

LOS ANGELES

Daily Journal

— SINCE 1888 —

VOL. 114 NO. 253

FRIDAY, DECEMBER 28, 2001

The Practitioner Entertainment Law

Just Kidding

Courts Determine Parody on a Case-by-Case Basis

By David Halberstadter

In his 1928 novel "Point Counter Point," Aldous Huxley observed that "parodies and caricatures are the most penetrating of criticisms." The essence of a parody is that it imitates the characteristic style of an author or work for comic effect or ridicule. Its effectiveness depends on the ability to make the object of its criticism recognizable to the audience. Most parodies therefore quote or distort the original work's memorable features.

Most contemporary works enjoy protections against unauthorized copying. Even the copyright law recognizes, however, that certain unauthorized uses of copyrighted works may be considered "fair." Section 107 of the Copyright Act provides that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of copyright."

The statute enumerates four nonexclusive factors to be considered in determining fair use: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

Parody is generally considered a fair use, provided it meets the statutory test. But the application of the test to a given use is extremely fact-specific. So how can an author of humor-

ous commentary be sure that his work will, in fact, be treated as a parody rather than an infringement of another's copyright? And how does a legitimate parodist know whether she has copied a permissible amount of her target's work or too much?

It appears that the parodist cannot know for certain until a court provides the answer. Whether the work will be considered a permissible parody or an unlawful infringement may well depend upon which court is asked

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the question to begin with. As a result, a parodist has no meaningful way to predict whether his work will result in costly litigation or even potential liability.

A timely case in point is the recent litigation over the novel "The Wind Done Gone," written by Alice Randall and published by Houghton Mifflin Company. In essence, the novel chronicles the diary of a woman who is portrayed as the illegitimate half-sister of Scarlett O'Hara, the fictional protagonist of the Margaret Mitchell classic "Gone With the Wind."

In order to critique the depictions of slavery and the Civil War-era American South in "Gone With the Wind," "The Wind Done Gone" made liberal use of the core characters, relationships and pivotal scenes from "Gone With the Wind." The author considered these uses necessary

to parody the original work; the copyright owners of "Gone With the Wind" considered the new work an unauthorized sequel.

In granting the plaintiffs' requests for a temporary restraining order and preliminary injunction, the District Court rejected the defendant's claim of parody. *Suntrust Bank v. Houghton Mifflin Company*, 136 F. Supp.2d 1357 (N.D. Ga. 2001). It found that "The Wind Done Gone" took "the characters, character traits, scenes, settings, physical descriptions, and plot" directly from "Gone With the Wind." The court characterized the use of these elements from "Gone With the Wind" as "unabated piracy" and the quantity of the taking "overwhelming."

The 11th U.S. Circuit Court of Appeals disagreed. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). It dissolved the preliminary injunction, finding that the

parodic character of "The Wind Done Gone" was clear. In its view, the novel was "principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*."

The fact that the novel was published for profit was outweighed by its "highly transformative" use of the protected elements of "Gone With the Wind," and the court was not prepared to conclude that "The Wind Done Gone" copied more than was reasonable. So Randall's novel was transformed from "unabated piracy" into legitimate parody.

This was hardly the first time that federal courts had flip-flopped on a finding of parody. In the seminal decision of the last decade, the courts were asked to determine whether the rap song "Pretty Woman" by the group 2 Live

Crew constituted a parody or an infringement of Roy Orbison's rock ballad "Oh, Pretty Woman." The District Court granted summary judgment in 2 Live Crew's favor, but the 6th Circuit reversed, ruling that even if "Pretty Woman" was a parody, its "admittedly commercial nature" gave rise to a presumption against fair use.

The Supreme Court then reversed the appellate court, concluding that the commercial nature of a parody did not create a presumption against fair use and that the 6th Circuit had not given sufficient consideration to all of the relevant fair-use factors. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

Highlighting the problem confronted by every parodist, the Supreme Court observed that "the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies." The task of determining what uses of a copyrighted work are fair uses "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." And "the fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line."

Not surprisingly, lower court rulings following *Campbell* have been almost completely unpredictable, with one court rejecting a parody/fair-use defense upon facts from which another court might well have drawn the opposite conclusion. Three cases involving parodical advertisements illustrate the point.

In *Metro-Goldwyn-Mayer Inc. v. American Honda Motor Co. Inc.*, 900 F. Supp. 1287 (C.D. Cal. 1995), the court assessed whether a Honda commercial featuring chase scenes evocative of various James Bond films constituted permissible parody or copyright infringement.

