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Copyright Fair Use: A Comment On the Parody Defense

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Posters, rap songs, television programs, movies and novels are all examples of works in which their authors used copyrighted material without permission and, when challenged, claimed their works were protected by the "fair use" doctrine. With increasing frequency, the success or failure of this defense depends on whether the challenged work "parodies" the pre-existing work. Because the criteria used to answer this question are subject to interpretation by the fact-finder—e.g., does the new work "comment on" or "transform" the work being parodied?—in order to provide flexibility in balancing the competing interests of the First Amendment and the copyright owner's ability to control his work, the parody fair use defense provides fertile ground for creative lawyering.

This article examines how courts have analyzed whether an asserted parody qualifies for fair use protection in the leading Supreme Court case of *Campbell v. Acuff-Ross Music Inc.*[1] and its progeny, including the recently issued, currently on appeal, decision from the Southern District of New York in *Salinger v. Colting*,[2] in which the parody fair use defense was rejected at the preliminary injunction stage.

The 1976 Copyright Act (17 U.S.C. §107) codified the previously existing common law fair use affirmative defense into a four-factor test that provides for consideration of (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. Although none of these factors, nor the preamble to §107, mentions "parody," ever since the Supreme Court's 1994 decision in *Campbell*, the parody fair use defense has been a popular refuge when an unlicensed use of a copyrighted work is challenged. Although the Supreme Court in *Campbell* addressed all four of §107's fair use factors, this article focuses on the first factor because, in practice, resolution of the first factor has generally been given prominent weight in determining the success or failure of the parody fair use defense.

The plaintiff in *Campbell*, the copyright owner of the Roy Orbison song "Oh Pretty Woman," contended that the musical group 2 Live Crew's unlicensed parody song, "Pretty Woman," constituted copyright infringement. Under its first factor analysis, the Supreme Court ruled that the new work must "comment on" and, preferably, "transform" the original author's work in order to qualify as a parody protected by the fair use defense.

The Court further ruled that the fairness of the use of an unlicensed work "diminishes" if the "commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh." In holding that the 2 Live Crew song was a protected parody, the Court ruled that its lyrics "can be taken as a comment on the naiveté of the original…[and] as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies." The Supreme Court found that the new song did not merely "supersede" the original work, but rather commented on it and transformed it into something with a different purpose or character that provided "new expression, meaning or message."

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High-Profile Cases

The Supreme Court's emphasis on whether the new work transforms and comments on the original has been employed in multiple high-profile parody fair use cases since *Campbell*. However, while the courts in these cases have applied the same analytic framework, the results are not always easy to reconcile. In *Suntrust Bank v. Houghton Mifflin Co.*[3] and *Leibovitz v. Paramount Pictures Corp.*,[4] the courts ruled that the works in question were legitimate, fair use protected parodies. In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA Inc.*[5] and *Salinger v. Colting*, supra, the courts found that the works in question were not.

In *Dr. Seuss*, the allegedly infringing work was an illustrated book about O.J. Simpson's double murder trial titled "The Cat Not in the Hat! A Parody by Dr. Juice." In addition to the similarities in the title and use of the image of Dr. Seuss' "Cat in the Hat" character, defendants' book employed Dr. Seuss' familiar poetic meter and language. The copyright owner of the Dr. Seuss works asserted copyright and trademark claims and sought to preliminarily enjoin the unlicensed exploitation of "The Cat Not in the Hat!"

Defendants argued that there was no copyright infringement because the challenged book was a fair use parody. Recognizing that the parody had to comment on Dr. Seuss' works in order to be protected, defendants argued, in part, that their work did this by evoking the world of "The Cat in the Hat" in order to comment on "the mix of frivolousness and moral gravity that characterized the culture's reaction" to the double murders. The U.S. Court of Appeals for the Ninth Circuit disagreed, labeling the argument a "post hoc characterization." While finding that defendants' work "broadly mimic[ked] Dr. Seuss' characteristic style," the Court ruled that it did not hold the style up to ridicule or otherwise comment on it. To the contrary, "The Cat Not in the Hat!" simply used Dr. Seuss' copyrighted material in its retelling of the Simpson murder highlights to "get attention" and "avoid the drudgery in working up something fresh."

Less than a year later, in *Leibovitz v. Paramount Pictures Corp.*, the U.S. Court of Appeals for the Second Circuit issued its first significant post-*Campbell* parody fair use decision. The plaintiff, Annie Leibovitz, a well known photographer of celebrities, claimed that a poster advertising the movie "Naked Gun 33⅓" infringed her copyright in the nude photograph she had taken of a seven-months-pregnant Demi Moore that appeared on the cover of Vanity Fair magazine. In the ad, the defendants superimposed the face of the movie's star, Leslie Nielsen, onto a photograph of a pregnant woman's body that was designed to replicate identically Ms. Leibovitz's photograph of Ms. Moore.

