'…But I know it when I see it'

Parody, copyright law and the First Amendment

by
Bruce Sostek and Thomas Yoo, Guest Columnists
The *Forth Worth Business Press*

January 10 – 16, 2003

Reprinted with Permission

Depending on which side of the fence they happen to be standing, different people have widely divergent views regarding the subject of parody. On one side, parodies can be a "vital commodity in the marketplace of ideas," an essential source of entertainment and social commentary. On the other side, it is rarely fun to be on the receiving end of a parody — or, in other words, the butt of the joke. Ernest Hemingway once proclaimed that parody is a step down aesthetically from bathroom wall graffiti.

The artistic merit of parody aside, parodies embody an equally contentious issue in copyright law. From the perspective of a copyright owner, parody too often appears to be a cheap excuse for profiting from the hard work of another artist.

Section 107 of the Copyright Act declares that certain "fair uses" of copyrighted materials — including criticism, commentary, teaching and research — do not constitute infringement. Four criteria define the fair use test:

- The purpose and character of the use;
- The nature of the original work;
- The amount and substantiality of the copied portion in relation to the entire original;
- The effect of the use upon the original's actual or potential market value.

Several cases that have taken place since the Supreme Court's last word on the subject, *Campbell v. Acuff-Rose*, have exposed the inherent tension between copyright law and the First Amendment's protection of free speech, as well as some of the particular problems posed by parody.

Campbell v. Acuff-Rose

The parody in this case was a rap remake of the Roy Orbison pop classic, "Oh, Pretty Woman." Borrowing heavily from the original, 2 Live Crew added a hip hop beat, record scratching and substituted its lyrics:

Big hairy woman you need to shave that stuff
Big hairy woman you know I bet its tough
Big hairy woman all that hair ain't legit
'Cause you like 'Cousin It'

In the view of the Sixth Circuit, 2 Live Crew had taken the heart of the original version, which alone was qualitatively too much to be fair. A unanimous Supreme Court reversed that decision, holding that parody can so transform the essential character of an original material's meaning, expression or message that it becomes a new and autonomous work. In contrast to the Appeals Court decision, Justice Souter reasoned that "parody's humor necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin."

The *Acuff-Rose* decision evaluated the parody against the four fair use criteria, and on the first three — purpose, nature and fairness — ruled that the transformative nature of the parody weighed in favor of finding fair use that did not contravene the original copyright. On the fourth factor, market value, the Court held the record was insufficient as to whether the Crew's parody acted as a market substitute in the derivative market for hip-hop remakes of "Pretty Woman." Parodies typically address fundamentally different markets than do their targeted works, the Court asserted, but the decision left unclear how lower courts can reliably distinguish harm resulting from the usurpation of demand (e.g., a straight ''bootleg" copy of the original), a legally cognizable injury, and harm resulting from suppression of demand (e.g., a scathing review by a music critic), a non-cognizable injury. Subsequent cases have exposed the difficulties inherent in such an injury.

Leibovitz v. Paramount Pictures Corporation

This 1996 case emphasized the *Acuff-Rose* view that the transformative nature of parody was key to establishing fair use. The plaintiff, photographer Annie Liebovitz, sued Paramount Pictures for an ad it used to promote the movie *Naked Gun 33 1/3: The Final Insult*. The ad spoofed Liebovitz's nude photo of pregnant actress Demi Moore (a "meaningful" depiction of the pregnant female form) by transposing the head of the film's male star, Leslie Nielson, onto a reproduction of Moore's naked, pregnant body. The Court entered summary judgment for Paramount, finding that the ad was a "highly transformative" parody of the Liebovitz photo. The ruling held that the ad, despite its commercial purpose, met the fair use test of parody because it was sufficiently different from the original photo and served a very different market function. Crucial to the Court's finding was that a parody must contain "direct reference" to the original work. In this case, the Court found that such a direct reference existed, citing the ad's clear intention to make a "mockery of an image that had become a 'cultural icon.'"

