As Fair as They Wanna Be—The U.S. Supreme Court Upholds the Fair Use Parody Defense

The U.S. Supreme Court has lined up with earlier court rulings that parody may be considered a fair use of underlying copyrighted material

by David R. Ellis

For the first time in almost a decade, the U.S. Supreme Court has issued an opinion in a case involving the doctrine of fair use in copyright law, this time in the context of a parody of the Roy Orbison standard, "Oh, Pretty Woman," by the rap group 2 Live Crew, on its album "As Clean As They Wanna Be." The case, *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (March 7, 1994), will be discussed below, after an overview of other recent developments in the law of fair use.

The fair use doctrine is a statutory exception to the copyright owner's exclusive rights under the Copyright Act to reproduce, adapt, and distribute his or her copyrighted work and, for certain types of works, to perform and display the work publicly. 17 U.S.C. §106. Under §107 of the Copyright Act, the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement. In determining whether a particular use is fair, the courts consider the following factors on a case-by-case basis:

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. 17 U.S.C. §107.

Because fair use cases are decided on a fact-intensive, case-by-case basis, the law is often unclear in particular circumstances. A wide variety of cases have been decided over the past decade, starting with two Supreme Court decisions in the mid-eighties, *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) (the Betamax case), and *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (Gerald Ford's memoirs). A year ago, Congress amended §107 to clarify one unsettled area of the fair use doctrine, and the Supreme Court in *Campbell* has now provided direction in another area. Below is a summary of several leading cases relating to fair use, by category.

Unpublished Works

In *Harper & Row v. Nation Enterprises*, the U.S. Supreme Court held that publication by the *Nation* magazine of excerpts from Gerald Ford's unpublished memoirs constituted copyright infringement. In focusing on the second fair use factor, the *nature* of the work, the Court ruled that the fact that a work is unpublished is a critical part of its nature, and the scope of fair use is narrower with respect to unpublished works than to published works. Therefore, the unpublished nature of a work is a key, although not necessarily dispositive, factor tending to negate fair use.

In two subsequent decisions, *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987), and *New Era Publications v. Henry Holt Co.*, 873 F.2d 576, *rehearing en banc denied*, 884 F.2d 659 (2d Cir. 1989), the court of appeals for the Second Circuit reemphasized the narrow scope of fair use for unpublished works. Both cases involved the unauthorized use of unpublished letters and other writings of famous authors, J.D. Salinger (author of *The Catcher in the Rye* and *Franny and Zooey*), and L. Ron Hubbard (Scientology founder and science fiction writer), in biographical accounts that were objected to by the subject or his heirs. In *Salinger*, the court ruled that unpublished works "normally enjoy complete protection," but in a subsequent case, *Wright v. Warner Books*, 953 F.2d 731 (2d Cir. 1991), the court permitted some use of unpublished writings, thereby rejecting a per se rule against all use of unpublished works. Two other recent cases from the Second Circuit were *New Era Publications v. Carol*, 904 F.2d 152 (2d Cir. 1990), in which the use of Hubbard's *published* writings was held to be a fair use, and *Lish v. Harper's Magazine Foundation*, 807 F. Supp. 1090 (S.D.N.Y. 1992), in which unauthorized publication of an edited version of an unpublished letter was held not to be a fair use.

As a result of these cases, a number of commentators, historians, biographers, and publishers complained that the courts had gone too far in protecting unpublished works, thereby limiting

the use of primary sources like letters and diaries in producing nonfiction works. They, therefore, asked Congress to overrule these judicial precedents, and were rewarded in October 1992 with the enactment of Public Law 102-492, which added this sentence to §107: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." This means that courts will now fully weigh each of the prescribed statutory fair use factors and not give overwhelming weight to the unpublished nature of the work.

Educational and Research Uses

Two recent test cases in the Second Circuit focused on whether "productive" uses such as copying for educational or research purposes (which tend to be favored by society and the courts) can be considered fair use when done by profit-making businesses for commercial purposes, which the Supreme Court has said is "presumptively unfair." *Sony*, 464 U.S. 417. In *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), several major publishing houses sued Kinko's print shops for copying, without permission and without paying royalties, excerpts from books, and binding them into anthologies for sale to college students. The court held this not to be a fair use because the commercial nature of the use outweighed the educational purpose and served to supplant rather than transform the plaintiffs' works in the marketplace, thereby depriving the authors and publishers of profits they would otherwise have earned.

