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It's Not Funny: What Writers and Book Publishers Should Know about

Parody, Satire, and the Fair Use Privilege

With the consistent influx of new books entering the market, it can be difficult for writers and book publishers to exclusively produce titles that are original and not in some part imitations of previous works. Indeed, this imitation is sometimes purposeful, as works that satirize or make a parody of other stories have been created for almost as long as storytelling has been conceived. Works of satire and parody can quickly enter tumultuous judicial territory, however, because if a parodist or satirizer does not obtain proper permissions, the copyright owner of the original work can claim copyright infringement and pursue legal actions such as suing for damages or seeking an injunction to stop publication of the derivative work. A writer or publisher looking to produce a work that borrows from and comments upon a previous work while still staying in compliance with the law must put first aside any preconceived conceptions about how satire and parody are typically talked about in literature. Instead, they must look at these concepts in the way that the United States court system views them—as two different entities, one more legally protectable than the other.

This paper examines what book publishers and writers should consider when producing a work of parody, including the differences between satire and parody and how a court determines if a work is protected under the fair use privilege, which legally permits the use of a copyrighted work in specific instances that could include acts such as criticizing, commenting, and teaching. To illustrate these ideas—as well as point out the potential subjectivity involved in this type of

legal analysis—two case studies involving books that contain elements of satire and parody are discussed herein. It should be noted that nothing written in this paper is actual legal advice.

Anyone looking to publish a work of this nature is strongly encouraged to consult qualified, licensed legal counsel before doing so.

Parody vs. Satire

In the eyes of the court, a parody is a defined legal concept that, when classified correctly, can be considered a fair use defense against a copyright infringement claim. A work is classified as a parody when it is transformative, meaning it takes elements of an original copyrighted work and creates a new work that simultaneously comments on the old one. Despite the humorous image that the word “parody” evokes, it’s important to note that the court does not rule on whether or not a work is funny. “There is no humor defense for copyright infringement. You are not exempt from obtaining clearance of copyrighted material just because the material is used in a humorous way. There is only a parody defense, which is a subset of the fair use defense.”¹

A successful work of parody—at least in a legal sense—is what is referred to as a *transformative* work, meaning it must use “some elements of a prior author’s composition to create new one that, at least in part, comments on that author’s works.”² A parody that has the capacity to provide a social benefit by creating a new work while simultaneously expanding and commenting upon a previous work is one that is much more likely qualify for legal protection under the fair use privilege. When parody is recognized as having a socially significant value as free speech, a parodist is “permitted to use another’s copyrighted work if he takes no more than is necessary to ‘conjure up’ the object of the parody.”³ The idea of taking no more than is

¹ Cuartero, Victoria, Dan Satorius, and Michael C. Donaldson. “Parody, Satire, and Jokes.”

² Cuartero, Victoria, Dan Satorius, and Michael C. Donaldson. “Parody, Satire, and Jokes.”

³ Baroni, Michael. “The Limits of Parody. (Writer’s Copyright Infringement Limitations).”

necessary to allude to the parodied work will be examined in the next section discussing fair use factors and, as shown in the case studies, is often subjective.

Unlike parody, the court defines satire as something that takes elements from a copyrighted work to comment on something else that is not related to the work. “While a parody targets and mimics the original work to make its point, a satire uses the work to criticize something else, and therefore requires justification for the very act of borrowing.”⁴ Satire that uses another writer’s copyrighted work as the vehicle to comment on another target will almost never be considered fair use for writers that produce in a commercial market.⁵ When distinguishing if a work is considered a parody in a legal sense, remember that opposed to other satirical forms, parody “is a comment made in direct response to the original. . . . It is parody’s criticism of the *expression* of the original that makes parody eligible for the protection as fair use.”⁶

Fair Use Factors

For parody or any other unauthorized copy seeking protection under the fair use privilege, the court must always apply a four-pronged test of statutory fair use factors, codified in section 107 of the Copyright Act.⁷ The test is applied on a case-by-case basis, and though this list of factors is not exhaustive, the following four factors must all be weighed when deciding whether a work constitutes a 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;

⁴ Wilson Marshall, Juli, and Nicholas J. Siciliano. “The Satire/Parody Distinction. . . ,” 2.