Under the third factor, the Court noted that the extent of copying in this case was substantial. Employing *Acuff-Rose's* "conjure up" test ("whether the defendant took more than was reasonably required to conjure up the original and bring home the point of its parody"), the Court admitted that copying the more distinctive elements of the *Vanity Fair* cover may have been necessary to convey the point of the parody.

However, the Court conceded in stretches of its opinion that perhaps not all of the borrowed elements in the *Naked Gun* ad were strictly necessary. At several points in the opinion, the Court can be found deconstructing the different elements of the photos and assessing the necessity of each. In its own words: "Perhaps the defendant could have used the pose and backdrop, but not the lighting of the original, or the pose and lighting, but not the backdrop and still achieved its purposes." The scrutiny of these types of artistic judgments is treacherous ground for judges and juries to walk. As Justice Holmes articulated, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the most narrow and obvious limits." Nevertheless, the Court afforded the defendants leeway in their artistic choices because the work was of such a transformative nature.

Dr. Seuss Enterprises v. Penguin Books

In 1997, the U.S. Ninth Circuit Court of Appeals held that the work at issue in this case was a satire, not a parody, and thus not entitled to fair use protection. The controversy in this case centered on *The Cat NOT in the Hat! A Parody by Dr. Juice*, a book that reproduced the verbal and graphic style of the Dr. Seuss *The Cat in the Hat* children's books to re-tell the tale of the O.J. Simpson murder trial.

Concerning the purpose and character of the defendant's use, the court concluded that *The Cat NOT in the Hat* did not constitute a legitimate parody. It dissected the definition of parody and determined that in order to be a parody in the legal sense, a work must at least in part target the plaintiff's copyrighted work. The Ninth Circuit held that the critical difference is that in a parody, the original work is the object of the defendant's commentary, and in a satire, the copyrighted work is merely "a vehicle to poke fun at a different target."

The Court held that the self-titled "parody" was in fact something less than transformative, because the original was not the focus of the work's criticism. The Court characterized the work as merely an attempt to "avoid the drudgery in working up something fresh" to recount the Simpson trial. The authors of *The Cat NOT in the Hat* argued that they were in fact parodying the simplistic moral code of the Seuss books in the context of the Simpson trial's real life complexities, and it is difficult to see exactly why the Court so summarily dismissed these arguments. There seems little questions that the book did in some degree transform the message of the original for a humorous purpose, much as did the ad in the *Liebovitz* case. By in effect ruling that the authors were just lazy humorists and not skilled parodists, the *Seuss* decision illustrated the difficulty in applying the concept of transformative value to test an author's true artistic intent.

Sun Trust Bank v. Houghton Mifflin Company

The U.S. Eleventh Circuit Court of Appeals integrated fair use and First Amendment analysis in this 2001 decision. The trustees of the estate of Margaret Mitchell attempted to prohibit publication of Alice Randall's *The Wind Done Gone*, a parodic pseudo-sequel of the immensely successful Mitchell novel *Gone With the Wind*. Intended as a critique of *Gone with the Wind*'s social framework, Randall's book directly parodied the original borrowing numerous elements and re-casting them from the first-person perspective of a female slave.

The Eleventh Circuit held that the "shared principles of the First Amendment and the copyright law" weighed heavily against applying the Copyright Act to enjoin free speech in this case. In doing so, it marked the first application by a federal appeals court of first amendment jurisprudence as a limit on copyright enforcement. While basing its decision on constitutional grounds, the Court also clearly ruled that *The Wind Done Gone* was a fair use parody that specially targeted Mitchell's work.

The *Acuff-Rose* and *Sun Trust Bank* decisions in particular have broken ground in using the copyright law concept of fair use to protect parody as an expression of First Amendment rights. However, as courts continue to wrestle with the issue, the distinctions between protected commentary and mere repetition have proved more difficult to distinguish. Determining where the line falls is daunting task with considerable ramifications for free speech.

Bruce Sostek and Thomas Yoo are in the Intellectual Property practice group of the Dallas office of the law firm of Thompson & Knight LLP. Sostek is head of the practice group.