

## Litigation

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# When Parodists Wish Upon the Fair Use Star

A dream come true could be a nightmare.

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W O E TO THE COPYRIGHT lawyer asked to provide an opinion on fair use. The task of predicting whether a use falls on the fair or unfair side of the fair use dividing line can be perilous. In addressing such questions, the copyright attorney is often reduced to offering “on the one hand” and “on the other hand” circumlocutions followed by a somewhat definite “maybe.”

Analyzing whether an alleged “parody” constitutes fair use is an area that is particularly hazardous. This is because courts have arguably taken inconsistent approaches on the issue of whether “parody” may encompass works that parody the author of an underlying copyrighted work as opposed to the copyrighted work itself. As a result, an aspiring parodist needs steely resolve (or a deep-pocketed publisher willing to shoulder the risk) in order to tolerate the uncertainty associated with whether the work is protected parody, or satire (which is subject to a more exacting fair use analysis).

In the landmark case *Campbell v. Acuff-Rose*, the U.S. Supreme Court addressed the question whether the rap band 2 Live Crew’s re-working of the classic Roy Orbison song “Oh, Pretty Woman” constituted fair use. The Court made clear that parody can support a fair use claim, because parody helps generate socially valuable criticism. The Court observed that parody depends upon taking from the underlying work to criticize or mock the original.<sup>1</sup>

Courts have struggled with the question whether that argument extends to second comers who criticize or mock the creators of the originals as opposed to the underlying work itself. The Supreme Court arguably left that question unresolved in *Campbell*.

Such cases have forced district courts to balance the cherished American tradition of lampooning public figures with the rights of authors to prevent “unfair” or excessive borrowing of their works. District courts have yet to develop a consistent analytical approach in deciding these questions, and no court of appeals has squarely addressed the issue.

Several recent cases have grappled with it, however. The Southern District of New York recently accepted the “parody-the-author” fair use argument in a case

brought by the composer of “When You Wish Upon a Star” against the producers of the Family Guy animated television show. A different judge in the Southern District rejected it in a case brought by J.D. Salinger against the author and publisher of a work borrowing from Salinger’s iconic work “The Catcher in the Rye.”

To complicate matters further, the Central District of California, echoing an earlier decision from that same court also involving the Family Guy television show, recently endorsed the parody-the-author argument in a case brought by Don Henley (a songwriter and founding member of the successful 1970s soft rock band the Eagles) but then found no fair use on the facts before it.

Given these inconsistent approaches, one can expect continued litigation on the “parody-the-author” fair use defense.

### Fair Use, Explained

As the Supreme Court observed in *Campbell*, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”<sup>2</sup>

As the Second Circuit has explained, “Copyright law...must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them—or ourselves by reference to the works of others...”<sup>3</sup>

The fair use doctrine was codified in §107 of the 1976 Copyright Act.

A significant factor in determining whether a use is “fair” under U.S. copyright law is determining “whether the new work merely supersede[s] the objects of the original creation...or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>4</sup>

The Court in *Campbell* concluded, “[s]uch works...lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright...and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>5</sup>

In *Campbell*, the Court distinguished between “parody” and “satire,” finding the former to have an “obvious claim to transformative value.”<sup>6</sup> The “nub” of parody, as defined by the Court, “is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”<sup>7</sup>

Satire, in contrast, has been defined as use of a copyrighted work as a “vehicle to poke fun at another target.”<sup>8</sup>

The *Campbell* Court concluded that parody has a greater claim to fair use than satire since a parody “needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s...imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>9</sup>

Recently, several district courts have confronted arguments by purported parodists that they were seeking, at least in part, to criticize the author of the targeted work (as opposed to the work itself). These courts have struggled with the issue of whether criticism of an author falls on the parody or satire side of the fair use equation and, at times, have reached seemingly inconsistent conclusions.

### ‘Parody-the-Author’ May Be OK

Last year, the Southern District of New York accepted a variation on the parody-the-author claim in *Bourne Co. v. Twentieth Century Fox Film Corp.*<sup>10</sup>

There, the defendants had written a song for the television comedy Family Guy set to the tune of “When You Wish Upon a Star,” originally written by Leigh Harline and Ned Washington for the Disney film Pinocchio. In the Family Guy version, a character, Peter, decides he “needs a Jew” to help him achieve financial success.

Peter looks out of a window into the night sky, just as toymaker Gepetto did in Pinocchio as he wished for a “real boy.” Peter’s lyrics begin: “Nothing else has worked so far/So I’ll wish upon a star/Wondrous dancing speck of light/I need a Jew./Lois makes me take the rap/Cause our check-book looks like crap/Since I can’t give her a slap/I need a Jew.”

