of limitations applies where the gravamen of the dispute is authorship under the Copyright Act. The contractual issue is governed by Florida law. Does Florida's statute of limitations or the Copyright Act's statute of limitations apply?

7. Under Florida law, courts must enforce anti-waiver provisions, that is, provisions stating that a signatory does not waive its rights through inaction or delay. Signatories sign a written contract with an anti-waiver provision. One signatory to that contract asserts that the other signatory waived its rights under that contract through its inaction. Can that assertion prevail?

8. The Appellees used a character with a copyright owned by Caracol without approval. The Appellees argue that they did not infringe any copyright because the character has merely a visual appearance. Is that argument correct when Caracol introduced evidence

that the character has a name, wears a certain style of clothes, speaks with a specific accent, has a backstory, and additionally is portrayed by the same specific actor?

STATEMENT OF THE CASE

The district court’s decision to grant summary judgment in the Appellees’ favor is “subject to plenary review.” *Sorrels v. NCL (Bah.) Ltd.*, 796 F.3d 1275, 1286 (11th Cir. 2015). “Summary judgment is appropriate where ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Blue v. Lopez*, 901 F.3d 1352, 1357 (11th Cir. 2018) (quoting FED. R. CIV. P. 56(a)). At the summary-judgment stage, courts review “all evidence and factual inferences in the light most favorable to the non-moving party” and resolve “all reasonable doubts about the facts in favor of the non-movant,” here, Caracol. *Morton v. Kirkwood*, 707 F.3d 1276, 1280 (11th Cir. 2013) (internal quotation marks omitted).

The record evidence, when viewed in the light most favorable to Caracol, shows the following.

I. IN A SHOW CALLED *EL CARTEL*, CARACOL CREATED A TELEVISION CHARACTER NICKNAMED “EL CABO.”

Caracol Television S.A. is a Colombian entity that operates a network of television stations in Colombia and produces programming for those stations as well as distributors and carriers throughout the world. [ECF No. 3-1] In 2008, Andres Lopez Lopez wrote a novel—*El*

Cartel de los Sapos (roughly translatable as the Cartel of Snitches).

[ECF No. 88-3 at 10, p. 35:12–23]¹ Caracol bought the rights to turn that novel into a television series. [ECF No. 88-5 at 11, p. 38:2–15] Caracol did just that and created *El Cartel* and *El Cartel 2*, which aired on Caracol in 2008 and 2010, respectively. [ECF No. 88-5 at 11, pp. 38:16–39:1]

In *El Cartel* and *El Cartel 2*, Caracol created a character called Milton Jimenez and nicknamed “El Cabo.” This character appeared in 45 of *El Cartel*’s 57 episodes, and he appeared in all 50 episodes of *El Cartel 2*. [ECF No. 93-1 at 4] Caracol created El Cabo as he appeared in *El Cartel* and *El Cartel 2*. [ECF No. 93-1 at 6] The character had a distinct accent, look, and backstory and was portrayed by a specific actor, Robinson Diaz. [ECF No. 3-1 at 4–5; ECF No. 93-1 at 14]

¹ When citing material in the district court’s docket, this brief cites the page number listed on the ECF-created header, not the page number of the individual documents. *See* 11TH CIR. R. 28-4. That said, because some of the deposition transcripts contain multiple pages on a single ECF page, those citations contain a parallel citation to the transcript page number and line number.

II. FOUR YEARS LATER, TELEMUNDO TELEVISION STUDIOS, LLC AND CARACOL AGREED TO CO-CREATE AND CO-PRODUCE A DIFFERENT SHOW, *EL SEÑOR DE LOS CIELOS*.

Telemundo Television Studios, LLC produces Spanish-language television programming.² [ECF No. 83-2 at 2] In 2012, it and Caracol executed an agreement (the Co-Production Agreement), in which they agreed to jointly create, develop, and produce an unrelated Spanish-language show called *El Señor de los Cielos* (the “Series”). [ECF No. 83-2 at 2] The show would be based on an original script owned by Telemundo Television, and it would run from 60 to 75 episodes. [ECF No. 7 at 18 § 2] Caracol and Telemundo Television are sophisticated business entities, so the Co-Production Agreement was a thorough contract.

A. In the Co-Production Agreement, Telemundo Television and Caracol Defined Their Relationship.

Under the Co-Production Agreement, Caracol and Telemundo Television had to each pay 50% of the production cost in monthly installments. [ECF No. 7 at 19 § 3(c)] They agreed that each “will own

² In this brief, Caracol uses the term the “Telemundo Entities” to describe collectively Telemundo Television Studios, LLC, Telemundo Network Group, LLC, and Telemundo Internacional, LLC.

and control all exclusive, irrevocable and perpetual right, title and interest (including copyright, as further defined below), throughout the universe in and to the Series and all elements or portions thereof.”

[ECF No. 7 at 21 § 5(a)] That language noted that ownership would be “in perpetuity.” [ECF No. 7 at 21 § 5(a)] The Co-Production Agreement recognized that Caracol and Telemundo Television “jointly and exclusively own the copyright” to the Series “in perpetuity throughout the world.” [ECF No. 7 at 22 § 5(c)]

Because Caracol and Telemundo Television acknowledged each other as co-authors of the Series, this left them in a bind. As co-authors of the Series, the Copyright Act offered neither protection if the other “unilaterally publish[ed] the jointly owned work” or works based on the Series. *Gaiman v. McFarlane*, 360 F.3d 644, 652 (7th Cir. 2004).

Instead, as co-authors and co-owners of the Series, Caracol’s and Telemundo Television’s legal recourse would be an “accounting of profits” arising “under state . . . law.” *Id.* Given the international dimension of the show’s creation, production, and distribution, the Co-Production Agreement took steps to diligently describe Caracol’s and

Telemundo Television's rights to publish and reproduce the Series or any of its derivatives.

In section 5(b), the Co-Production Agreement prevented either Caracol or Telemundo Television from unilaterally making sequels or spinoffs without the other's consent. [ECF No. 7 at 21–22 § 5(b)] That section created a process whereby Telemundo Television and Caracol could reach an agreement on how to produce and develop any derivative works from the Series.

First, if “either Party is interested in creating and/or producing or licensing a Remake, Spinoff, or Sequel based on the Series . . . such Party shall offer to the other Party the option to become a co-producer.” [ECF No. 7 at 21 § 5(b)] Second, “[i]f the Party that receives the offer to co-produce . . . rejects the offer in writing,” Caracol and Telemundo Television had 60 days to negotiate terms by which “the interested party may be granted the sole right to produce” the remake, spinoff, or sequel. [ECF No. 7 at 21 § 5(b)] Thus, instead of submitting any possible dispute about remakes to the vagaries of some undetermined state's law on accounting, the Co-Production Agreement's signatories agreed to a process outlined in that agreement. And those signatories

agreed that the Co-Production Agreement would be interpreted and governed by Florida law. [ECF No. 7 at 27 § 10(d)]

B. Caracol and Telemundo Internacional Contemporaneously Executed the Distribution Agreement.

At the same time, Caracol executed another agreement (the Distribution Agreement) with Telemundo Internacional, LLC, which distributes programming to international outlets. [ECF No. 7 at 31] Under the Distribution Agreement, Caracol would have the “exclusive right” to exploit the Series in certain territories (Caracol Distribution Territories), while Telemundo Internacional had the “exclusive right” to exploit the show in other territories (Telemundo Distribution Territories). [ECF No. 7 at 35 § 4] Each of Caracol and Telemundo Internacional, however, would receive 50% of the net revenues earned by the other in distributing the show in their respective Distribution Territories. [ECF No. 7 at 36 § 6] And each had a duty to account its revenue to the other. [ECF No. 7 at 37 § 7]

The Distribution Agreement was to last, at a minimum, ten years. [ECF No. 7 at 35 § 3.1] And, if for whatever reason, the Distribution Agreement terminated, neither Caracol nor Telemundo Internacional

could exploit the Series ever again without the other's consent. [ECF No. 7 at 35 § 3.2]

C. Caracol and Telemundo Television Successfully Produced the Series.

The Series, which ultimately consisted of 74 episodes, cost nearly \$12 million to produce. [ECF No. 88-1 at 24, p. 90:18–21] Thus, Caracol invested nearly \$6 million in the Series. [ECF No. 83-2 at 7; ECF No. 88-1 at 24, p. 90:22–24]

In April 2013, the Series finally aired in the United States, and Caracol would not broadcast the Series in Colombia until January 2015. [ECF No. 83-2 at 3] Telemundo Network Group aired it in the United States, and Telemundo Internacional distributed it internationally.