The Second Circuit held that the advertisement was transformative because of the stark contrast between the serious Demi Moore and the smirking Leslie Nielsen, replete with a pregnant stomach. After acknowledging that it was a closer question as to whether the advertisement commented on the original, the court ruled that the ad could reasonably be perceived

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as commenting, through ridicule, on the "seriousness, even the pretentiousness, of the original," and, therefore, did constitute fair use.

The different outcomes in the *Leibovitz* and *Dr. Seuss* cases illustrate the potential unpredictability of the parody fair use defense. One can certainly imagine the Ninth Circuit panel that decided *Dr. Seuss* rejecting the fair use rationale offered in *Leibovitz*. Just as the use of Dr. Seuss' copyrighted work was viewed as mimicry lacking in critical commentary, so, too, could Paramount's use of a famous, controversial photograph for its "Naked Gun 33⅓" advertisement be seen as simply using Ms. Leibovitz's copyrighted work in order to "get attention" for the movie while "avoid[ing] the drudgery of working up something fresh." As for the Second Circuit's finding that the poster commented on the photo's self-important seriousness, again, it is easy to imagine the Dr. Seuss panel viewing this justification as merely an after-the-fact rationale for the unlicensed use of the copyrighted photograph.

Challenges Over Novels

Contrasting rulings were also issued in two more recently decided cases in which *Campbell's* parody fair use analysis was applied to determine whether the challenged works—in each, a full-length novel that drew heavily on a hugely popular copyrighted novel and its characters—constituted copyright infringement. In a decision issued in 2001 that surprised many, the U.S. Court of Appeals for the Eleventh Circuit, in *Suntrust Bank v. Houghton Mifflin Co.*,[6] found the challenged work protected under the fair use doctrine.

The plaintiff in *Suntrust*, the owner of the copyright for the best-selling novel "Gone With the Wind" ("GWTW"), sued for copyright infringement and moved to preliminarily enjoin exploitation of a book titled "The Wind Done Gone" ("TWDG"), which the defendants described as "an inversion" of GWTW in which many of GWTW's story lines are told from the perspective of the slaves. Both the District Court and the Eleventh Circuit agreed that the first half of TWDG was "largely an encapsulation of [GWTW]" that incorporated GWTW's copyrighted characters, story lines and settings.

Despite finding that TWDG made "substantial use" of GWTW, the Eleventh Circuit vacated the preliminary injunction entered by the District Court, ruling that such use was "fair" because TWDG was "principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of GWTW." For example, the Eleventh Circuit found that TWDG eliminated the romanticism of the slavery depicted in GWTW and reversed GWTW's race roles, portraying whites as stupid or feckless and instilling in nearly every black character redeeming qualities not found in GWTW. In supporting its fair use ruling, the Eleventh Circuit stated that it "was hard to imagine how [the author] could have specifically criticized GWTW without depending heavily upon copyrighted elements of that book."

Eight years after the *Suntrust* decision, in *Salinger v. Colting*, Judge Deborah A. Batts of the Southern District of New York was faced with a copyright infringement claim in which the renowned author, J.D. Salinger, sought to preliminarily enjoin exploitation of an unlicensed novel that drew heavily on his classic novel, "The Catcher in the Rye." Fredrik Colting wrote the challenged book, "60 Years Later: Coming Through the Rye," under the pseudonym John David California. Mr. Colting admitted that his book's main character, "Mr. C.," was a 60-year-older version of Holden Caulfield, the famous protagonist of Mr. Salinger's novel. While the defendant did not deny that his book was a continuation of Mr. Salinger's novel—indeed it was marketed as a "sequel" in the United Kingdom and referenced many experiences that Mr. Salinger created for Caulfield in The Catcher in the Rye—Mr. Colting claimed that "60 Years" was a protected parody.

In support of his parody fair use position, Mr. Colting contended that "60 Years" commented on "The Catcher in the Rye," on Holden Caulfied, and on J.D. Salinger himself. The court was not persuaded. It cited Mr. Colting's pre-lawsuit statements and marketing materials as evidence that "60 Years" was intended as a sequel and Mr. C. as merely a 60-years-older Holden Caulfield having the same character traits and making the same kinds of observations as Caulfield made in "The Catcher in the Rye."

Unlike in *Suntrust*, where the Eleventh Circuit found that TWDG was "principally and purposefully a critical statement," Judge Batts ruled that "60 Years" "contains no reasonably discernable rejoinder or specific criticism of any character or theme of [The Catcher in the Rye]." The court found that Mr. Colting simply reiterated the characteristics of Holden that were thoroughly depicted in Mr. Salinger's novel, including the contrast between Caulfield's critical and rebellious nature and his tendency toward depressive alienation—concluding that "it is hardly parodic to repeat that same exercise in contrast, just because society and the characters have aged."