⁵ Baroni, Michael. “The Limits of Parody. (Writer’s Copyright Infringement Limitations)” 1252–1251.

⁶ Smith, Marlin H. “The Limits of Copyright: Property, Parody, and the Public Domain,” 1247–1248.

⁷ Smith, Marlin H. “The Limits of Copyright: Property, Parody, and the Public Domain,” 1247–1248.

(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.⁸

Though each factor is considered in every fair use analysis, the factors are almost never weighed evenly. Factors will interact with each other, and, for example, “the more transformative the intended use, the less significance that may be given to other factors that could otherwise weigh against a finding of fair use, such as commercialism.”⁹

Even if the court determines before the fair use test that a work is parody, the test must still be employed. It is worth noting as well that employing the fair use test can lead to works being classified as fair use that may initially appear to be against the guidelines. For example, “even satire that does not target the original work can be considered fair use if, for instance, there is little possibility that consumers would view the satire as a commercial substitute.”¹⁰ Because of the case-by-case nature of applying the fair use factors, the line between parody and satire can quickly become blurred, and the case examples below will expand upon this thought.

Two Case Studies

In *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*, 924 F. Supp. 1559 (*Dr. Seuss*), the Ninth Circuit considered whether the producers of *The Cat NOT in the Hat! A Parody by Dr. Juice* had infringed on the copyright of Dr. Seuss’s works or were entitled to a free use defense.¹¹ The book, which told the story of the famous O. J. Simpson murder trial (Simpson trial) using the style of Dr. Seuss, was written by Alan Katz and Chris Winn, acquired by publisher Dove, Inc., and set to be distributed by Penguin Books. Before the book could be published, Dr. Seuss

⁸ Smith, Marlin H. “The Limits of Copyright: Property, Parody, and the Public Domain,” 1251–1252.

⁹ Fishman, Stephen. *The Copyright Handbook*, 253.

¹⁰ Wilson Marshall, Juli, and Nicholas J. Siciliano. “The Satire/Parody Distinction. . . ,” 3.

¹¹ Shapiro, Mary L., “An Analysis of the Fair Use Defense in *Dr. Seuss Enterprises v. Penguin*,” 1.

Enterprises, L.P., (Seuss Enterprises) the owner of the copyright for most of the works created by Theodor Geisel (Dr. Seuss), filed a complaint for copyright infringement as well as a motion for a preliminary injunction to prevent the book from being distributed to the public.¹²

The creators of *The Cat NOT in the Hat!* made no claims that the work wasn't inspired by Dr. Seuss's *The Cat in the Hat*. The facts of the Simpson trial were retold through "poems and sketches" similar to those used in the Dr. Seuss children's story; the "work was narrated by Dr. Juice, a character based on Dr. Seuss; and contained a character called "The Cat NOT in the Hat."¹³ In fact, the authors went so far as to classify the work as derivative on their own by including "A Parody" in the title. They argued that the work was a parody because it applied the childlike style of Dr. Seuss to an adult subject matter—commenting on both the "naiveté of the original" work in conjunction with the public's obsession with following every detail of the Simpson trial.¹⁴ The Ninth Circuit Court of Appeals, however, determined that the book had been misclassified by its creators and was, in the eyes of the court, a satire instead of a parody. The court claimed that *The Cat NOT in the Hat!* "did not poke fun at or ridicule Dr. Seuss. Instead, it merely used the Dr. Seuss characters and style to tell the story of the murder."¹⁵ The court noted that the use of the Cat in the Hat character's "stovepipe hat, Dr. Juice as a narrator, and a title similar to the original's title were all means of drawing attention to the new work, perhaps to 'avoid the drudgery of working up something fresh.'"¹⁶ The injunction was upheld, and Penguin Books was prevented from distributing 12,000 books, printed at an expense of \$35,000.¹⁷

¹² Shapiro, Mary L., "An Analysis of the Fair Use Defense in *Dr. Seuss Enterprises v. Penguin*," 3–4.