D. Caracol Granted Telemundo Television Permission To Create Season 2 on Its Own.

In 2013, Telemundo Television decided to make a second season to the Series, as allowed under the Co-Production Agreement. But Caracol did not want to co-produce this sequel. So Telemundo Television sent Caracol a term sheet with a cover letter. The cover letter recognized that the offer was “pursuant to Section 5(b) of the Co-Production Agreement.” [ECF No. 7 at 49] Of course, section 5(b) of the Co-Production Agreement is the section that allowed either signatory the

“sole right to produce” a sequel, remake, or spinoff with approval of the other signatory. [ECF No. 7 at 21 § 5(b)]

The term sheet, which the Appellant, Appellees, and district court have consistently called the Letter Agreement, allowed Telemundo Television to create a second season to the Series. By the Letter Agreement’s terms, the “Sequel” consisted of “approximately sixty (60) episodes of approximately forty-two (42) minutes in length.” [ECF No. 7 at 51 § 4]

Under the Letter Agreement, Telemundo Television would own—in perpetuity—all elements and work related to the “Sequel” that it was creating on its own:

From inception through all stages of completion, the Sequel and all elements thereof, including the underlying works, format and scripts of the Series, will be exclusively owned by [Telemundo Television] throughout the world.

[Telemundo Television] will own and control all exclusive, irrevocable and perpetual right, title and interest (including copyright), throughout the universe in and to the Sequel and all derivatives of the Sequel, and all elements, underlying works or portions thereof, including all raw footage, from the inception of production, in any and all media and formats, now known or hereafter devised, in perpetuity, including without limitation all literary, dramatic, or other material

contained therein, and the results and proceeds of the services in connection therewith.

[ECF No. 7 at 51–52 § 7] The Letter Agreement went on to clarify that, although Telemundo Television could use the Series’ characters, stories, scenarios, and locales “for purposes of creating the Sequel,” it could not “use images and content licensed by Caracol for the Series, except as agreed mutually.” [ECF No. 7 at 51 § 3] This included El Cabo.

In return, Caracol received an exclusive exhibition license to run the second season in Colombia. [ECF No. 7 at 52 § 10] This exclusive exhibition license had a monetary value of approximately \$350,000.

[ECF No. 83-2 at 6] Also, Telemundo Television promised to pay Caracol “a foreign participation equal to 15% of 100% of Foreign Net Sales” from the international distribution of the second season. [ECF No. 7 at 53 § 11]

The Letter Agreement was addressed to and signed by “Felipe Boshell,” who was, at the time, Caracol’s managing director. [ECF No. 7 at 49] Though no longer employed by Caracol, at his deposition, Mr. Boshell testified that the Letter Agreement was never intended to transfer “all of [Caracol’s] rights” in the Series. [ECF No. 83-4 at 15] Another of Caracol’s agents agreed, noting that the consideration

received by Caracol was in step with a “grant of the right to solely produce and own” the second season, not the Series. [ECF No. 83-2 at 7]

III. TELEMUNDO TELEVISION RAN AMOK AND CREATED SEASONS 3, 4, 5, 6, AND 7, AS WELL AS A SPINOFF, WITHOUT CARACOL’S APPROVAL.

Telemundo Television produced the second season without a hitch. But in 2015, Telemundo Television created a third season, which consisted of 104 episodes. [ECF No. 83-2 at 8] It then created a fourth season (80 episodes) in 2016, a fifth season (95 episodes) in 2017, a sixth season (99 episodes) in 2018, and a seventh season (75 episodes) in 2019. [ECF No. 83-2 at 8] It also created a spinoff show called *El Chema*, which consisted of 84 episodes. [ECF No. 83-2 at 8] The third, fourth, fifth, sixth, and seventh seasons, along with *El Chema* (collectively, the “Derivative Series”), are all, like the second season, derivative works of the Series. But, unlike the second season, the Derivative Series was made without Caracol’s approval and in contravention of section 5(b) of the Co-Production Agreement. In fact, in creating the Derivative Series, Telemundo Television never offered Caracol an opportunity to co-produce. [ECF No. 83-2 at 8]

In 2014, consistent with its interpretation of the Letter Agreement, Caracol requested its share of the profits for Telemundo Television's decision to sell remake rights to the Series to NBC. [ECF No. 88-4 at 209] It was then that Telemundo Television asserted its interpretation of the Letter Agreement as an assignment of all of Caracol's copyright to the Series. This assertion was contrary to Caracol's understanding of the effect of the Letter Agreement. The undisputed evidence showed that none of Caracol's agents had any authority to execute a transaction with a value in excess of \$664,000 without approval of Caracol's board. [ECF No. 83-2 at 7] And Caracol's board never approved the Letter Agreement, despite Caracol investing \$6 million in the Series. [ECF No. 83-2 at 7]

IV. TELEMUNDO TELEVISION, TELEMUNDO INTERNACIONAL, AND TELEMUNDO NETWORK GROUP, LLC INFRINGED ON CARACOL'S COPYRIGHT OF *EL CARTEL*.

The Derivative Series did not just ignore Caracol's contractual rights under the Letter Agreement, Co-Production Agreement, and Distribution Agreement, it also infringed Caracol's copyright rights in El Cabo. In one episode of season 5 and all episodes of season 6, El Cabo makes an appearance. [ECF No. 93-1 at 4] Telemundo Television,

Telemundo Internacional, and Telemundo Network Group created, distributed, and aired, respectively, these infringing episodes. The character who appeared in the Derivative Series had the same names (Milton Jimenez and El Cabo), had the same likeness, spoke with the same accent, and was portrayed by the same actor. [ECF No. 3-1 at 4–5; 93-1 at 4] As noted above, Telemundo Television created fifth and sixth seasons in 2017 and 2018, respectively. Telemundo Television also used the character in one episode of the fourth season, produced in 2016.

V. CARACOL SUED FOR COPYRIGHT INFRINGEMENT AND BREACH OF CONTRACT.

In 2018, El Cabo appeared in every episode of the sixth season—99 episodes—so on August 23, 2018, Caracol filed a lawsuit against Telemundo Television, Telemundo Internacional, and Telemundo Network Group. [ECF No. 1] It eventually filed an Amended Complaint. In the Amended Complaint, the Appellant raised four claims.

In Count IV, Caracol sued the Appellees for infringing Caracol’s copyright of *El Cartel* and *El Cartel 2* (that is, for using Caracol’s original character, El Cabo). [ECF No. 7 at 12] In Counts II and III, Caracol sued Telemundo Internacional and Telemundo Television for breach of the relevant agreements. [ECF No. 7 at 10–11] In Count II,

Caracol sought monetary damages for breach of contract. In Count III, it sought an accounting as provided by the relevant agreements, including the Letter Agreement. In Count I, Caracol sought a declaratory judgment against Telemundo Television holding that the Letter Agreement had not assigned Caracol's ownership rights to the Series completely to Telemundo Television.

