

Walt Disney Productions v. Air Pirates (581 F.2d 751)

This Circuit Court case from 1978 involved a suit by Disney alleging copyright infringement of its characters by Air Pirates for its adult counter-culture comic book. Air Pirates mocked Disney's Silly Symphony books with its own Silly Sympathies line of comics; the defendant also parodied well-known Disney characters such as Toby Tortoise and Max Hare by changing their personalities. Judge Cummings deliberated back and forth over both (1) whether or not a character from an illustrated book could be copyrighted, and (2) whether or not the change in personalities of the characters was enough to warrant a claim to fair use.

Ultimately, Judge Cummings ruled in favor of Disney, writing that "Defendants' assertion that they copied no more than necessary appears to be based on an affidavit, which stated that 'the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, and upon closer examination is discovered to be quite something else.' The short answer to this assertion, which would also justify substantially verbatim copying, is that when persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take as much of a component part as they need to make the "best parody." Instead, their desire to make the 'best parody' is balanced against the rights of the copyright owner in his original expressions." [7]

Though he cited as important Air Pirates' defense that their characters--though similar in appearance and clearly meant to mock Disney's characters--"parodied [Disney characters'] personalities, their wholesomeness and their innocence," Judge Cummings' ruling was ultimately decided primarily by the third copyright factor: the amount and substantiality of the portion taken.

This was an important ruling because it was cited in *Original Appalachian Artworks v. TOPPS Chewing Gum*, and in that case helped with the ruling that the Garbage Pail Kids were a copyright infringement of the Cabbage Patch Kids. The precedent set here that a parody cannot be the “best parody” without copying more than fair use allows was later overturned in *Campbell v. Acuff-Rose Music*, which established that sometimes a parody *must* be the “best” in order for it to qualify for fair use.

ORIGINAL APPALACHIAN ARTWORKS v. TOPPS CHEWING GUM (642 F. Supp. 1031)

Following the ruling of copyright infringement against the defendant in *Disney v. Air Pirates*, the court ruled that TOPPS infringed on the Cabbage Patch Kids with their parodic trading cards, the Garbage Pail Kids. Partially following the precedent set in *Disney v. Air Pirates* that taking too much in order to make the “best parody” could constitute infringement, Judge Tidwell focused on the first and fourth copyright factors: the purpose and character of the use, and the effect of the use upon the potential market, respectively.

As to the first factor, Judge Tidwell argued that the two products were competing against each other in the same market; however, this ignores the obvious: namely, that the Garbage Pail Kids catered to a wholly different audience than the Cabbage Patch Kids and so, though they might have had similar products in the same market, they were not competing against each other by virtue of the different tastes of their respective audiences. More succinctly, the Cabbage Patch Kids catered to the “wholesome” crowd, while the Garbage Pail Kids catered to the “gruesome” crowd; to argue that they competed against each other is akin to saying that Budweiser competes against Pepsi since both are drinks.

As to the fourth factor, Tidwell makes note of the decision in *Sony v. Universal* that “There is a presumption that commercial use of a copyrighted product naturally produces harmful effects.” However, this misinterprets the intent of the *Sony* decision, which was meant to limit complete copying (such as videotaping) for commercial use, not uses that may in fact be transformative.

Finally, Judge Tidwell quotes favorably from *DC Comics v. Unlimited Monkey Business*, involving parody of Wonder Woman and Superman: “Defendants do not engage in critical

comment that constitutes part of the 'free flow of ideas' underlying the doctrine of fair use. Instead, they seek to augment the commercial value of their own property by creating new, and detrimental, associations with plaintiff's property." Tidwell uses this negative language throughout the decision, and makes it clear that he has a low opinion of the Garbage Pail Kids. This is the unofficial fifth fair use consideration: whether you are "good" or "bad." To Tidwell, the Garbage Pail Kids were clearly "bad" because they were crass commercialized products that took much but added nothing.