The court rejected Honda's defense that the commercial was a parody on the action film genre, noting that the Supreme Court in *Campbell* had specifically opined that "[t]he use ... of a copyrighted work to advertise a product, even in parody, will be entitled to less indulgence ... than the sale of the parody for its own sake."

By contrast, in *Paramount Pictures v. Leibovitz*, 137 F.3d 109 (2nd Cir. 1998), the 2nd Circuit treated as permissible parody a commercial poster for the film "Naked Gun 33 1/3," in which Leslie Nielsen posed like pregnant Demi Moore on a notorious cover of Vanity Fair

magazine. The appellate court found that the advertisement qualified as a "transformative" work that at least arguably commented on the seriousness, even the pretentiousness, of the original photograph.

Yet in another case involving a movie poster, *Columbia Pictures Industries Inc. v. Miramax Films Corp.*, 11 F. Supp.2d 1179 (C.D. Cal. 1998), a District Court rejected a claim of parody by the producers of a documentary film that exposed the consequences of corporate America's focus on profits. Posters for the documentary mimicked in content and style the posters for the film "Men In Black," but because neither the documentary nor its ad commented on or criticized the original film, the poster was not a parody.

Disputes involving humorous depictions of celebrities likewise have produced different results. *Cardtoons L.C. v. Major League Players Association*, 95 F.3d 959 (10th Cir. 1996), involved the sale of mock baseball trading cards featuring caricatures of major-league baseball players on the front and humorous commentary about their careers on the back. The 10th Circuit accorded the card producers full First Amendment protection because the cards provided important social commentary on public figures.

But in *Dr. Seuss Enterprises L.P. v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir. 1997), the 9th Circuit rejected a claim of parody for a commentary on O.J. Simpson's murder trial that was told in the distinctive style of Dr. Seuss' "The Cat in the Hat." The new poem mimicked Dr. Seuss' style but did not "hold his style up to ridicule." In essence, O.J. Simpson, not Dr. Seuss or his works, was the "butt of the joke."

And in *Elvis Presley Enterprises v. Capece*, 141 F.3d 188 (5th Cir. 1998), a restaurant owner was prevented from operating a restaurant/bar called "The Velvet Elvis," in which references to Elvis Presley permeated the establishment's decor and menu. The owner claimed it was his intention to parody "the Las Vegas lounge scene, the velvet painting craze and perhaps indirectly, the country's fascination with Elvis."

The 5th Circuit ruled that Elvis was not a true target of the restaurant's arguable parody, which was therefore not a fair use of the plaintiff's protected images and marks.

Challenges to the comedic use of fictional characters also have produced varying results. In *Lyons Partnership v. Giannoulas*, 179 F.3d 384 (5th Cir. 1999), the owner of television's "Barney" character challenged the use of a

similar-looking dinosaur in a routine performed at sporting events, in which the putative Barney is slapped, stood upon and otherwise subjected to aggressive physical conduct by the "San Diego Chicken." The 5th Circuit concluded that the routine was a parody because it targeted Barney himself.

In *Mattel Inc. v. MCA Record Inc.*, 28 F. Supp.2d 1120 (C.D. Cal. 1998), the manufacturer of the Barbie doll challenged the release of a song entitled "Barbie Girl," in which a woman and man assume the identities of Barbie and Ken and sing about their "plastic" life. The District Court considered the song a legitimate parody because the singers were ostensibly poking fun at women who, like Barbie, are "plastic, unreal, and easily manipulable by others."

But in *Williams v. Columbia Broadcasting Systems Inc.*, 1999 WL 1260143 (C.D. Cal. 1999), a court rejected a challenge by the owners of the "Mr. Bill" clay figure to CBS' broadcast, during an Army-Navy football game, of an animated segment that spoofed what would happen to a sailor forced to undergo Army basic training. The segment used a clay figure that, like Mr. Bill, was subjected to fates that repeatedly smashed the figure. CBS claimed the segment was a parody.

Even though the court rejected the parody claim because the Navy, not Mr. Bill, was the intended target, it found the use to be fair nonetheless. It characterized the segment as the "isolated production of a humorous skit created by a group of spirited soldiers," the "negligible economic effect" of which outweighed "the extra protection that is afforded to a creation of fancy."

Given these disparate court decisions, a parodist has no clear guidelines for what will constitute a parody. What will happen if the appropriated work or its author is only one of the intended targets of criticism? Or what if the parody comments generally on social attitudes and beliefs that are depicted in the copied work? A parodist also cannot know until it is too late whether he has made too much use of the targeted work. While the absence of a "bright-line" test ensures a degree of flexibility in determining fair use, it may also chill the very speech the fair use doctrine was intended to protect.

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