The show’s producers argued that their song mocked not only the original and its feel-good innocence, which the court agreed constituted parody, but also Walt Disney himself and his purported anti-Semitism. The defendants did not argue that the song mocked the lesser-known actual composers, but rather that Walt Disney and his alleged anti-Semitism were associated with the original in the public mind and was thus a fitting target for parody. The court approved this argument as supporting a parodic character, and granted summary judgment for the defendants.<sup>11</sup>

### But Not Necessarily

This April, however, just three months after the reclusive author J.D. Salinger died, the Second Circuit handed his estate a partial victory in what was a decades-

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long effort to protect “The Catcher in the Rye” from borrowers or adapters.

Salinger had accused author Fredrik Colting of infringing “The Catcher in the Rye” with his “60 Years Later: Coming through the Rye,” which was due to be published in the United States in September 2009. Colting’s book told the story of a supposedly 76-year-old Holden Caulfield, the adolescent protagonist of Salinger’s 1951 book, and inserted Salinger himself into the narrative.

In the Colting work, Caulfield, referred to as “Mr. C.,” haunts Salinger, who tries to bring Caulfield back to life in order to kill him. Caulfield increasingly discovers that he has free will, and grows defiant toward his creator. Ultimately, the Salinger character finds he cannot bring himself to kill Caulfield, and sets him free.

The new story, like the old, featured Caulfield as narrator, and made references to events in “Catcher in the Rye.” Though Colting had sought to market “60 Years Later” as a sequel, calling it “a marvelous sequel to one of our most beloved classics,” as the litigation proceeded, he asserted it was more of a critical commentary.

The Second Circuit, focused principally on the conclusion that the district court applied the wrong preliminary injunction standard, gave the fair use defense only passing consideration, suggesting, as had the district court, that it was not a close case. “Not one [factor] supports Defendants’ claim of fair use,”<sup>12</sup> the appeals court said. The Circuit agreed that Colting’s after-the-fact effort to defend his book as a critique of the original, thus lending it transformative value, was not credible.<sup>13</sup> And it let stand the district court’s conclusion that “Salinger is likely to succeed on the merits of his copyright infringement claim.”<sup>14</sup>

Left unresolved by the Second Circuit, however, was the lower court’s finding that a work that criticizes only the author, and not the work itself, does not qualify as a parody. The district court held: “While the addition of Salinger as a character in ‘60 Years’ is indeed novel, the Court is unconvinced by Defendants’ attempts to shoehorn Defendants’ commentary and criticism of Salinger into the parodic framework of *Campbell*, which requires critique or commentary of the work.”<sup>15</sup>

“60 Years Later,” the district court held, “is at most, a tool with which to criticize and comment upon the author, J.D. Salinger, and his supposed idiosyncra[s]ies. It does not, however, direct that criticism toward ‘Catcher’ and Caulfield themselves, and thus is not an example of parody.”<sup>16</sup>

The Second Circuit was silent on that issue, observing only the fact of the lower court’s rejection of the parody-the-author argument in *Salinger*, without wading into whether it was appropriate under *Campbell*.<sup>17</sup> Nor did the court address what were arguably conflicting rulings by the Southern District on the issue of parody-the-author as a fair use argument.

### California Disagrees on ‘Campbell’

In assessing a copyright infringement claim brought by the musician Don Henley against the creators of an online political advertisement, the Central District of California explicitly disagreed with the Southern District on a key interpretation of *Campbell*.

As noted above, in *Salinger*, the district court found, relying upon *Campbell*, that a work claiming protection as parody must necessarily comment on the work and not the author of the work. The California district court took a more expansive view, finding nothing in *Campbell* to foreclose parodies aimed at authors.<sup>18</sup> “In fact, the [*Campbell*] Court recognized that parody resists a strict definition. Under *Campbell*’s reasoning, rather than its precise phrasing, criticism of the author

via the author’s works may fit within the structure of protectable parody.”<sup>19</sup>

The Central District of California then analyzed the case based on the assumption that parody-the-author may constitute legitimate fair use.<sup>20</sup>

In *Henley*, the defendant, Chuck DeVore, in an ultimately failed bid for the Republican U.S. Senate nomination in California, repurposed two Don Henley songs. First, DeVore and his aide Justin Hart, a co-defendant in the case, turned Henley’s “The Boys of Summer” into a campaign song called “The Hope of November.” Incorporating the melody of the 1984 Henley hit from a karaoke version found online, Hart rewrote the lyrics to attack both President Obama and House Speaker Nancy Pelosi.

The original’s opening lines, “Nobody on the road/nobody on the beach/I feel it in the air/The summer’s out of reach” became “Obama overload/Obama overreach/We feel it everywhere/Trillions in the breach.”<sup>21</sup>

After Henley requested that YouTube take down the video, DeVore allegedly high-fived a staff member, believing he “had struck a vein of gold” with a controversy that would generate campaign donations.<sup>22</sup> He and Hart then set about making a second video, this one set to the music of Henley’s “All She Wants to Do Is Dance,” re-titled “All She Wants to Do Is Tax,” a jab at his would-be general election rival, Democratic Senator Barbara Boxer.