What is so astounding about this case and *Disney v. Air Pirates* is that they seem so blatantly and obviously wrong in retrospect. However, in both cases the judges ruled primarily based on flawed precedent that ended up being perpetuated. It's hard to the judges too much because precedent is such an important part of the legal process. And if there is one positive to arise from these two decisions it is that, with the ruling in *Campbell v. Acuff-Rose Music*, fair use and parody were spelled out and handled head-on instead of remaining the nebulous entities they previously had been.

**Unfair Use: The Lack of Fair Use Protection for Satire Under § 107 of the Copyright Act --
Adriana Collado, Journal of Technology: Law & Policy (June 2004)**

This article gives a summary of fair use and parody decisions and attempts to show how satire should be protected under fair use because it is transformative. The primary argument against protecting satire under fair use is that “owners are likelier to allow use of their works in satire because satires do not target the copyrighted works directly” (II.A). This, of course, ignores the problem encountered in cases such as *Dr. Seuss Enterprises v. Penguin Books USA*, where, for instance, “satirists that propose using copyrighted works to criticize something else in an offensive manner are not likely to be granted licenses because copyright owners may fear the use will reflect negatively on their works” (IV.A). That is, courts have reasoned that because specific copyright holders aren’t being directly targeted by satirists, they will gladly license their work.

This line of reasoning willfully ignores reality; however, this reasoning still should not preclude fair use of satire, as, Collado notes, “reputational harm is not an interest that copyright law is designed to protect” (IV.A). Certain copyright holders, such as Disney and Dr. Seuss, notoriously guard their property against parody. Yet because of the rich nature of these works, they are ripe for parody and satire; by disallowing fair use of satire, the law in effect stifles the free speech and creativity of new authors. “The assumption,” writes Collado, “a satirist can ‘shop around’ for copyrighted works to employ in his satire ignores the nature of the creative process” (IV.C).

Finally, we may be headed towards a future where a court will rule that satire is protected under fair use. As Collado notes, “In *Campbell [v. Acuff-Rose Music]*, the Supreme Court defined satire as ‘commentary.’ In turn, the Fair Use Doctrine states ‘fair use of a copyrighted work ... for

purposes such as criticism [and] comment ... is not an infringement of copyright” (V). If a court were to acknowledge this--and the Supreme Court has nearly already done so with *Campbell*--then it would place satire under the fair use umbrella alongside parody. This would have an enormous impact on society; however, because most satire, like parody, does not compete in the same market as the original work, there can be little argument besides greed and prudishness against this result. Yet, as noted before, prudishness cannot be a legal justification for stifling free speech; as for the competing markets: satires and parodies, by their very natures, nearly never compete in the same markets as their progenitors, which would render moot the main argument against their fair use.

The Wind Done Gone, the Law Done Wrong?: Fair Use and the First Amendment in *Suntrust Bank v. Houghton Mifflin Co.* -- Sarah A. Gessner, 35 Conn. L. Rev. 259 (Fall 2002)

In this article, Gessner lays out the case of *Suntrust v. Houghton Mifflin*, which involved an infringement suit brought by the estate of Margaret Mitchell, author of *Gone With the Wind*, against Alice Randall, who wrote *The Wind Done Gone*. The latter was written as commentary and criticism of the former, which glorified the Antebellum South while denigrating African Americans.

Despite the fact that *The Wind Done Gone*'s publisher, Houghton Mifflin, marketed the work as parody, Suntrust, which represented Mitchell's estate, claimed that the work competed in the same market as *Gone With the Wind*, which still remains popular in all its forms. The article notes that "The Mitchell Trust had authorized sequels to Mitchell's book in the past, and that this was an important market for them" (II.B.1.a). This, however, ignored the fact that the two books catered to completely different markets; further, the title *The Wind Done Gone* is easily construed to be parodic and indicates to readers that the book meant to be a departure from the conventions of *Gone With the Wind*. To wit, the article notes that "Houghton Mifflin contended that 'to the extent that [*Gone With the Wind*'s] fully developed characters have analogs in [*The Wind Done Gone*], [*The Wind Done Gone*], as part of its parody, presents them as flat, one-dimensional characters who are not substantially similar to the characters created by Margaret Mitchell" (II.B.1.b).