VI. THE DISTRICT COURT GRANTED SUMMARY JUDGMENT AGAINST CARACOL.

Because the interpretation of the Letter Agreement and Co-Production Agreement (unless ambiguous) is a matter of law, Caracol moved for partial summary judgment on Count I. [ECF No. 83] For their part, the Appellees moved for summary judgment on all counts. [ECF No. 86] In their motion for summary judgment, the Telemundo Entities argued that the Letter Agreement's plain language (and certain parol evidence) supported an interpretation that Caracol transferred all rights to the Series. And, this argument continued, if the Appellees' interpretation of the Letter Agreement prevailed, then the Appellees "prevail[ed] on all claims." [ECF No. 86 at 12]

On January 25, 2021, the district court granted the Telemundo Entities' motion for summary judgment and denied Caracol's motion for

partial summary judgment. [ECF No. 112] According to the district court, the Letter Agreement’s language was unambiguous and supported the Appellees’ construction. [ECF No. 112 at 8] Though the district court quoted the entire language in the background section—including the limitation that Telemundo Television would own the Series only “[f]rom inception through all stages of completion”—it ignored that language in its analysis section. [ECF No. 112 at 3] And, even though it found the Letter Agreement’s language unambiguous, the district court dived into the parol evidence.

It concluded that the parol evidence supported Telemundo Television’s interpretation. [ECF No. 112 at 9] At no point did the district court even mention Felipe Boshell’s testimony—specifically, that Caracol never intended to transfer its rights in the Series for perpetuity. Nor did it mention any other parol evidence that supported the Appellant’s interpretation of the Letter Agreement.

Finally, the district court held that because Caracol failed on Count I, it must by necessity fail on Counts II, III, and IV. According to the district court, because of the transfer of its ownership interest in the Series, Caracol no longer had an interest in El Cabo. Even though

Caracol created El Cabo in its own productions of *El Cartel* and *El Cartel 2* (and not in the Series), the district court held that Caracol transferred El Cabo to Telemundo Television when it signed the Letter Agreement. [ECF No. 112 at 10] As to Counts II and III, which alleged that Telemundo Television and Telemundo Internacional breached the Distribution Agreement and Letter Agreement, the district court held that the Letter Agreement defeated those counts too, even though no one argued that it modified those agreements.

SUMMARY OF THE ARGUMENT

In Count I, Caracol and Telemundo Television disagreed on how to interpret the Letter Agreement, and the Court, selecting two separate clauses, held that both clauses meant the same thing: Caracol had transferred all of its rights in the Series to Telemundo Television. That analysis renders the two clauses redundant. Worse, the district court's interpretation meant, somehow, that by its plain language the Letter Agreement precludes Caracol from seeking an accounting under section 11 of that very same contract. By contrast, Caracol's interpretation gives separate meanings to these clauses, differentiates (as the Letter Agreement does) between the "Series" and the "Sequel," and does not outright ignore language in the Letter Agreement. On this basis, the Court should reverse, and it should instruct the district court to grant the Appellant summary judgment on Count I.

Alternatively, the district court concluded that the parol evidence supported Telemundo Television's interpretation. Yet the language of the Letter Agreement is unambiguous, so parol evidence cannot be considered. In any event, the parol evidence was hotly contested by the parties, with the Telemundo Entities and Caracol providing starkly

conflicting views about their intent through subsequent conduct, extraneous documents, and testimony. In no universe could a district court find no genuine dispute on this issue. If this Court finds the Letter Agreement ambiguous, then reversal is nonetheless required. In that case, the parties' intent must be determined at trial.

Next, the district court held that because Caracol failed in Count I, it necessarily failed as to Counts II, III, and IV. Since this Court should reverse on Count I, it should reverse on Counts II, III, and IV too. Even if Caracol should lose on Count I, Counts II, III, and IV are unaffected by any determination of Count I. Take Count IV, in which the Appellant sues for the Telemundo Entities' copyright infringement of *El Cartel* and *El Cartel 2*. That dispute does not turn on the Series, since *El Cartel* and the Series are two separate things. For its part, Count III seeks an accounting under the Letter Agreement. It makes no sense to hold, as the district court did, that the Letter Agreement transferred Caracol's right to the Series and that, by doing so, the Letter Agreement rendered another portion of itself meaningless.

Furthermore, the Telemundo Entities will certainly ask this Court to affirm for reasons not mentioned or held by the district court. Yet these alternative bases for affirmance have no merit.

First, the Appellees will assert that the Copyright Act's three-year statute of limitations bars federal courts from interpreting the Letter Agreement. But the three-year statute of limitations applies where ownership or authorship *under the Copyright Act* is the gravamen of the dispute. Here, everyone agrees that Caracol and Telemundo Television co-authored the Series. The question in Count I is whether that ownership interest was transferred under a written agreement governed by Florida law. To this question, the Copyright Act is, at most, incidental. As the First Circuit Court of Appeals recognizes, that difference renders the three-year statute of limitations inapplicable.

Second, they will assert the doctrines of equitable assignment or waiver. But the Co-Production Agreement's anti-waiver provision bars the waiver argument. And the equitable-assignment argument must lose because the Copyright Act requires any conveyance to be in writing. What's more, the Telemundo Entities never pleaded equitable assignment as an affirmative defense, and so under this Court's

precedent they could not argue equitable assignment for the first time at summary judgment.

The Telemundo Entities' third alternative argument will likely maintain that El Cabo—the character created in *El Cartel* and at the center of Count IV's copyright-infringement claim—is not copyrightable. Nonsense. El Cabo has a name, a nickname, a backstory, an accent, and a distinct appearance. Nothing more is required to make a character copyrightable.

ARGUMENT

The district court's decision to grant summary judgment in Appellees' favor is "subject to plenary review." *Sorrels*, 796 F.3d at 1286. A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Because the Letter Agreement plainly contravenes Telemundo Television's reading and squarely supports Caracol's reading, the district court's order should be reversed. Caracol's motion for partial summary judgment should have been granted, and Counts II, III, and IV should be set for trial.

I. THE LETTER AGREEMENT DID NOT TRANSFER ALL RIGHTS TO THE SERIES FROM CARACOL TO TELEMUNDO TELEVISION.

Since 2014, Telemundo Television has taken the position that the Letter Agreement stripped Caracol of all its interest in the Series. In Count I, Caracol sought a declaration that the Letter Agreement did no such thing. Both the Appellant and the Appellees moved for summary judgment on this issue. Ultimately, the district court agreed with Telemundo Television. The district court is incorrect, and its reading of the Letter Agreement violates basic principles of contractual

interpretation: It renders entire clauses superfluous, ignores entire words, and *sub silentio* modified entire sections of the Co-Production Agreement and the same Letter Agreement out of existence.

A. Florida Law Controls and, Under Florida Law, the Plain Language Governs.

The Letter Agreement contained a choice-of-law provision stating that it must be “construed in accordance with the laws of the State of Florida.” [ECF No. 7 at 53 § 12] Accordingly, in interpreting the Letter Agreement, this Court must apply Florida law. *See Am. United Life Ins. v. Martinez*, 480 F.3d 1043, 1059 (11th Cir. 2007); *Se. Floating Docks v. Auto-Owners Ins.*, 82 So. 3d 73, 80 (Fla. 2012).

“Florida’s general contract law requires that the court discern the intent of the parties from the language used in their agreement.”

