

VETTING PARODIES: THE PRIMARY IMPORTANCE OF “TARGETING THE ORIGINAL”

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The prepublication review by attorneys of entertainment programs and publications requires a broad grasp of the law concerning copyright and fair use, trademarks (and rights under the First Amendment to make use thereof), defamation and other torts, and what is variously termed misappropriation, the right of privacy or the right of publicity. A central principle in such prepublication review is that a parody must “target the original” if it is to qualify as “fair use” under §107 of the copyright statute.

In his concurring opinion in *Campbell v. Acuff-Rose Music*,<sup>1</sup> Supreme Court Justice Anthony Kennedy elaborates on this principle as follows:

[P]arody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition. It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).<sup>2</sup>

The majority opinion by Justice David Souter draws an analogous distinction between “parody” and “satire”: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>3</sup>

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<sup>1</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 596-600 (1994) (concurring opinion, J. Kennedy).

<sup>2</sup> *Id.*, 510 U.S. at 597.

<sup>3</sup> *Id.*, 510 U.S. at 580-81 (majority opinion).

Perhaps the best example of a would-be parody that failed to meet the test of targeting the original is *The Cat NOT in the Hat! A Parody by Dr. Juice*. This book told the story of the O.J. Simpson murder trial in the same style that was used in the well-known *The Cat in the Hat*, *Horton Hatches the Egg* and numerous other children's books by Theodor S. Geisel, who wrote under the pseudonym "Dr. Seuss." In addition to using the same sort of simple, rhyming repetitive language found in the Dr. Seuss books, *The Cat NOT in the Hat!* specifically used the image of Dr. Seuss's Cat in the Hat on the front and back covers and 13 times in the text itself.

Dr. Seuss Enterprises obtained a preliminary injunction against further sale or distribution of *The Cat NOT in the Hat!*,<sup>4</sup> and its prominent publisher Penguin Books USA appealed to the Ninth Circuit, which affirmed.<sup>5</sup>

Echoing the Supreme Court's distinction between parody and satire in the *Campbell* case, the Ninth Circuit found that the stanzas and illustrations in *The Cat NOT in the Hat!* "simply retell the Simpson tale." Although the book "does broadly mimic Dr. Seuss' characteristic style, it does not hold *his style* up to ridicule."<sup>6</sup> Penguin USA's attorneys, of course, had sought to justify the book as a commentary on *The Cat in the Hat* itself, arguing as follows:

The Parody is a commentary about the events surrounding the Brown/Goldman murders and the O.J. Simpson trial, in the form of a Dr.

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<sup>4</sup> *Dr Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9<sup>th</sup> Cir.), *cert. denied*, 521 U.S. 1146 (1997).

<sup>5</sup> *Dr Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9<sup>th</sup> Cir.), *cert. denied*, 521 U.S. 1146 (1997).

<sup>6</sup> *Id.*, 109 F.3d at 1401 (emphasis in original).

Seuss parody that transposes the childish style and moral content of the classic works of Dr. Seuss to the world of adult concerns. The Parody's author felt that, by evoking the world of *The Cat in the Hat*, he could: (1) comment on the mix of frivolousness and moral gravity that characterized the culture's reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as *The Cat in the Hat* in a way that implied that the work was too limited to conceive the possibility of a *real* trickster "cat" who creates mayhem along with his friends Thing 1 and Thing 2, and then magically cleans it up at the end, leaving a moral dilemma in his wake.<sup>7</sup>

However, the Ninth Circuit agreed with the lower court that this fair use defense was "pure shtick" and that defendants' "post-hoc characterization of the work" was "completely unconvincing."<sup>8</sup>

The Dr. Seuss case is thus a caution to publishers, producers or attorneys who might otherwise believe it is a simple matter to always come up with an argument that demonstrates that an original work was indeed targeted. For purposes of establishing a bona fide parody, it will not suffice, for example, to justify depicting a copyrighted character such as Mickey Mouse in an unusual sexual situation merely on the ground that one is thereby commenting on the sexual mores of the society in general.<sup>9</sup> Instead, one would have to argue, more precisely, that any such depiction comments on some quality inherent in the original character. Whether such arguments will be successful may depend on a variety of factors, including the judge and venue.<sup>10</sup> The same sort of problems arise with respect to

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<sup>7</sup> Quoted in *id.*, 109 F.3d at 1402-03.

<sup>8</sup> *Id.*, 109 F.3d at 1403.

<sup>9</sup> See *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9<sup>th</sup> Cir.), *cert. denied*, 439 U.S. 1132 (1979).

<sup>10</sup> Compare the *Air Pirates* case, *supra*, with *Mattel, Inc. v. Pitt*, 229 F.Supp.2d 315, 322-23 (S.D.N.Y. 2002) (holding that repainting and recostuming a Barbie doll head as "Dungeon

depictions of celebrities without a clear newsworthy purpose or a clear comment on the celebrity in question, and judicial opinions on such matters have varied widely.<sup>11</sup>

At the same time, publishers and producers should bear on mind that the distinction drawn between parody and satire does not preclude the use of a copyrighted image or work to satirize something other than the image or work itself. Comedians and political cartoons are forever using the latest slogans and advertising campaigns to make jokes that have nothing to do with the slogans and campaigns themselves. In 1975, when the motion picture “Jaws” first opened, literally dozens of political cartoonists appropriated the underwater image on the “Jaws” poster of a giant shark about to bite an unsuspecting female swimmer at the surface, putting a vast array of pairs of political labels on the respective shark and swimmer. Such uses had nothing to do with commenting on the motion picture itself, but simply made use of the popular image to comment on something else entirely, *i.e.*, the political issues of the day.

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Doll” was fair use because it was “comment on what [the defendant] perceive[d] as the sexual nature of Barbie”).

<sup>11</sup> Compare, *e.g.*, *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9<sup>th</sup> Cir. 2001) (magazine’s use, without authorization, of still photograph of actor Dustin Hoffmann from motion picture “Tootsie” to create composite computer-generated images falsely depicting him wearing fashion designers’ women’s clothes held protected under the First Amendment), *with Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (holding there was no “informational or newsworthy dimension” to unauthorized depiction of Muhammad Ali in magazine illustration as naked and seated in a corner of a boxing ring), *and Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973) (First Amendment did not preclude recovery under New York Civil Rights Law for photograph of plaintiff Cary Grant’s head on torso of model clothed in cardigan sweaterjacket in connection with magazine article dealing with clothing styles).

Even if they do not qualify as parodies, such “satirical” uses can still be justified in terms of the other statutory criteria for fair use, at least to the extent they appropriate only the amount necessary to make the point at issue and do not involve any harm to the market for the original work. As far as the many political cartoons featuring the “Jaws” shark and swimmer were concerned, Universal Pictures was so thrilled with the free publicity that it ran its own advertisements that simply featured dozens of the cartoons. However, publishers and producers must continue to be wary of uses of copyrighted images lacking any parodic element that arguably tarnish such images, since courts may be less inclined to cut them the same degree of slack in the name of general satire.<sup>12</sup>

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<sup>12</sup> See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 598 (1994) (concurring opinion, J. Kennedy) (“[C]ourts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else’s song or place the characters from a familiar work in novel or eccentric poses.”); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).