The district court ruled for Suntrust, but the decision was later overturned by the Eleventh Circuit Court, which argued for Randall's First Amendment rights to free speech: "The Eleventh Circuit used the First Amendment to impose a limitation on The Mitchell Trust's copyright in

order to give the public ‘access to Randall’s ideas [and] viewpoint in the form of expression she chose’” (II.B.3). Writes Gessner: “The public interest should be taken into account when a determination of fair use is being made. If the work in question serves the public interest by illuminating an idea or bringing new ideas/interpretations to the forefront, it should be deemed a fair use if it does not substantially effect [sic] the market for the original. ... Randall’s book highlights the social injustices of Mitchell’s book; it exists as a foil to the original and in no way seeks to assume the place of the original in the minds of the readers” (IV.D.V).

This is an important argument because it lies at the heart of the purpose of copyright: the progress of arts and science. In as such, free speech considerations that affect the overall progress must take precedent over copyrights and be immune from infringement prosecution.

SUNTRUST BANK v. HOUGHTON MIFFLIN COMPANY (268 F.3d 1257) -- LexisNexis

This is the Eleventh Circuit appeal of the of the case brought by Suntrust against Houghton Mifflin charging infringement on Margaret Mitchell's *Gone With the Wind* by Alice Randall's *The Wind Done Gone*. In this case, Judge Birch ruled in favor of Houghton Mifflin by virtue of First Amendment rights. Interesting, he writes in a footnote:

I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright. ... However, fair use is commonly referred to an affirmative defense, see *Campbell v. Acuff-Rose Music, Inc.* ... Nevertheless, the fact that the fair use right must be procedurally asserted as an affirmative defense does not detract from its constitutional significance as a guarantor to access and use for First Amendment purposes. (n3)

Birch rules that *The Wind Done Gone* had value beyond what fair use laws afforded it because the nature of the work was a social commentary meant to create dialogue and end the myths about the Antebellum South. "Freedom of speech requires the preservation of a meaningful public or democratic dialogue," he writes (II.B). In essence, Birch held that Randall was merely continuing a discussion that Mitchell had established; by adding her own expression, Randall was free to "use or discuss the idea" (II.B.1).

This was a landmark, but controversial decision, as discussed more in "**The Wind Done Gone, the Law Done Wrong?**" and tangentially in "Fair Use Commercial Parody Defense." I agree with the outcome, though I'm undecided about the rationale. Instead, I think a less controversial justification for ruling for fair use would be to allow satires--which *The Wind Done*

Gone is more of than a parody--the same protections afforded to parodies. This is discussed further in "Unfair Use."

CAMPBELL v. ACUFF-ROSE MUSIC, INC. (Supreme Court, 1994)

This case is perhaps the most important decision by any court on fair use and parody. Singer Roy Orbison brought suit for copyright infringement against rap group 2 Live Crew for copying the opening lyrics and beat to Orbison's song "Oh Pretty Woman." Going all the way to the Supreme Court, Justice Souter held for the unanimous court that 2 Live Crew's song qualified for fair use protection because of its parodic nature. Drawing a sharp contrast with the decisions in *Disney v. Air Pirates* and *Original Appalachian Artworks v. TOPPS Chewing Gum*, the court ruled that "Even if 2 Live Crew's copying of the original's first line of lyrics and characteristic opening bass riff may be said to go to the original's 'heart,' that heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim" (e). This is because 2 Live Crew took parts of "Oh Pretty Woman" and transformed them into an original entity.

Souter notes that "It is uncontested here that 2 Live Crew's song would be an infringement ... but for a finding of fair use through parody" (II). This is because parody, by its very nature, requires the taking of a certain amount of an original work. Since the purpose of parody is to criticize, a parody must be allowed to copy enough of a work that audiences will be able to recognize it as a parody; to take too little would muddle in the audience's mind whether or not something is a parody. This is thus a drastic departure from *Disney v. Air Pirates*, which ruled that, though the "best parodies" required substantial similarities to the original, creating the "best parody" is not an exemption from infringement.