Citigroup v. Amodio, 894 So. 2d 296, 298 (Fla. Dist. Ct. App. 2005).

“When that language is clear and unambiguous, the courts cannot indulge in construction or interpretation of its plain meaning.” *Hurt v.*

Leatherby Ins., 380 So. 2d 432, 433 (Fla. 1980). Under Florida law,

courts must interpret contractual language with an eye to the contract

as a whole, and they cannot interpret contracts so as to render

provisions superfluous. *See, e.g., Univ. of Miami v. Frank*, 920 So. 2d 81,

87 (Fla. Dist. Ct. App. 2006); *Discover Prop. & Cas. Ins. v. Beach Cars of W. Palm*, 929 So. 2d 729, 732 (Fla. Dist. Ct. App. 2006). Critically, parol evidence “is not admissible to vary or contradict the terms of a written instrument.” *Bucacci v. Boutin*, 933 So. 2d 580, 583 (Fla. Dist. Ct. App. 2006).

B. Caracol’s Interpretation of the Letter Agreement Gives Meaning to Every Section, Clause, and Word.

Caracol contends that the Letter Agreement provided Telemundo Television with the rights to the Series in order to make a second season (the Letter Agreement defines this second season as the “Sequel”). Under this interpretation, the Letter Agreement provided Telemundo Television the right to use the Series and its underlying elements while Telemundo Television filmed and created the second season. Once Telemundo Television finished the “Sequel,” both Caracol and Telemundo Television would jointly retain their rights (as provided by the Co-Production Agreement) to the Series. As the author of the second season, Telemundo Television would be the owner of the second season—but not the Series. This interpretation coincides perfectly with the Letter Agreement’s language.

To begin with, the Letter Agreement acknowledges its purpose: Telemundo Television “will develop, produce, own, and distribute a sequel to ‘El Señor de los Cielos’ (the ‘Series’) for the exhibition and exploitation in the United States, its territories, as well as throughout the world (the ‘Sequel’).” [ECF No. 7 at 51 § 3(a)] The Sequel was not a never-ending story. Instead, it was simply a second season: “The Sequel shall consist of approximately sixty (60) episodes of approximately forty-two (42) minutes in length.” [ECF No. 7 at 51 § 4]

Now, obviously, creating a second season of *El Señor de los Cielos* (i.e., the Sequel) would be impossible without referencing characters, stories, and locations from the first season (i.e., the Series). To that end, the Letter Agreement gave Telemundo Television the right to *use* the Series *to create the Sequel*: “Sequel will be based on the original format of the Series, which [Telemundo Television] shall have all right to use all elements (e.g., characters, story, scenarios, locales, etc.) derived from the Series and any new elements added . . . for purposes of creating the Sequel.” [ECF No. 7 at 51 § 3(b)]

And, to protect Telemundo Television from any attempt by Caracol to create its own second season or to provide a license for

someone else during Telemundo Television's creation of the second season, the Letter Agreement granted Telemundo Television exclusive ownership over the second season and any elements of the Series incorporated into the second season *during the creation of the second season*: "From the inception through all stages of completion, the Sequel and all elements thereof, including the underlying works, format and scripts of the Series, will be exclusively owned by [Telemundo Television] throughout the world." [ECF No. 7 at 51 § 7] (To date, neither the Appellees nor the district court has given any explanation about what "From inception through all stages of completion" means under their interpretation or why that language should be ignored.)

By its plain terms, Caracol gave Telemundo Television ownership over the Series' elements incorporated into the second season from the second season's inception till its completion. In vivid contrast with this language, Caracol gave Telemundo Television outright ownership *in perpetuity* (the Letter Agreement's diction, not Caracol's) of the second season and any of the second season's derivatives:

[Telemundo Television] will own and control all exclusive, irrevocable and perpetual right, title and interest (including copyright), throughout the universe in and to the Sequel and all derivatives

of the Sequel, and all elements, underlying works or portions thereof, including all raw footage, from the inception of production, in any and all media and formats, now known or hereafter devised, in perpetuity, including without limitation all literary, dramatic, or other material contained therein, and the results and proceeds of the services in connection therewith.

[ECF No. 7 at 51–52 § 7] And this language never even mentions the Series and does not authorize additional derivative works of the Series.

In sum, the Letter Agreement works as a cohesive whole. It recognizes that Telemundo Television wanted to create a second season of the Series. Understandably, the Letter Agreement allowed Telemundo Television to *use* any of the Series’ elements to create the second season. During the creation of the second season, the second season and its elements belonged to Telemundo Television, including any of the Series’ elements used in the second season. And, when the second season was complete, Telemundo Television outright owned any original work in the second season and any derivative works that might be created from that the second season’s original work.

This interpretation has the added benefit of conforming with copyright law, generally. “[A] derivative work is copyrightable on its own basis.” *Brownstein v. Lindsay*, 742 F.3d 55, 67 (3d Cir. 2014).

“Derivative work protection only extends to those parts of the derivative work that are novel beyond the original work and the author or authors of the underlying work retain their rights to their original work.” *Id.*; *see also* 17 U.S.C. § 103 (explaining copyright protections afforded to derivative works). Under this framework, any original content in the second season and any derivatives of that original content should belong to Telemundo Television, while the authors (Caracol and Telemundo Television) of the Series should retain their rights to the Series. It is thus not surprising that Caracol and Telemundo Television agreed, in writing, to this very framework.

C. Telemundo Television’s Interpretation Renders Most of the Letter Agreement Superfluous.

In contrast to Caracol’s reading—which gives purpose to every clause—the district court’s and Telemundo Television’s interpretation renders language repetitive and superfluous. The district court believed that section 3 and the first clause in section 7 both did the same thing twice: grant Telemundo Television the right to the Series in perpetuity. Not so.

i. The district court’s interpretation pretended “use” and “own” were synonymous and excised seven words from section 3 of the Letter Agreement.

Initially, the district court found that the Letter Agreement assigned all of Caracol’s rights in the Series because of section 3, which gave Telemundo Television the “right to use all elements . . . derived from the Series.” [ECF No. 112 at 8] But that language gets Telemundo Television nowhere.

After all, section 3 contains the word “use,” not “own,” and those words have different meanings. To interpret “use” as “own” violates a bedrock principle of contractual interpretation: Words and phrases should be “given their common and ordinary meanings absent specific contractual definitions.” *Murley v. Wiedamann*, 25 So. 3d 27, 29–30 (Fla. Dist. Ct. App. 2009). To twist the word “use” into “own” is unsupportable.

The district court’s interpretation of section 3 further commits a cardinal sin: It outright ignores language in section 3. That section does not provide Telemundo Television unfettered right to use elements derived from the Series but only the right to use those elements *to create* the second season: “[Telemundo Television] shall have all right to

use all elements . . . derived from the Series . . . *for purposes of creating the Sequel.*” [ECF No. 7 at 51 § 3(b) (emphasis added)] The district court’s interpretation, however, simply ignores this language, in violation of the principle that courts must “give effect to all of” a contract’s “terms as agreed to by the parties.” *Watts v. Goetz*, 311 So. 3d 253, 259 (Fla. Dist. Ct. App. 2020).

Lastly, had Caracol simply transferred its rights to the Series to Telemundo Television, there would be no need from the get-go to grant Telemundo Television the use of the Series for purposes of creating the second season. In that situation, as owner of the Series in its entirety, Telemundo Television could simply do whatever it wanted with the Series and its underlying elements.

ii. The district court treated the words “Sequel” and “Series” interchangeably, but the Letter Agreement gave them distinct definitions.