¹³ Fishman, Stephen. *The Copyright Handbook*, 273.

¹⁴ Fishman, Stephen. *The Copyright Handbook*, 273.

¹⁵ Stim, Richard. "Summaries of Fair Use Cases."

¹⁶ Shapiro, Mary L., "An Analysis of the Fair Use Defense in *Dr. Seuss Enterprises v. Penguin*," 22.

¹⁷ Fishman, Stephen. *The Copyright Handbook*, 273.

The court applied the four fair use factors to the case and reached a decision that the scale tipped away from fair use because of the following determinations: the purpose and character of the use was satirical, commercial, and nontransformative; the nature of the copyrighted work was creative and thus entitled to the highest level of infringement protection; the amount and substantiality used was not considered reasonable because the work was not a parody but instead a satire; and the distribution of the infringed work had the potential to negatively affect the market for the copyrighted works by damaging “substantial good will and reputation” associated with Dr. Seuss’s works.¹⁸

Suntrust v. Houghton Mifflin Co., 268 F.3d 1257 (*Suntrust*) tells a story similar to that of the *Dr. Seuss* case but with very different results. *The Wind Done Gone*, a book written by Alice Randall and published and distributed by Houghton Mifflin Co. (Houghton), “reimagines the story of *Gone with the Wind* by telling it from the perspective of Scarlett O’Hara’s black half-sister.”¹⁹ At the time of the *Suntrust* case, Suntrust Bank (Suntrust) was the trustee of the Mitchell trust, the copyright holder for Margaret Mitchell’s famous novel, *Gone with the Wind*. Suntrust considered the contents of *The Wind Done Gone* to be too similar to the original copyrighted work and sued both Randall and Houghton for copyright infringement and filed for an injunction to prevent *The Wind Done Gone* from continued distribution.

The Wind Done Gone is directly inspired by *Gone with the Wind* in that it copies characters, scenes, and plot elements from the prior book to create fictional diary entries written by Cynara, the illegitimate daughter a plantation owner, and Mammy, the slave who looks after the owner’s children.²⁰ When the case was originally heard in the U.S. District Court, the court

¹⁸ Shapiro, Mary L., “An Analysis of the Fair Use Defense in *Dr. Seuss Enterprises v. Penguin*,” 20–26.

¹⁹ “Copyright Law. Fair Use Doctrine. Eleventh Circuit Allows Publication of Novel Parodying *Gone with the Wind*,” 2364.

²⁰ Fishman, Stephen. *The Copyright Handbook*, 273.

granted Suntrust's preliminary injunction after considering the four fair use factors and determining that *The Wind Done Gone* had insufficiently transformed *Gone with the Wind*—to the court, it seemed more like a sequel than a parody. The District Court asserted that Suntrust had a “substantial likelihood of success” in winning the case.²¹ When the case reached oral arguments in the Eleventh Circuit, however, the injunction was reversed. The court ruled that the injunction represented “unlawful prior restraint” and had been granted in violation of the First Amendment. The Eleventh Circuit employed what seems to be a broader legal definition of parody than the District Court in this case, or, as described by the *Harvard Law Review*:

The Eleventh Circuit avoided expansive subjectivity and developed a cogent analytic process by which it could determine the parodic character of *The Wind Done Gone*.

Because various definitions of parody exist, a narrow definition requiring exclusively some combination of humor, comic effect, or ridicule is unduly constraining. Limiting the criteria of parodic analysis to variants in the realm of humor invites an inappropriately subjective inquiry as courts effectively assess the comedic success or quality of the parodic work rather than whether the new work comments on or criticizes the original.²²

The Wind Done Gone, the court held, should be considered a parody because the work's “aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.”²³ The Eleventh Circuit came to this decision by concluding that *The Wind Done Gone* produced “specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in the original work.”²⁴

²¹ “Copyright Law. Fair Use Doctrine,” 2365.