The court also laid out the legal distinction between parody and satire: "For the purposes of copyright law ... 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. ... If, on the contrary, the commentary has

no critical bearing on the substance or style of the original composition ... the claim to fairness in borrowing from another's work diminishes accordingly" (A). Put another way, and illustrated in *Dr. Seuss v. Penguin Books*, a parody comments upon what it is mocking, while a satire copies as a vehicle for mocking another target.

The reason this is such a landmark case is that it was a monumental victory for free speech. As noted from "**The Wind Done Gone, the Law Done Wrong?**", the primary nature of copyright law is to advance the progress of arts and science; limited monopolies are one vehicle, but they are not the only one. And also noted elsewhere, the limited monopolies often serve to limit free speech toward the advancement of arts and science. However, to counterbalance this is parody (and, hopefully, soon satire--see "Unfair Use"), the main purpose of which is to comment or critique another work. Limiting parodic fair use stifles criticism and free speech; however, allowing it not only advances free speech, but also advances the general arts and science because, as Souter noted, parody is by its nature transformative and creates new work.

THE FAIR USE COMMERCIAL PARODY DEFENSE AND HOW TO IMPROVE IT --

**Jonathan M. Fox, 46 IDEA 619, 2006 (LexisNexis -- SEARCH IN "LAW REVIEWS"
USING THE TITLE IN THE "KEYWORD" FIELD)**

In this article, Fox lays out the divergence between the dictionary definition of parody and the legal one, and concludes that "Supreme Court's current definition of parody has allowed certain works, completely devoid of the elements of literary parody, to qualify as fair use parodies" (I). This is because he argues that the court has given parodists too much flexibility by interpreting too broadly what a "parody" is.

Fox writes, "It appears that the purpose of fair use is to be fair to the party accused by the copyright holder of infringement" (V). This is because of the disconnect between what dictionaries say is "parody" versus what the courts say it is:

Although most would find 2 Live Crew's version of Pretty Woman to be at least mildly amusing, the Supreme Court made it very clear that the work's humorous component was not what made the song a fair use. Instead, it was primarily the song's transformative character coupled with the fact that it commented on or criticized the original. Both of these characteristics that won the song fair use protection are only tangentially related to the traditional definition of parody. Similarly, in its decision in *SunTrust Bank*, the Eleventh Circuit established that "judges need not set themselves up as arbiters of whether the product is funny. (V.A)

Fox then goes on to list ways in which copyright law can be changed to curtail the possibility that courts will grow too lenient with parodies. "Although commercial parodies are deserving of protection from a First Amendment perspective," Fox writes, "their strong commercial status renders their position in the realm of copyright law decidedly more suspect" (VI).

Fox makes the pertinent observation that legal definitions need to conform to dictionary ones, or else it leaves future courts with little ability to analyze and apply precedent.

Furthermore, he argues that that if parodists are all but immunized from infringement suits, then it has the possibility to negatively affect the progress of arts and science by curbing the creation

of new works--after all, it would essentially negate the purpose of copyrights, to give security to authors that their work will not be stolen, if all anyone has to do to copy it is to claim fair use through parody.

The Fair Use Doctrine in the U. S. American Copyright Act and Similar Regulations in the German Law -- Holger Postel and Jean-Luc Piotraut, 5 Chi.-Kent J. Intell. Prop. 142, Spring 2006 (LexisNexis -- SEARCH IN “LAW REVIEWS” USING THE TITLE IN THE “KEYWORD” FIELD)

This article analyzes the differences between American and German copyright laws as they relate to fair use. In large part, the differences amount to different interpretations based on natural rights. For instance, the article notes, “*Campbell* shows that there is no distinction between musical work and other forms of work as long as the purpose is in accordance with one of the criteria set out by section 107. While the German Copyright law does not allow an artist to use musical works without the licensee of the copyright holder, the American law does not recognize this distinction” (II.1).

Both the American and German legal systems interpret parody narrowly, mainly out of pragmatism: if they do not, it would “open the floodgates” to excessive parodying (which “**THE FAIR USE COMMERCIAL PARODY DEFENSE AND HOW TO IMPROVE IT**” argues is already happening). However, as the article notes, “The dilemma courts face is that parody is a form of art and courts are generally cautious in defining art” (II.2). The dilemma also entails the problem of how do you protect copyrighted works on the one hand, while not stifling creative and transformative parodies on the other.