The district court also relied on the second clause of section 7. That clause granted Telemundo Television “perpetual right, title and interest (including copyright), throughout the universe in and to the Sequel and *all derivatives of the Sequel*, and all elements . . . in

perpetuity.” [ECF No. 112 at 8 (quoting ECF No. 7 at 51 § 7) (alteration in original)] That emphasis—made by the district court—is telling.

That emphasis indicates an erroneous assumption by the district court: that Telemundo Television’s right to create derivatives of the second season granted it the right to create derivatives of the Series. But that assumption pretends that “Sequel” is a synonym of “Series.” That assumption is improper as a general rule of contractual interpretation. *See Beach Towing Servs. v. Sunset Land Assocs.*, 278 So. 3d 857, 861 (Fla. Dist. Ct. App. 2019) (per curiam) (“First, ‘[a]s a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended.” (alteration in original)). The impropriety is greater, however, since the Letter Agreement explicitly defines “Sequel” and “Series,” and they are defined as different things. [ECF No. 7 at 51 § 3]

iii. The district court wholly ignored the only sentence speaking about Telemundo Television’s ownership as well as other sections of the Letter Agreement.

As noted, the Letter Agreement did in fact provide Telemundo Television an ownership interest in the Series. The first sentence of section 7 states: “From inception through all stages of completion, the

Sequel and all elements thereof, including the underlying works, format and scripts of the Series, will be exclusively owned by [Telemundo Television] throughout the world.” [ECF No. 7 at 51 § 7] The district court mentioned this language in its background section but omitted it from its analysis section. A parsing of this language (and comparison to the rest of the Letter Agreement) further defeats the district court’s reading.

After all, unlike the rest of section 7—which granted Telemundo Television ownership over the “Sequel” in perpetuity—this language provided ownership of the “Sequel and all elements thereof, including the underlying works, format and scripts of the Series” till completion of the Sequel. By contrast, the next sentence in section 7 grants Telemundo ownership over the Sequel “in perpetuity” but makes no mention whatsoever of the “Series.” This distinction in words—which reflect a difference in time and in scope—matters under Florida law. *See Beach Towing Servs.*, 278 So. 3d at 861. What’s more, to date, neither the Appellees nor the district court has given any explanation about what “From inception through all stages of completion” means. Nor have they provided any reason to simply ignore that language.

Similarly, section 11 of the Letter Agreement provides Caracol the right to receive “participation statement with respect [to] payments due to Caracol on a quarterly basis.” [ECF No. 7 at 53 § 11] That right is the basis for Count III. But, according to the district court, that entire language is meaningless: Caracol could never show a breach of section 11 because sections 3 and 7 of the same Letter Agreement render it meaningless. Again, this contravenes Florida law. *See Watts*, 311 So. 3d at 259.

iv. The district court’s reading modified entire sections of the Co-Production Agreement and Distribution Agreement.

Other issues arise with the district court’s interpretation. For instance, under the district court’s interpretation, the Letter Agreement—which does not even purport to modify the Co-Production Agreement—modifies and amends whole sections of the Co-Production Agreement.

As already mentioned, section 5(b) created a process by which Telemundo Television and Caracol would have to negotiate the creation, production, or licensing of *any* remake, spinoff, or sequel. [ECF No. 7 at 21 § 5(b)] Section 9 prevents assignments of any rights in the Co-

Production Agreement except to a signatory's own affiliates or "any acquirer of all or substantially all of the assets of or equity interest in such" signatory. [ECF No. 7 at 25 § 9] And although the Co-Production Agreement bars "any provision" from being "changed except by a writing executed" by Caracol and Telemundo Television, the Letter Agreement apparently modified all of these provisions *without saying so*. [ECF No. 7 at 27 § 10(f)]

As no one disputes, the Co-Production Agreement and Distribution Agreement granted Caracol certain rights with regard to the Series. By its plain language, the Letter Agreement did not transfer all of Caracol's rights in the Series to Telemundo Television. To the contrary, the Letter Agreement gave Telemundo Television the right to create a derivative of the Series and to own "in perpetuity" that specific derivative and that derivative's derivatives. Because the plain language supports Caracol's argument, the district court erred in granting summary judgment in the Telemundo Entities' favor. Reversal is therefore required with instruction that summary judgment on Count I be granted in Caracol's favor.

D. Even if the Letter Agreement Were Ambiguous, Caracol Must Prevail Because Copyright Law Requires a Clear Intent To Transfer.

The Letter Agreement is unambiguous, so under Florida law parol evidence is wholly inappropriate. *See Kipp v. Kipp*, 844 So. 2d 691, 694 (Fla. Dist. Ct. App. 2003). But assume the letter agreement were ambiguous. The district court held that the parol evidence supported Telemundo Television’s interpretation. That ruling, however, is in error, because, under § 204 of the Copyright Act, copyright rights cannot be assigned unless the assignment is clear. And if the assignment is not clear from the unambiguous and plain language of the Letter Agreement, no transfer could have occurred.

Section 204 of the Copyright Act “forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price.” *Effects Assocs. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990). Based on this principle, federal courts have stated that “[i]t is for these reasons that the intention of a copyright owner seeking to transfer an ownership interest must be clear and unequivocal.” *Weinstein Co. v. Smokewood Entm’t Grp.*, 664 F. Supp. 2d 332, 341 (S.D.N.Y. 2009); *accord Woods v.*

Resnick, 725 F. Supp. 2d 809, 826 (W.D. Wisc. 2010); *Papa's-June Music v. McLean*, 921 F. Supp. 1154, 1159 (S.D.N.Y. 1996).

As noted above, the plain language of the Letter Agreement shows that Caracol did not transfer its interest in the Series to Telemundo Television. To the extent this Court disagrees and finds that language ambiguous, Caracol must nonetheless prevail. For, under § 204, ambiguous language cannot possibly reflect a “clear and unequivocal” transfer of copyright ownership. For this reason, reversal is required.

E. Even if Florida Law’s Parol Evidence Rule Applied, a Genuine Dispute Exists on that Issue.

Regardless, if for whatever reason § 204 is inapplicable here, a genuine dispute exists over the parol evidence. Under Florida law, where an agreement’s language is ambiguous, a factfinder may rely on parol evidence to uncover the signatories’ intent. *See, e.g., LaFarge Corp. v. Travelers Indem.*, 118 F.3d 1511, 1517 (11th Cir. 1997) (per curiam); *Barnett v. Destiny Owners Ass’n*, 856 So. 2d 1090, 1092 (Fla. Dist. Ct. App. 2003); *First Cap. Income & Growth Funds v. Baumann*, 616 So. 2d 163, 165 (Fla. Dist. Ct. App. 1993) (per curiam). Here, summary judgment would still be inappropriate because Telemundo Television and Caracol provided conflicting evidence on that very issue.

To find against Caracol, the district court outright ignored the parol evidence supporting Caracol. [ECF No. 112 at 9–10]

Caracol offered plenty of parol evidence supporting its interpretation. First, he then-agent who signed the Letter Agreement on Caracol's behalf out-of-hand rejected the Telemundo Entities' interpretation; he, instead, testified that Caracol did not intend to assign its rights to the Series to Telemundo Television. [ECF No. 83-4 at 15] Another of Caracol's agents provided similar testimony. [ECF No. 83-2 at 7] That constitutes parol evidence in support of Caracol's interpretation. *See Branscombe v. Jupiter Harbour, LLC*, 76 So. 3d 942, 947 (Fla. Dist. Ct. App. 2011); *Am. Agronomics Corp. v. Ross*, 309 So. 2d 582, 584 (Fla. Dist. Ct. App. 1975) (per curiam). And that testimony suffices to defeat summary judgment. *See United States v. Stein*, 881 F.3d 853, 857 (11th Cir. 2018) (en banc).