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In the place of the opening lyrics “They’re pickin’ up the prisoners and/puttin’ ’em in a pen/And all she wants to do is dance, dance,” Hart and DeVore substituted: “They’re picking up the taxpayers and/puttin’ ’em in a jam/And all she wants to do is tax, tax.”<sup>23</sup>

The *Henley* court concluded that “The Hope of November” met the parody test by ridiculing Henley as a putative Obama supporter.<sup>24</sup> (Henley disputed the notion that he leans liberal, saying in court papers that he had donated to and backed Republican candidates including Senator John McCain.)<sup>25</sup>

Henley, the defendants said, could be viewed as the narrator of “November,” since he was the singer of “The Boys of Summer.” Just as the narrator of the original pined for a bygone summer, Henley in the new song was a liberal lamenting Obama’s shortcomings, and pining for the hopeful days of his campaign, DeVore argued.

The court accepted this argument: “Here, ‘November’ pokes fun at Obama and the naivete and subsequent disappointment of his supporters, which includes Henley, the song’s narrator,” the court said.<sup>26</sup> Nevertheless, the court said, this mocking of Henley was a “relatively minor element” of a song that primarily took aim at Obama, and copied the original song too extensively.<sup>27</sup>

The court found no parodic value in “All She Wants to Do Is Tax.” The new song commented neither on “All She Wants to Do Is Dance” nor on Henley. “The Defendants evoked the same themes of the original in order to attack an entirely separate subject. This is satire, not parody. . . . The Defendants have innumerable alternatives with which to mock Boxer and her policies,” the court held.<sup>28</sup>

While the court said satire may sometimes qualify for fair use protection, it “faces a higher bar . . . because it requires greater justification for appropriating the original work.”<sup>29</sup> The Henley copies did not meet this higher threshold, the court found. Unlike other satires that have found protection in fair use, the two songs did not represent “intense transformation[s],” and were more than “minor appropriation[s].”<sup>30</sup> Accordingly, the court granted summary judgment in the plaintiffs’ favor on the issue of copyright infringement of both songs.

### Conclusion

For someone seeking to harpoon an author of a work, the sharpest spear available may well be mimicry of the target’s works. How better to slay those who have come before than with their own words? But deciding whether such mockery is fair use or not may depend to a very large degree on the subjective impressions of the reviewing court.

President Harry Truman famously once said “I’m tired of economists who say, ‘On the one hand . . . and then on the other hand.’ Send me a one-armed economist.” One imagines that President Truman would have expressed similar frustration if confronted with a copyright lawyer’s opinion on fair use.

However, given the arguably inconsistent approaches to date on fair use issues relating to parody, copyright lawyers may well have to be two-handed analysts until a consistent calculus emerges as to parody-the-author fair use defenses.

1. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579-80 (1994).

2. *Campbell*, 510 U.S. at 575 (quoting U.S. Const., Art. I, § 8, cl. 8).

3. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).

4. *Campbell*, 510 U.S. at 579 (internal quotations and citations omitted).

5. *Campbell*, 510 U.S. at 579 (internal quotations and citations omitted).

6. *Campbell*, 510 U.S. at 579.

7. *Campbell*, 510 U.S. at 580.

8. *Dr. Seuss Enters., L.P. v. Penguin Books USA Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

9. *Campbell*, 510 U.S. at 580-81.

10. *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499 (S.D.N.Y. 2009).

11. *Id.* at 507-508.

12. *Salinger v. Colting*, 607 F.3d 68, 73 (2d Cir. 2010).

13. *Id.* at 83.

14. *Id.*

15. *Salinger v. Colting*, 641 F. Supp. 2d 250, 261 (S.D.N.Y. 2009).

16. *Id.*

17. *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010).

18. *Henley v. DeVore*, No. SACV 09-481 JVS, 2010 WL 2533388 (C.D. Cal. June 10, 2010).

19. *Id.* at \*7.

20. The Central District of California reached the same conclusion in another case involving the Family Guy television show. *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007). In *Burnett*, the Family Guy created a crude knockoff of Carol Burnett’s character. The court rejected plaintiffs’ objection that targeting the entertainer was not valid parody. “[I]t is immaterial whether the target of Family Guy’s ‘crude joke’ was Burnett, the Carol Burnett Show, the Charwoman, Carol’s Theme Music or all four,” the court held. 491 F. Supp. 2d at 968.

21. *Id.* at \*9.

22. *Id.* at \*19.

23. *Id.* at \*23.

24. *Id.* at \*10.

25. *Id.* at \*8.

26. *Id.* at \*10.

27. *Id.*

28. *Id.* at \*11.

29. *Id.*

30. *Id.* at \*12.