The court was equally dismissive of defendants' contention that "60 Years" was a protected parody because it commented on Mr. Salinger (who was included as a character in defendants' book). Because *Campbell* requires that a protected parody comment upon the copyrighted work that is the subject of the parody, the court found that commentary about Mr. Salinger was not commentary on either "The Catcher in the Rye" or Holden Caulfield and, thus, could not be a protected parody.

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Judge Batts' rejection of the parody fair use defense in *Salinger* is noteworthy because barely three months earlier, in *Bourne Co. v. Twentieth Century Fox Film Corp.*,[7] she sustained such a defense and granted the summary judgment dismissal of a music copyright infringement claim. Bourne is the copyright owner of the popular song "When You Wish Upon a Star," which The Walt Disney Company has used in television programming, television advertisements, its "Pinocchio" motion picture and its amusement parks. Bourne challenged defendants' inclusion of a song titled "I Need a Jew" in an episode of the television show "Family Guy" titled "When You Wish Upon a Weinstein." "Family Guy," as described by the court, "frequently contains irreverent, iconoclastic plotlines and pop-cultural references." In the episode, one of the main characters "wishes upon a Weinstein" because he thinks he will be richer if a Jewish man takes care of his money.

Judge Batts held that the song parodied "When You Wish Upon a Star" and was entitled to "fair use" protection. By pairing the "Family Guy" character's bigoted stereotypes of Jewish people with "When You Wish Upon a Star's" fairy tale world view, the court found that "I Need a Jew" commented on the original song's fantasy that wishing upon a star can make one's dreams come true, while also making the point that "any categorical view of a race of people is childish and simplistic, just like wishing upon a star."

Judge Batts supported her parody ruling by crediting defendants' evidence that "I Need a Jew" was also intended to comment on the "widespread belief" that Walt Disney was anti-Semitic, even though "When You Wish Upon a Star" did not concern Walt Disney personally. Notably, this ruling contrasts with the ruling in *Salinger* that Mr. Colting's claim that "60 Years" commented on J.D. Salinger personally did not support his parody defense because commenting on Mr. Salinger was not the same as commenting on "The Catcher in the Rye."[8]

The ruling in *Salinger* provides some reassurance to copyright owners that more than an after-the-fact rationale as to how the putative parody transforms and comments on the original is required and that the proffered parody will be subject to scrutiny. However, just as the criteria for determining when a parody qualifies as fair use are imprecise, the rigor with which the proffered parody is to be scrutinized is not subject to an established standard. As a result, the outcome in these cases appears to depend heavily on how great the deference (or strict the scrutiny) the judge hearing the case applies when evaluating whether the proffered parody qualifies as a "fair use" under *Campbell*.

The good news for copyright owners, is that *Suntrust*, at least so far,[9] did not begin a "trend." If *Salinger* had, like the *Suntrust* decision, found the use in "60 Years" to be "fair," novelists, screenwriters, movie producers and others might be tempted to devote their energy to figuring out how to incorporate established brand-named characters such as Harry Potter, James Bond and such animated icons as Shrek into their stories and to concocting parody rationales to support such use.

1. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).
2. *Salinger v. Colting*, 2009 WL 1916354 (SDNY July 1, 2009), appeal argued, No. 09-2878 (2d Cir. Sept. 3, 2009).
3. 268 F.3d 1257 (11th Cir. 2001).
4. 137 F.3d 109 (2d Cir. 1998).
5. 109 F.3d 1394 (9th Cir. 1997).
6. 268 F.3d 1257 (11th Cir. 2001).
7. 602 F.Supp.2d (S.D.N.Y. 2009).
8. Additional differences in the facts presented in *Salinger* and *Bourne Co.* may help explain their different outcomes. In contrast to the pre-lawsuit statements and marketing materials in *Salinger* that the court found to undercut the credibility of Mr. Colting's parody argument, in *Bourne Co.*, Judge Batts supported her fair use ruling by citing evidence demonstrating that defendants had intended from the outset to parody "When You Wish Upon a Star."
9. The final word in *Salinger* has not been written. Mr. Colting filed an expedited appeal, which was argued Sept. 3, 2009. Much of the argument concerned whether a preliminary injunction should have issued even assuming that a likelihood of infringement was established. While past precedent has supported presuming irreparable harm and issuing a preliminary injunction when a likelihood of copyright infringement is established, the Second Circuit appeared to take very seriously arguments challenging the application of that precedent on the grounds that (i) Mr. Colting's alleged infringement was not "simple piracy," and (ii) in *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006), the Supreme Court raised questions regarding the viability of issuing an injunction in a copyright infringement lawsuit based on a presumption of irreparable harm.