Second, three undisputed facts raise a reasonable inference supporting Caracol's interpretation: (1) Caracol's board needed to approve any transaction worth more than \$664,000, (2) Caracol invested \$6 million in creating and owning the Series, and (3) an assignment of Caracol's interest in the Series was never approved by

the board. Given these facts, a factfinder could easily infer that Caracol did not, at the time, think it was selling a \$6 million investment.

Third, less than a year after signing the Letter Agreement, Caracol believed it owned its rights to the Series. [ECF No. 88-4 at 209] Indeed, Caracol requested its share of the profits for Telemundo Television's decision to sell remake rights to the Series to NBC, a request Caracol would not make unless it believed it owned the Series. [ECF No. 88-4 at 209] Thus, there is a dispute even as to Caracol's subsequent course of conduct.

Fourth, the contemporaneous cover letter to the Letter Agreement supports Caracol's interpretation. That cover letter acknowledges that the signatories signed the Letter Agreement pursuant to "Section 5(b) of the Co-Production Agreement." [ECF No. 7 at 49] Section 5(b) of the Co-Production Agreement dealt, exclusively, with the mechanism whereby Telemundo Television and Caracol could reach a deal on how to produce and develop any derivative works from the Series. Section 5(b) did not consider the transfer or assignments of rights under the Co-Production Agreement (another unmentioned section did that). And doing something "pursuant" to a section is the opposite of "modifying" or

“amending” that section, which is what Telemundo Television’s interpretation seeks to do.

On the whole, parol evidence supports Caracol’s interpretation. To be sure, parol evidence also supports Telemundo Television’s interpretation. But which facts should prevail constitutes a determination for trial, not summary judgment. The district court evaded this conclusion by *ignoring* Caracol’s evidence. Even if the Letter Agreement is ambiguous (and it is not), the district court erred and reversal on Count I is required.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNTS II THROUGH IV.

This Court should also reverse the district court’s determination that the Telemundo Entities deserve summary judgment on Counts II, III, and IV.

A. Even if Counts II Through IV Necessarily Depend on Count I (and They Do Not), the District Court Erred in Granting Summary Judgment on Those Counts.

As to Counts II through IV, the district court gave little analysis. It concluded that, because “Caracol transferred all of its interests in the Series to” the Telemundo Entities, Caracol no longer had any copyright interest in the Series or the “El Cabo” character. [ECF No. 112 at 10]

But, as shown, Caracol did not transfer its interest in the Series to any of the Appellees. The district court's conclusion on this issue is incorrect. Reversal is thus required on the district court's decision to grant summary judgment in the Telemundo Entities' favor on Counts II through IV.

B. Besides, Counts II, III, and IV Do Not Depend on Count I.

The district court's conclusion (based on the Telemundo Entities' argument) that Counts II through IV necessarily depend on Count I shows a serious misunderstanding of this case.

i. Count IV seeks damages for copyright infringement of *El Cartel*, not the Series.

Take, for example, Count IV. Count IV is strictly a claim for copyright infringement based on the Copyright Act. "To succeed on its claim of copyright infringement," a plaintiff "must prove (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Compulife Software v. Newman*, 959 F.3d 1288, 1301 (11th Cir. 2020). In Count IV, Caracol asserts that it owns the copyright to *El Cartel* and *El Cartel 2* and that, in 2016 through 2018, the

Telemundo Entities used elements belonging to those shows (namely, El Cabo) without permission in the Derivative Series.³

It is undisputed that Caracol authored El Cabo in *El Cartel* and *El Cartel 2*; it is undisputed that Caracol therefore owns El Cabo; and it is undisputed that the same character (portrayed in the same way by the same actor) appeared in the Derivative Series created, distributed, and exhibited by the Telemundo Entities. [ECF No. 93-1 at 2, 4, 6, 14–15] And yet, somehow, the district court found that, under these facts, it should reject Caracol’s copyright-infringement claim.

Presumably, this conclusion is based on the wayward notion that because Caracol licensed El Cabo’s usage in the Series, Caracol transferred its right to El Cabo when it purportedly transferred its rights to the Series. But nothing in either the Co-Production Agreement or the Letter Agreement even purports to transfer Caracol’s rights to *El Cartel* or *El Cartel 2*—shows that Caracol created years before it

³ Because the infringements occurred in 2016, 2017, and 2018 and because Caracol initiated this lawsuit in 2018, no statute of limitations issue arises. *See* 17 U.S.C. § 507(b); *Petrella v. Metro-Goldwyn-Mayer*, 572 U.S. 663, 672 (2014).

executed even the Co-Production Agreement. And this conclusion by the district court is the opposite of what the Copyright Act requires.

The Series could not supplant *El Cartel* or *El Cartel 2*'s copyright. Even assuming that the Series was somehow a derivative of *El Cartel* (and it is not),⁴ “[w]orks derived from copyright material—‘derivative works’ as they are called—are copyrightable provided the derivative work has some incremental originality; the copyright in the derivative work is limited to that increment.” *Saturday Evening Post v. Rumbleseat Press*, 816 F.2d 1191, 1194 (7th Cir. 1987), *abrogation on other grounds recognized by Glickenhau & Co. v. Household Int’l*, 787 F.3d 408, 426 (7th Cir. 2015); *see also Brownstein*, 742 F.3d at 67 (“[T]he author or authors of the underlying work retain their rights to their original work.”).

Perhaps an example can illustrate the flaw in the district court’s logic. If an anachronistic William Shakespeare provided Tom Stoppard

⁴ The undisputed evidence is that Caracol licensed *El Cabo* to be used in the Series and in the second season. [ECF No. 3-1 at 5] Nowhere does the district court or the Telemundo Entities maintain a transfer of *El Cabo* to the Series. Nor could they: The Copyright Act requires a written, signed conveyance, and they have provided no such written conveyance. *See* 17 U.S.C. § 204.

a license to use *Rosencrantz and Guildenstern* in a play—let’s call the play *Rosencrantz and Guildenstern Are Dead*—Tom Stoppard could profit, reproduce, and copyright his play. Tom Stoppard could copyright any original elements of his play. And Tom Stoppard could use these new original elements (say he added some characters that Shakespeare never dreamt of in his philosophy) to create derivative works arising from *Rosencrantz and Guildenstern Are Dead*.

But Tom Stoppard could not exceed the license’s scope and use *Rosencrantz and Guildenstern* in contravention of the bard’s wishes. Depending on the context, doing so could be copyright infringement or breach of contract. *See, e.g., Fantastic Fakes v. Pickwick Int’l*, 661 F.2d 479, 483–84 (5th Cir. Unit B Nov. 1981);⁵ *Photographic Illustrators v. Orgill, Inc.*, 953 F.3d 56, 59 (1st Cir. 2020); *Jacobsen v. Katzer*, 535 F.3d 1373, 1379–80 (Fed. Cir. 2008). And, contrary to the district court’s logic, he could not impede William Shakespeare’s usage of *Rosencrantz and Guildenstern* in anything Shakespeare so desired. *See, e.g., Brownstein*, 742 F.3d at 67; *Saturday Evening Post*, 816 F.2d at 1194.

⁵ A decision made by a Unit B panel of the Former Fifth Circuit is binding on the Eleventh Circuit. *See Stein v. Reynolds Secs.*, 667 F.2d 33, 34 (11th Cir. 1982).