²² “Copyright Law. Fair Use Doctrine,” 2368.

²³ Fishman, Stephen. *The Copyright Handbook*, 274.

²⁴ “Copyright Law. Fair Use Doctrine,” 2371.

After the court determined that the work was a parody, the four fair use factors were considered in the following manner: the purpose and character of the use was indeed commercial, but this quality was given less weight because the work was also a parody and transformative; the fact that the nature of the copyrighted work was creative and thus entitled to the highest level of infringement protection didn't hold much sway because parodies "almost invariably copy publicly known, expressive works"; the amount and substantiality used was considered reasonable because the work was a parody and "must be able to 'conjure up' at least enough of [the] original to make the object of its critical wit recognizable"; and the court found that Suntrust did not provide sufficient evidence that the distribution of the infringed work had the potential to negatively affect the market for the copyrighted work.²⁵ *The Wind Done Gone*, the court concluded, was a parody entitled to fair use protections.

Takeaways

The different results of the *Dr. Seuss* and *Suntrust* cases—including the initial sway away from fair use protections in *Suntrust*—show how subjective a decision regarding parody and fair use privilege can be. Some may argue that the difference between these cases is that the "court didn't like *The Cat NOT in the Hat!*, while it did like *The Wind Done Gone*."²⁶ As one writer argues:

The *Cat* court said that authors' claim that their work commented on the naiveté of the Dr. Seuss stories was "pure shtick" and "completely unconvincing." In contrast, the *Wind* court said the book was a "critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*." Subjective decisions like these show why it can be so hard to predict if a parody is a fair use or not.²⁷

²⁵ "Copyright Law. Fair Use Doctrine," 2367–368.

²⁶ Fishman, Stephen. *The Copyright Handbook*, 274.

²⁷ Fishman, Stephen. *The Copyright Handbook*, 274.

This assertion ignores the possibility that the *Dr. Seuss* parody defense may have been as “unconvincing” as the court opined, but what is clear is that whenever a court evaluates whether a work can be classified as a fair use parody, the process is unavoidably subjective.²⁸

With so much subjectivity involved in classifying whether an unauthorized parody is entitled to fair use protections, it’s understandable that writers and book publishers may be wary of producing a work of this nature. The four fair use factors are weighed differently in every case, and it’s hard to know what specific aspects the court will give more weight to for or against a parody’s favor—such how much is *too* much when considering the amount and substantially of the portion used in relation to the copyrighted work. One thing seems fairly certain, though: when a court decides a work isn’t a parody in the legal sense, the fair use defense is much more likely to fail.²⁹ This analysis isn’t meant to deter writers from creating works of parody; in fact, a truly transformative parody can provide a societal benefit by helping readers comprehend the original text in a more sophisticated, multifaceted way. “Parody requires us to acknowledge texts as separate and distinct, while at the same time it requires us to understand that the existence of an intertextual relationship; the parody is an offspring of the original, but it is still intrinsically tied to it.”³⁰ Parodists and other writers of satire that want to avoid legal entanglements should remember the following guidelines:

. . . clear distinctions exist between parody and satire. Fair use allows a writer to use elements from another’s work in order to parody that work, but you should never use elements of another’s work as part of a satire. Satires must be either wholly original works or sanctioned by the holder of the original work’s copyright.³¹

²⁸ “Copyright Law. Fair Use Doctrine,” 2369.

²⁹ Fishman, Stephen. *The Copyright Handbook*, 273.

³⁰ Hall, Ashley E, Kathie Gossett, and Elizabeth Vincelette. “Parody, Penalty, and Pedagogy,” 190.

³¹ Baroni, Michael. “The Limits of Parody.

If writers and book publishers can distinguish the legal definitions of satire and parody, employ their own preliminary fair use analyses, and devote resources toward consulting the proper legal counsel before distributing a work, effective, transformative works of parody will have a much better chance to thrive.

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