In *American Geographical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), scientists employed by Texaco, a profit-seeking company, had made photocopies of articles published in scientific and technical journals for research purposes. Recognizing that scientific research is a productive use, the court nonetheless rejected the defense of fair use because of the commercial nature of Texaco's use. The court contrasted Texaco's commercial use with that of the use made by scientists at the National Institute of Health and National Medical Library in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975). There the copying was done by governmental nonprofit organizations devoted exclusively to the advancement of science and was held to be a fair use. The *Texaco* case is now on appeal to the Second Circuit.

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Reverse Engineering of Computer Programs

In two cases decided in the summer of 1992, the Federal Circuit in Washington, D.C., and the Ninth Circuit in California were called upon to determine the scope of fair use in the context of reverse engineering of computer programs embedded in video games. The two cases were *Atari Games Corp. v. Nintendo of America*, 975 F.2d 832 (Fed. Cir. 1992), and *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

In the two cases, the courts ruled that "intermediate" copying of computer software by disassembling the program code for the purpose of reverse engineering could be a fair use. Both of the plaintiffs were video game manufacturers whose programs had been copied by competitors in order to understand how the programs functioned so that they could develop additional games to play on the plaintiffs' consoles. Since the purpose of the copying was to understand the programs' unprotected ideas (and then to develop new programs), rather than merely to pirate the protected expression of the programs themselves, the courts ruled that the copying could be a fair use. This was particularly so since intermediate copying was the only practical way for the defendants to learn enough about the programs to enable them to develop compatible games and compete in the video games market.

For more on these cases, see my article "Chips, Locks and Video Games: Courts Rule on the Scope of Protection in Computer Copyright Cases," in the July/August 1993 issue of The Florida Bar *Journal*, p. 75.

Parody

In *Campbell v. Acuff-Rose*, 114 S. Ct. 1164, the Supreme Court considered the fair use defense in the context of a parody version of a copyrighted song. In 1991, the U.S. district court in Nashville had ruled that 2 Live Crew's use of Roy Orbison's rock ballad "Oh, Pretty Woman" in a parody version on the rap album "As Clean As They Wanna Be" qualified as fair use. 754 F. Supp. 1150 (M.D. Tenn. 1991). On appeal, the Sixth Circuit Court of Appeals reversed in a split 2-1 decision. 972 F.2d 1429 (6th Cir. 1992). The majority held that the commercial nature of the parody rendered it "presumptively unfair," citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, and that by taking the "heart" of the original, the rap group had taken too much of the work to qualify as fair use, *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) (Gerald Ford's memoirs). The dissenting judge, however, argued that the mere fact that the parodists hoped to make money from their song did not make their use presumptively unfair, since the defendants were not merely *reproducing* the copyrighted work, but were *transforming* it for the more creative purpose of criticism and parody.

In light of the conflicting opinions in the lower courts, the Supreme Court granted certiorari to resolve the fair use debate. In rendering its decision, the Court had the benefit of reviewing an entertaining line of parody cases dating to the early 1950's.

The first significant case to address the fair use defense in a parody situation was *Benny v. Loews, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958). There the court ruled that the defendants, in presenting a "burlesque" version of the movie "Gas Light" as "Autolight" on the Jack Benny television show, had appropriated too substantial an amount of the plaintiff's

work and thus could not prevail on a defense of fair use.

However, in *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955), the same trial judge who had ruled against the defendants in *Benny* found that a parody of the movie "From Here to Eternity" called "From Here to Obscurity" on the Sid Caesar show was a fair use. The judge said: "Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about . . . [the] recalling or conjuring up of the original."

In *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964), the plaintiffs were Irving Berlin and other songwriters; the defendant was *Mad Magazine*, which had published satiric parody lyrics of 57 popular songs in "More Trash From Mad—A Sickening Collection of Humor and Satire From Past Issues." In holding that the lyrics to such titles as "The First Time I Saw Maris" and "Louella Schwartz Describes Her Malady" were fair use, the court said: "[W]e believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." Thus, "where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper."

In *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), the defendants published an underground comic book which "centered around a rather bawdy depiction of the Disney characters as active members of a free-thinking, promiscuous drug ingesting counter culture." In ruling against a claim of fair use, the court found that the defendants had copied the Disney characters verbatim whereas they could have drawn recognizable caricatures that would have recalled the original. The court ruled that the parodist can use only what is necessary to conjure up the original, not so much as might satisfy the desire to make the "best parody" of a copyrighted work.