Simply put, even if the Telemundo Entities outright owned the Series (like Stoppard outright owns *Rosencrantz and Guildenstern Are Dead* in the hypothetical), a license to use El Cabo does not provide them outright ownership of El Cabo (like the license does not grant Stoppard outright ownership over *Rosencrantz* or *Guildenstern*).⁶ Instead, the original author (Caracol) of the original work (*El Cartel* and El Cabo) retains its “right to [its] original work.” *Brownstein*, 742 F.3d at 67.

ii. The district court confusingly concluded that the Letter Agreement prevented a breach of the Letter Agreement.

In Count III, Caracol alleged that Telemundo Television and Telemundo Internacional failed to provide an accounting and failed to provide quarterly statements “regarding Foreign Net Sales for the Sequel,” which constituted a breach of the Letter Agreement. [ECF No. 7 ¶ 43] Confusingly, the district court held that Caracol could not show a breach of the Letter Agreement because that same agreement

⁶ Obviously, if Caracol’s license allowed the Telemundo Entities to use El Cabo in the Derived Series, then there would be no infringement, but the Appellees have not even argued this, and no record evidence supports that argument.

“assigned” Caracol’s “ownership interest in the Series.” [ECF No. 112 at 10] But this makes no sense.

To prevail on a breach-of-contract claim, a plaintiff must prove the existence of a valid contract, a material breach of that contract, and damages flowing from the breach. *See Ferguson Enters. v. Astro Air Conditioning & Heating*, 137 So. 3d 613, 615 (Fla. Dist. Ct. App. 2014). The district court did not find a lack of genuine dispute as to material facts concerning any of these elements. Except in a throwaway footnote, the Telemundo Entities’ motion for summary judgment does not even mention Count III; it certainly never argued a lack of genuine dispute as to material facts. [ECF No. 86 at 23 n.21]

Instead, the Telemundo Entities argued (and the district court held) that section 11 of the Letter Agreement could not be breached because sections 3 and 7 of the same Letter Agreement transferred Caracol’s right to the Series. But this argument—that section 11 of the Letter Agreement provided Caracol illusory rights to proceeds and an accounting—is not an argument to reject Count III of the Amended Complaint. The argument, rather, highlights the absurdity of the interpretation of the Letter Agreement offered by the Appellees and

adopted by the district court. *See Kipp*, 844 So. 2d at 694 (courts should avoid absurd interpretations).

According to the Telemundo Entities, section 11 may require that Telemundo Television “pay Caracol a foreign participation equal to 15% of . . . Foreign Net Sales” and that Telemundo Internacional “provide Caracol with a participation statement with respect [*sic*] payments due to Caracol on a quarterly basis,” but those requirements amount to nothing, never amounted to anything, and can never amount to anything. [ECF No. 7 at 53 § 11] Because neither the Telemundo Entities nor the district court offered any explanation why Caracol cannot enforce section 11 of the Letter Agreement, reversal is required.

iii. Count II is based on a breach of the Co-Production Agreement, and no one argued that the Letter Agreement modified the Co-Production Agreement.

The district court’s conclusion that its interpretation of the Letter Agreement stymied Count II is incorrect. In Count II, Caracol sued for breach of the Co-Production Agreement and the Distribution Agreement. Caracol explicitly noted that the Letter Agreement did not “negate Caracol’s rights under” those agreement. [ECF No. 7 at 10] And, of course, the Letter Agreement did not.

The signatories could not modify the Co-Production Agreement or Distribution Agreement except in a signed writing. [ECF No. 7 at 27 § 10(f), 42 § 18.6] Nothing in the Letter Agreement purported to amend the Co-Production Agreement or the Distribution Agreement. For their part, the Telemundo Entities have never even argued that the Letter Agreement modified or amended the Co-Production or Distribution Agreement.

At bottom, section 5(b) of the Co-Production Agreement provided the Appellant certain rights. By its plain language, nothing in that section depended on Caracol's ownership of the Series. And nothing in this lawsuit pretended to modify section 5(b) of the Co-Production Agreement. The same applies to Caracol's rights under the Distribution Agreement. By pretending that the Letter Agreement modified the Appellant's rights under these other agreements out of existence—when no one even raised modification or amendment—the district court erred.

III. NO ALTERNATIVE BASES EXIST FOR AFFIRMANCE.

As they did below, the Telemundo Entities are likely to raise every possible argument in an attempt to seek an affirmance of the district court's order. No such basis for affirmance exists, however.

A. The Telemundo Entities Butcher the Statute of Limitations.

Under the Copyright Act, “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). In *Webster v. Dean Guitars*, this Court held that where the gravamen of a claim concerns copyright ownership, “an ownership claim accrues when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his ownership rights.” 955 F.3d 1270, 1276 (11th Cir. 2020). Based on these principles, the Telemundo Entities contend that Caracol knew of its “ownership” dispute with the Telemundo Entities since 2014, so Count I is time barred by § 507(b) of the Copyright Act. This argument is incorrect, for it confuses a contractual dispute (that is, how to interpret the Letter Agreement under state law) with a copyright dispute (whether under the Copyright Act a party has contributed enough to give him a copyright interest in the work).

The Copyright Act’s statute of limitations does not apply here. It applies to civil actions “maintained” under the Copyright Act. 17 U.S.C. § 507(b). Where a plaintiff asserts that he “*is* a co-owner” of a copyright

because his “contribution” to the work “gave him a copyright interest,” the ownership issue arises out of the Copyright Act, and the three-year statute of limitations applies. *See Gaiman*, 360 F.3d at 652. But “[n]ot all claims of co-ownership will arise under the Copyright Act.”

Cambridge Literary Props. v. W. Goebel Porzellanfabrik GmbH & Co., 510 F.3d 77, 81 n.1 (1st Cir. 2007).⁷

For example, “whether there is co-ownership may be determined,” as here, “by the terms of a contract governed by state law or through other ownership interests governed by state law and thus not require application of the Copyright Act.” *Id.* In that situation, “the applicable statute of limitations would be state rather than federal.” *Gaiman*, 360 F.3d at 652; *see also Goodman v. Lee*, 78 F.3d 1007, 1013 (5th Cir. 1996) (“[E]ven though the case requires an interpretation of the Copyright Act’s definition of a joint work—thereby compelling the assumption of federal jurisdiction—the action is not being *maintained* under the provisions of the Copyright Act Accordingly, we reject the Lees’

⁷ Where the copyright issues are incidental to the interpretation of a contract, federal courts have refused to find that they have subject-matter jurisdiction over the matter. *See Royal v. Leading Edge Prods.*, 833 F.2d 1, 3 (1st Cir. 1987); *Topolos v. Caldewey*, 698 F.2d 991, 994 (9th Cir. 1983).

contention that the three-year statute of limitations set out in § 507(b) governs . . .”).

And this distinction is the downfall of the Telemundo Entities’ statute-of-limitations argument. Unlike *Dean Guitars* or the other opinions cited by the Telemundo Entities, no one is disputing authorship or ownership under the Copyright Act; they are disputing ownership under the Letter Agreement. *See Dean Guitars*, 955 F.3d at 1272 (“Buddy Webster . . . modified a Dean ML guitar, produced by Dean, and paid someone to paint a lightning storm graphic on the guitar.”); *Kwan v. Schlein*, 634 F.3d 224, 227 (2d Cir. 2011) (noting that written agreement between parties listed one as editor but, going around the agreement, editor sought co-author designation because she ghost-wrote book); *Merchant v. Levy*, 92 F.3d 51, 55 (2d Cir. 1996) (“Unlike a case where a dispute as to copyright ownership arises under an agreement between the parties, resolution of which depends on state contract law, copyright ownership by reason of one’s status as a co-author of a joint work arises directly from the terms of the Copyright Act itself.” (citation omitted)); *Zuill v. Shanahan*, 80 F.3d 1366, 1368 (9th Cir. 1996) (noting that no contract existed among the parties). In

fact, the Co-Production Agreement explicitly recognizes both Caracol and Telemundo Television as co-owners of the Series. Ownership under state contract law, not the Copyright Act, is the gravamen of Counts I, II, and III. Hence, Florida’s five-year statute of limitations governs. *See* FLA. STAT. § 95.11(2)(b).

