

BARBIE MEETS PRETTY WOMAN: SEXUAL PARODY AS “FAIR USE”

BY JOHN F. BURLEIGH, SENIOR COUNSEL, JACOBS DEBRAUWERE LLP

Though it may seldom appeal to the better angels of our natures, comedy that portrays a society’s heroes and icons in unexpectedly embarrassing and demeaning sexual circumstances has a longstanding pedigree. Sexual burlesques of heroic figures go back at least as far as certain vases, paintings and sculptures of the ancient Greeks and Romans that depicted such figures as Odysseus and Circe, and Hercules and Umphale, in ridiculous sexual circumstances. Because of the reproachful example they set, it is, indeed, often pleasing to see virtuous and heroic figures cut down a peg or two and shown by such means to be seemingly no better than the rest of us.

In modern America, where popular entertainers and trademarks enjoy the esteem formerly bestowed on heroes and statesmen, a more likely instance of such parody might be the kind of work that occasioned the 1981 case *MCA, Inc. v. Wilson*¹: a song entitled “Cunnilingus Champion of Company C” written to the tune of the World War II-era song “Boogie Woogie Bugle Boy of Company B,” which celebrated the eponym’s indicated talents and activities. Another such instance is the explicitly sexual portrayal of Mickey Mouse, Minnie Mouse and 15 other Disney characters in the “underground” comic strip involved in *Walt Disney Productions v. Air Pirates*.²

¹ *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). The song was featured in an Off-Broadway musical, “Let My People Come,” written by the son of Broadway columnist Earl Wilson.

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

Genuine parody has long been understood as a protected form of “fair use” under the American copyright law.³ Nonetheless, as the decisions against the fair use claims in *MCA v. Wilson* and *Walt Disney v. Air Pirates* reflect, until recently, courts have been reluctant to extend such protection to works whose primary ostensible parodic element is an explicitly sexual burlesque of an original work. In *Air Pirates*, the Ninth Circuit ruled that the defendant’s “substantially verbatim copying” was not fair use of the Disney characters because it took more than was necessary to achieve a parodic effect.⁴ Ostensibly avoiding the issue of whether sexual parodies are afforded less leeway than nonsexual parodies, the court in *Air Pirates* suggests that, for there to be a successful fair use defense, well-known cartoon characters must be visually caricatured and not parodied merely by placing them in comic or uncharacteristic situations.⁵ The untenable implication of *Air Pirates* is that it would never be fair use to use well-known comic-strip characters such as Charlie Brown, Mickey Mouse or Bugs Bunny in a parody without physically changing their features, even if the purpose of such use is a genuine, non-sexual parody of the characters or (in the case of such characters as Mickey Mouse and Bugs Bunny) their corporate masters.

Air Pirates is still ostensibly good law, however, especially in such characters’ judicial hometown, the Ninth Circuit, so publishers must be especially cautious in vetting ostensible

³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under [17 U.S.C.] §107.”).

⁴ *Walt Disney Productions v. Air Pirates*, 581 F.2d at 757. See *Benny v. Loew’s Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff’d by equally divided Court*, 356 U.S. 43 (1958).

⁵ *Walt Disney Productions v. Air Pirates*, 581 F.2d at 757-58.

parodies and other features that contain literal rendering of such famous cartoon characters.

In *MCA, Inc. v. Wilson*, the Second Circuit confronted the issue of sexual parody more directly (albeit conclusorily) with the following holding: “We are not prepared to hold that a commercial composer can plagiarize a competitor’s copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism. We conclude that defendants did not make fair use of plaintiff’s song.”⁶ At the same time, the court acknowledged nonsexual song parodies that were legitimate instances of fair use.⁷ The Second Circuit recognized the ease with which anyone who substitutes sexual lyrics for nonsexual ones, or who presents a literary or cartoon character in an unexpected sexual situation, can make the argument that he is thereby parodying the blandness, banality and conventionality of the original, and it was therefore reluctant to credit such a work’s *bona fides* as “parody.”

⁶ *MCA, Inc. v. Wilson*, 677 F.2d at 185. See also *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205-06 (2d Cir. 1979) (holding that, even if a “fair use” defense applied to trademark infringement claims, defendant’s use of the name and uniforms of the Dallas Cowboys Cheerleaders in its “sexually depraved film” would not qualify for such a defense).

⁷ *Elsmere Music, Inc. v. National B’cstg Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff’d*, 623 F.2d 252 (2d Cir. 1980) (“I Love Sodom,” “Saturday Night Live” parody of “I Love New York,” is fair use); *Berlin v. E.C. Pubs., Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (parody lyrics to “A Pretty Girl Is Like a Melody” are fair use). Such legitimate instances of song parodies were apparently distinguished on the more obvious grounds that, unlike the musical comedy song in *MCA, Inc. v. Wilson*, neither “had the intent of fulfilling the demand for the original.” *MCA, Inc. v. Wilson*, 677 F.2d at 184. See also *Fisher v. Dee*, 794 F.2d 432 (9th Cir. 1986) (“When Sonny Sniffs Glue,” parody of “When Sunny Gets Blue,” is fair use).