Subsequent parody cases have gone both ways. In *Dallas Cowboys Cheerleaders, Inc. v. Scorecard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979), the court rejected a fair use defense in the case of a poster showing five topless former Dallas Cowboys cheerleaders. However, in *Pillsbury Co. v. Milky Way Products*, 215 U.S.P.Q. 124 (N.D. Ga. 1981), the court ruled that the defendant's pornographic depiction of the Pillsbury doughboy and doughgirl characters was a fair use parody. Appellate courts were also split in three song parody cases: *Compare Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 (2d. Cir. 1980) ("I Love Sodom" for "I Love New York"), and *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) ("When Sonny Sniffs Glue" for "When Sunny Gets Blue") (fair use), *with MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) ("Cunnilingus Champion of Company C" for "Boogie Woogie Bugle Boy of Company B") (not fair use, by a 2-1 decision).

In Campbell, *the Supreme Court reversed the Sixth Circuit's decision that the commercial nature of a parody precluded a finding of fair use*

In *Campbell*, the Supreme Court reversed the Sixth Circuit's decision that the commercial nature of a parody precluded a finding of fair use. Justice Souter, writing for a unanimous Court, said that parody, like other comment or criticism, *may* qualify as fair use, but fair use should not be presumed unless all of the relevant fair use factors are examined. For the purpose of determining whether a parody was fair use, the threshold question was whether the parodic character of the use could reasonably be perceived, not whether the parody was in good taste or bad. Quoting Justice Holmes, the Court said "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

The Court then considered each of the four statutory fair use factors. As to the first fair use factor, the purpose and character of the use, the Court said that the appeals court had erroneously limited its inquiry of this factor essentially to one relevant fact, the commercial nature of the rap group's use. It had then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony* that "every commercial use of copyrighted material is presumptively unfair." However, the Court said that the fact that a use is commercial, as opposed to nonprofit, is but one element of the first fair use factor analysis. Commerciality tends to weigh against a finding of fair use, but it does not bar a finding of fair use in every case.

As to the second statutory factor, the nature of the copyrighted work, the Court found that the original song's creative expression for public dissemination fell within the ambit of copyright's protective purposes. However, said the Court, this fact was not much help in this case, for the creative nature of the underlying work was not "ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."

In considering the third fair use factor, the Court said that the appeals court erred in finding that the amount and substantiality of the use was unreasonable as a matter of law. Although the group took the "heart" of "Oh, Pretty Woman," the Court said that it is the heart that most readily conjures up the original song for parody, and it was the heart at which the parody took aim. "When parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable." The Court thus found that the rap group's use of the original song's lyrics was not excessive, but remanded to the lower court the question of whether the group's repetition of the original's bass riff was excessive copying in light of the song's parodic purpose and charac-

ter, transformative elements, and potential for market substitution.

As to the fourth fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, the Court rejected the appeals court's ruling that the wholly commercial nature of the group's use created a presumption of likelihood of future harm. Because the group copied "Oh, Pretty Woman" for the purpose of parody and not it in its entirety or merely for commercial purposes, the parody was not a *substitute* for the original, but rather was a *transformative* use, serving different market functions from the original. The plaintiffs also did not show that 2 Live Crew's use of the original harmed a potential rap market for the song.

Having weighed all four statutory fair use factors, the Supreme Court reversed the appeal court's ruling that a commercial parody could not be a fair use of a copyrighted work. The Supreme Court has thus demonstrated that it has a sense of humor, and further recognized, in Justice Souter's words, that parody, "like less ostensibly humorous forms of criticism . . . can provide social benefit, shedding light on an earlier work, and in the process, creating a new one." The Court has now lined up with those earlier courts that have held that parody, like other forms of comment or criticism, may be considered a fair use of underlying copyrighted material.❐

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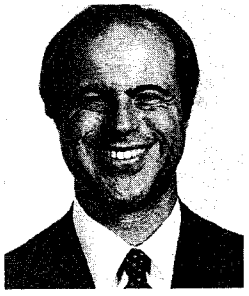

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This column is submitted on behalf of the Entertainment Arts & Sports Law Section, Garland Hogan, chair, and Jean Perwin and Joe Fleming, editors.

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