As to Count IV—the sole claim in the Amended Complaint that is actually based on the Copyright Act—there is no statute of limitations issue. As noted above, Caracol’s ownership in *El Cabo* arises from *El Cartel* and *El Cartel 2*. And the Appellees infringed this copyright in 2016 through 2018, well within the three-year period required by § 507(b).

The Telemundo Entities seek to muddle and confuse by lumping their alleged infringement of *El Cartel* with their alleged breach of the Letter Agreement, but that is merely a frivolous ruse. It is undisputed that Caracol owns the copyright to *El Cartel* and hence *El Cabo*. Nothing in the Letter Agreement even mentions *El Cartel*.

A final note. As already explained, *Dean Guitars* is inapplicable. Here, the ownership dispute revolves around a run-of-the-mill contract; in *Dean Guitars*, the ownership dispute revolved around “authorship”

as defined by the Copyright Act. As the First Circuit noted in *Cambridge*, that distinction makes all the difference. But, regardless, *Dean Guitars* should be limited to its facts. Though the rule adopted in *Dean Guitars* is the rule followed by the majority of circuit courts on this issue, as Judge Murphy explained in *Everly v. Everly*, this rule—i.e., where the gravamen of a claim requires a determination of authorship under the Copyright Act, § 507(b) applies—is a bad one. 958 F.3d 442, 460 (6th Cir. 2020) (Murphy, J., concurring).

It is a bad rule because, contrary to this Court’s dictate that statutory interpretation should begin and largely end with a statute’s language, *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), the rule fails to follow § 507(b)’s language. Section 507(b) prevents causes of action “maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). The rule adopted by the majority of circuits pretends that a copyright-infringement claim accrues when a dispute over authorship materializes. Not so.

Any claim accrues when all of its elements come into existence. *See Everly*, 958 F.3d at 461 (Murphy, J., concurring) (quoting *Gabelli v.*

SEC, 568 U.S. 442, 448 (2013)). And copyright-infringement claims have two elements: (1) ownership and (2) infringement. *See Compulife*, 959 F.3d at 1302. A dispute over ownership, without a dispute over infringement, therefore cannot cause the claim’s accrual. And no other “justification derived from the text of the statute, the legislative history, or the policies of the Copyright Act” exists “for treating continuing claims of authorship any differently than continuing acts of infringement.” *Everly*, 958 F.3d at 465 (Murphy, J., concurring) (quoting 6 William F. Patry, *Patry on Copyright* § 20:37). Given this, *Dean Guitar* should be limited to its facts.

B. Waiver and Equitable Assignment Are Inapplicable.

Before the district court, the Telemundo Entities asserted that they should prevail on Count I because Caracol (1) waived any ownership interest under the Co-Production Agreement and (2) equitably assigned its copyright interest to the Series. These arguments are frivolous.

Equitable assignment fails for two reasons.

First, the Telemundo Entities alleged 30 affirmative defenses in their Answer, yet not one mentioned equitable assignment. [ECF No. 53

at 8–9] This Court’s precedent dictates that a party cannot seek to amend its pleading by briefing new issues at summary judgment. *See Lightfoot v. Henry Cnty. Sch. Dist.*, 771 F.3d 764, 779 (11th Cir. 2014); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam). The Appellees’ argument is therefore foreclosed.

Second, as it relates to copyright rights, equitable assignments are not allowed: “A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.” 17 U.S.C. § 204; *see also Effects Assocs.*, 908 F.2d at 556 (“While the copyright owner can sell or license his rights to someone else, section 204 of the Copyright Act invalidates a purported transfer of ownership unless it is in writing.”). Because the Telemundo Entities do not argue that the assignment was made via written conveyance, their equitable-assignment argument fails.

Waiver fails for one insurmountable reason.

The Co-Production Agreement explicitly bars the Telemundo Entities’ reliance on the waiver doctrine:

No failure or delay of any Party in exercising any power or right under this Agreement will operate as waiver thereof, nor will any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power.

[ECF No. 7 at 28 § 10(h)] “Florida courts have consistently enforced these types of clauses,” and these anti-waiver provisions defeat “as a matter of law” any “defenses of waiver and estoppel.” *Nat’l Home Cmtys. v. Friends of Sunshine Key*, 874 So. 2d 631, 634 (Fla. Dist. Ct. App. 2004).⁸ The Telemundo Entities’ waiver argument is thus a nonstarter as well.

C. El Cabo Is Obviously Protectible.

In their motion for summary judgment, the Telemundo Entities essentially concede that they used El Cabo without Caracol’s permission. They nonetheless argued that El Cabo is not copyrightable

⁸ To the extent that the Telemundo Entities are relying on subsequent agreements to *modify* the Co-Production Agreement or Letter Agreement, they never raised such an affirmative defense in their Answer and so have waived, forfeited, and abandoned that affirmative defense. [ECF No. 53 at 8–9] Again, the Appellees cannot amend their defenses at summary judgment. *See Lightfoot*, 771 F.3d at 779.

because he is a stock character with only physical qualities. [ECF No. 97 at 5] Nonsense.

As detailed by Caracol, El Cabo has a name, a look, and a backstory. His name is Milton Jimenez a.k.a. El Cabo. [ECF No. 3-1 at 4] He wears aviator-style wire sunglasses, tons of gold jewelry, and a cowboy hat. [ECF No. 3-1 at 4] He dresses informally in a track suit. [ECF No. 3-1 at 4] He wears white sneakers, is from Antioquia, Colombia, and speaks with a distinct accent. [ECF No. 3-1 at 4–5] He has an occupation: He’s a hitman who loses his temper quickly and is willing to kill without remorse. [ECF No. 3-1 at 5] These distinctive elements—which are portrayed in an audiovisual work and are portrayed by a specific actor—are more than enough for copyright protection.

In *Gaiman v. McFarlane*, the Seventh Circuit rejected a similar argument in a more-limited medium (comic books). 360 F.3d 644. There, a comic-book artist asserted that a character—“a drunken old bum” named Cogliostro—was not copyrightable. *See id.* at 660. The Seventh Circuit rejected that notion, since the character had a “specific name and a specific appearance.” *Id.* at 660. As the Seventh Circuit (correctly)

saw it, “Cogliostro’s age, obviously phony title (‘Count’), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character.” *Id.* “No more is required for a character copyright.” *Id.* As there, so too here.

Like Count Cogliostro, Milton Jimenez has a name and a nickname. Like Cogliostro, he has an age. Like Cogliostro, he has a backstory. And, like Cogliostro, he has a look. Accordingly, no more is required for a character copyright, and the Telemundo Entities’ argument to the contrary is unsupported by law and unsupportable by common sense.

CONCLUSION

For these reasons, this Court should reverse the district court's granting of summary judgment in the Telemundo Entities' favor, and, as to Count I, this Court should instruct the district court to enter summary judgment in Caracol's favor.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I, Freddy Funes, certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,699 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

April 19, 2021

/s/*Freddy Funes*

FREDDY FUNES

CERTIFICATE OF SERVICE

I certify that, on April 19, 2021, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via the CM/ECF system, as required by 11th Circuit Rule 25-3(a).

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