Copyright Fair Use: A Comment On the Parody Defense

By Alan R. Friedman

The courts have addressed the pre-existing work...
as commenting, through ridicule, on the "seriousness, even the pretentiousness, of the original," and, therefore, did constitute fair use.

The different outcomes in the Leibovitz and Dr. Seuss cases illustrate the potential unpredictability of the parody fair use defense. One can certainly imagine the Ninth Circuit panel that decided Dr. Seuss rejecting the fair use rationale offered in Leibovitz. Just as the use of Dr. Seuss' copyrighted work was viewed as mimicry lacking in critical commentary, so, too, could Paramount's use of a famous, controversial photograph for its "Naked Gun 33⅓" advertisement be seen as simply using Ms. Leibovitz's copyrighted work in order to "get attention" for the movie while "avoiding the drudgery of working up something fresh." As for the Second Circuit's finding that the poster commented on the photo's self-important seriousness, again, it is easy to imagine the Dr. Seuss panel viewing this Justification as merely an after-the-fact rationale for the unlicensed use of the copyrighted photograph.

**Challenges Over Novels**

Contrasting rulings were also issued in two more recently decided cases in which Campbell's parody fair use analysis was applied to determine whether the challenged works—each, a full-length novel that drew heavily on a hugely popular copyrighted novel and its characters—constituted copyright infringement. In a decision issued in 2001 that surprised many, the U.S. Court of Appeals for the Eleventh Circuit, in Suntrust Bank v. Houghton Mifflin Co., found the challenged work protected under the fair use doctrine.

The plaintiff in Suntrust, the owner of the copyright for the best-selling novel "Gone With the Wind" ("GWTW"), sued for copyright infringement and moved to preliminarily enjoin exploitation of a book titled "The Wind Done Gone" ("TWDG"), which the defendants described as "an inversion" of GWTW in which many of GWTW's story lines are told from the perspective of the slaves. The District Court and the Eleventh Circuit agreed that the first half of TWDG was "largely an encapsulation of [GWTW]" that incorporated GWTW's copyrighted characters, story lines and settings. Despite finding that TWDG made "substantial use" of GWTW, the Eleventh Circuit vacated the preliminary injunction entered by the District Court, ruling that such use was "fair" because TWDG was "principally and purposefully a critical statement that seeks to rebuke and destroy the perspective, judgments, and mythology of GWTW." For example, the Eleventh Circuit found that TWDG eliminated the romanticism of the slavery depicted in GWTW and reversed GWTW's race roles, portraying whites as stupid or feckless and instilling in nearly every black character redeeming qualities not found in GWTW. Insupporting its fair use ruling, the Eleventh Circuit stated that it "was hard to imagine how [the author] could have specifically criticized GWTW without depending heavily upon copyrighted elements of that book."

Eight years after the Suntrust decision, in Salinger v. Colting, Judge Deborah A. Batts of the Southern District of New York was faced with a copyright infringement claim in which the renowned author, J.D. Salinger, sought to preliminarily enjoin exploitation of an unlicensed novel that drew heavily on his classic novel, "The Catcher in the Rye." Fredrik Colting wrote the challenged book, "60 Years Later: Coming Through the Rye," under the pseudonym John David California. Mr. Colting admitted that his book's main character, "Mr. C.,” was a 60-year-older version of Holden Caulfield, the famous protagonist of Mr. Salinger's novel. While the defendant did not deny that his book was a continuation of Mr. Salinger's novel—indeed it was marketed as a "sequel" in the United Kingdom and referenced many experiences that Mr. Salinger created for Caulfield in The Catcher in the Rye—Mr. Colting claimed that "60 Years" was a protected parody.

In support of his parody fair use position, Mr. Colting contended that "60 Years" commented on "The Catcher in the Rye," on Holden Caulfield, and on J.D. Salinger himself. The court was not persuaded. It cited Mr. Colting's pre-lawsuit statements and marketing materials as evidence that "60 Years" was intended as a sequel and Mr. C. as merely a 60-years-older Holden Caulfield having the same character traits and making the same kinds of observations as Caulfield made in "The Catcher in the Rye."