In 1994, however, the Supreme Court showed no such reluctance in *Campbell v. Acuff-Rose Music*. That case involved the rap group 2 Live Crew's song "Pretty Woman," which appropriated and trashed the lyrics of the Roy Orbison hit "Oh, Pretty Woman," in successive verses rendering her a "big hairy woman," a "bald headed woman," and a "two timin' woman," and featuring, in the Supreme Court's words, "degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."⁸ In respectful terms worthy of a *Rolling Stone* critic's discussion of the metaphysical implications of one of Bob Dylan's innumerable phases, the Supreme Court found a parodic element here:

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.⁹

Having established the work's "parodic element," the Court also lectured in familiar relativistic terms that it would be impermissible to distinguish protectable parodies from unprotectable ones on the basis of mere "taste": "The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.

⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 583.

⁹ *Id.*

Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.”¹⁰

The Second Circuit in *MCA, Inc. v. Wilson* apparently feared that a decision such as *Campbell* would open the floodgates to sexual travesties cloaking themselves as protected parodies and satires “on the mores of society.” Such fears may have been borne out by District Court Judge Laura Taylor Swain’s recent decision in *Mattel, Inc. v. Pitt*,¹¹ which involved what she delicately described as “an unadorned doll’s head sculpture.”¹² More specifically, defendant Susanne Pitt took the large Barbie head from Mattel’s “SuperStar Barbie,” repainted and recostumed it in “Lederhosen-style’ bavarian bondage dress and helmet in rubber with PVC-mask and waspie [sic],”¹³ and sold it as a “Dungeon Doll” on her dungeondolls.com website, which also “offered various sexual paraphernalia for sale.”¹⁴

Mattel claimed copyright infringement and moved for summary judgment, but Judge Swain, denying the motion, credited defendant’s fair use defense on the basis of *Campbell*.

With respect to the critical first fair use criterion, the purpose of defendant’s use, Judge Swain maintained the same respectful stance toward defendant’s “Dungeon Doll” that the

¹⁰ *Id.*, 510 U.S. at 582. One might have thought that the first statutory criterion for “fair use” in 17 U.S.C. §107, “the nature and character of the use,” would require a court to make a qualitative assessment of the use. Relying on Justice Holmes’ statements against courts or officials being the “final judges of the worth” of works for purposes of the minimal criteria for mere copyrightability, the Court in *Campbell* applies the same broad relativistic brush to the manifestly different issue of the scope of the fair use defense. *Id.*, 510 U.S. at 582-83 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

¹¹ *Mattel, Inc. v. Pitt*, 229 F.Supp.2d 315 (S.D.N.Y. 2002).

¹² *Id.*, 229 F.Supp.2d at 318.

¹³ *Id.* at 323.

¹⁴ *Id.*, at 318.

Supreme Court had maintained toward 2 Live Crew's efforts in *Campbell*: "Defendant asserts that she is at least in part attempting to comment on what she perceives as the sexual nature of Barbie through her use of customized Barbie figurines in sadomasochistic costume and/or storylines. The patently transformative character of the accused works and Defendant's representations concerning their purpose support sufficiently the fair use defense to weigh against plaintiff on the current record."¹⁵ In this vein, again following the Supreme Court's lead, Judge Swain adds: "Nor is the question of whether the Dungeon Dolls are in good taste relevant."¹⁶ Of course, any sexually oriented use of a copyrighted character (or lyric, or trademark, for that matter) can be defended in such vacuous terms as a "comment on what [defendant] perceives as the sexual nature of [fill in the blank]."¹⁷

It is difficult to reconcile the *Air Pirates* and *MCA, Inc. v. Wilson* decisions with the decisions in *Campbell* and *Mattel, Inc. v. Pitt*, although the former ostensibly remain good law.¹⁸ Much of the humor in certain television programs and magazines consists of placing

¹⁵ *Id.* at 322-23.

¹⁶ *Id.*, at 322 n.2.

¹⁷ Indeed, given the apparently inevitable recourse by judges to Holmesian relativism in this context, *see also, e.g., Dr Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 n.8 (9th Cir.), *cert. denied*, 521 U.S. 1146 (1997) ("Our analysis does not take into account whether *The Cat NOT in the Hat!* is in good or bad taste. As Justice Holmes explained, ..."), courts will be hard-pressed to confine the permissiveness of *Campbell* and *Mattel, Inc. v. Pitt* to merely sexually oriented materials. Although the short-term result of *Campbell* is to give sexual portrayal a leg up on other fair use purposes (because of the ease with which defendants such as Pitt can couch any such portrayal as a comment on sexual mores), defendants will no doubt argue that other ostensible purposes should be cut the same degree of slack.

¹⁸ Perhaps whistling past the graveyard, Justice Anthony Kennedy, in his concurring opinion in *Campbell v. Acuff-Rose Music*, 510 U.S. at 598, cites the *Air Pirates* decision in support of his statement that "courts should not accord fair use protection to profiteers who

celebrities, copyrighted characters or trademarked products in unexpected sexual circumstances. If *Mattel, Inc. v. Pitt* is, indeed, the sign of judicial decisions to come, the producers and publishers of such wares can breathe a collective sigh of relief. However, at this early stage, producers and publishers cannot afford to assume that all courts will adopt Judge Swain's approach and must therefore continue to operate more cautiously as though *Air Pirates* and *MCA, Inc. v. Wilson* remain good law.

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.”