Unlike in Suntrust, where the Eleventh Circuit found that TWDG was "principally and purposefully a critical statement," Judge Batts ruled that "60 Years" contained no reasonably discernable rejoinder or specific criticism of any character or theme of [The Catcher in the Rye]." The court found that Mr. Colting simply reiterated the characteristics of Holden that were thoroughly depicted in Mr. Salinger's novel, including the contrast between Caulfield's critical and rebellious nature and his tendency toward depressive alienation—concluding that "it is hardly parodic to repeat that same exercise in contrast, just because society and the characters have aged."

The court was equally dismissive of defendants' contention that "60 Years" was a protected parody because it commented on Mr. Salinger (who was included as a character in defendants' book). Because Campbell requires that a protected parody comment upon the copyrighted work that is the subject of the parody, the court found that commentary about Mr. Salinger was not commentary on either "The Catcher in the Rye" or Holden Caulfield and, thus, could not be a protected parody.

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Judge Batts held that the song parodied "When You Wish Upon a Star" and was entitled to "fair use" protection. By pairing the "Family Guy" character's bigoted stereotypes of Jewish people with "When You Wish Upon a Star"'s fairy tale world view, the court found that "I Need a Jew" commented on the original song's fantasy that wishing upon a star can make one's dreams come true, while also making the point that "any parade "When You Wish Upon a Star" of people is childish and simplistic, just like wishing upon a star."

Judge Batts supported her parody ruling by crediting defendants' evidence that "I Need a Jew" was also intended to comment on the "widespread belief" that Walt Disney was anti-Semitic, even though "When You Wish Upon a Star" did not concern Walt Disney personally. Notably, this ruling contrasts with the ruling in Salinger that Mr. Colting's claim that "60 Years" commented on J.D. Salinger personally did not support his parody defense because commenting on Mr. Salinger was not the same as commenting on "The Catcher in the Rye."

The ruling in Salinger provides some reassurance to copyright owners that more than an after-the-fact rationale as to how the putative parody transforms and comments on the challenged work is required and that the proffered parody will be subject to scrutiny. However, just as the criteria for determining when a parody qualifies as fair use are imprecise, the rigor with which the proffered parody is to be scrutinized is not subject to an established standard. As a result, the outcome in these cases appears to depend heavily on how great the deference (or strict the scrutiny) the judge hearing the case applies when evaluating whether the proffered parody qualifies as a "fair use" under Campbell.

The good news for copyright owners, is that Suntrust, at least so far, did not begin a "trend." If Salinger had, like the Suntrust decision, found the use in "60 Years" to be "fair," novelists, screenwriters, movie producers and others might be tempted to devote their energy to figuring out how to incorporate established brand-name characters such as Harry Potter, James Bond and such animated icons as Shrek into their stories and to concocting parody rationales to support such use.

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3. 268 Fed. 1257 (11th Cir. 2001).
4. 417 Fed. 1257 (2d Cir. 1996).
5. 119 Fed. 1994 (9th Cir. 1997).
6. 268 Fed. 1257 (11th Cir. 2001).
7. 602 Esp. 2d (S.D. N.Y. 2009).
8. Additional differences in the facts presented in Salinger and Bourne Corp. may help explain their different outcomes. In contrast to the pre-lawsuit statements and marketing materials in Salinger that the court found to undercut the credibility of Mr. Colting's parody argument, in Bourne Corp., Judge Batts supported her fair use ruling by citing evidence demonstrating that defendants had intended from the outset to parody "When You Wish Upon a Star."
9. The final word in Salinger has not been written. Mr. Colting filed an expedited appeal, which was asked Sept. 3, 2009. Much of the argument concerned whether a preliminary injunction should have issued even assuming that a likelihood of infringement was established. While past precedent has supported presuming irreparable harm and issuing a preliminary injunction when a likelihood of copyright infringement is established, the Second Circuit appeared to take very seriously arguments challenging the application of that precedent on the grounds that (i) Mr. Colting's alleged infringement was not "serious enough," and (ii) in eBay Inc. v. MercExchange, 547 U.S. 388 (2006), the Supreme Court raised questions regarding the viability of issuing an injunction in a copyright infringement lawsuit based on a presumption of irreparable harm.