Interestingly, German law does not allow for music parody at all, though it does allow for other forms of fair use and parody similar to those in the US, including videotaping, photocopying, quoting, and news reporting. However, often American and German laws have similar ends, though their means differ.

Ultimately, both German and American laws will begin to come together more and more than in the past because of globalization. Especially as a result of the internet, the rules are changing and the world is getting smaller and smaller, and countries will soon no longer be able to have legal structures that are vastly different for fear of being incompatible with a neighbor, as evidenced by the streamlining of laws and codes with the Berne Convention the European Union.

**THE CAT IN THE HAT'S LATEST BAD TRICK: THE NINTH CIRCUIT'S
NARROWING OF THE PARODY DEFENSE TO COPYRIGHT INFRINGEMENT IN
DR. SEUSS ENTERPRISES v. PENGUIN BOOKS USA, INC. -- Jason M. Vogel, 20
Cardozo L. Rev. 287, September 1998**

This article analyzes the decision of infringement against the publisher of the book *The Cat NOT in the Hat!*, a satiric account of the OJ Simpson double murder trial, written in the style of Dr. Seuss. The case was ruled an infringement because *The Cat NOT in the Hat!* used Dr. Seuss conventions as a vehicle for commenting on OJ Simpson; *Campbell v. Acuff-Rose* established that to be considered parody and not satire (which is not covered under fair use--see "Unfair Use"), a work must criticize or comment on the work it is copying. The problems with this is that:

The argument that the commentary element should be an absolute prerequisite to fair use, thereby dispositively disqualifying satires, suffers four significant shortcomings, however. First, distinguishing between parodies and satires involves arbitrary judicial line-drawing, as there is no clear standard for how closely the work must focus on the original to qualify under "parody" status. ... A second significant shortcoming to the parody/satire dichotomy is the fact that satiric works causing inherently offensive associations to be drawn to the underlying work are as unlikely to be licensed as those that directly criticize the underlying work. ... A third flaw of the parody/satire rule is the notion that should the copyright owner refuse to license a satire, the satirist will be able to find other copyright owners who are more amenable to his use of their works. ... Finally, it is unreasonable to suggest that potential authors will be dissuaded from creating new works solely because their product may later be used as "unpermitted" and uncompensated elements of a satire. To the extent that the satire does not serve as a market substitute for the original, its presence will result in no cognizable economic loss to the original author. (B.III)

Vogel proposes that all satires fall under fair use consideration, much like parodies. This is because satires behave in much the same way that parodies do, and should be afforded the same rights: "Because inherently offensive satires implicitly analogize the external target of their

criticism to the material being borrowed, a reciprocal analogy can be inferred. For example, The Cat NOT in the Hat! implicitly asserts that, in some respects, O.J. Simpson is like the Cat in the Hat. This creates a reciprocal implication that the Cat in the Hat is somewhat like O.J. Simpson” (IV). He goes on to outline many of the arguments for satire as fair use discussed in “Unfair Use.”

This article makes some good points that fit in nicely with the narrative for this project that satire is not only commentary--and thus falls under free speech and fair use protections--but that it meets the other prerequisites for fair use by virtue of its similarity to parody. The courts are beginning to take note of this, as evidenced by the Campbell decision, and it is probably only a matter of time before they rule that a satire is substantially similar to parody.

FAIR USE OF COPYRIGHTED MATERIAL IN ADVERTISEMENT PARODIES -- A.

Hunter Farrell, 92 Colum. L. Rev. 1550, October 1992

This article summarizes and analyzes parodic advertisements such as the Coors beer commercial parodying the Energizer Bunny. However, the article notes that there has been an inability to uniformly agree how best to apply fair use criteria on these cases--something which is touched upon in "Fair Use Commercial Parody Defense." However, another difficulty is the weighing of the creative and transformative value of the parodic commercials with their innate commercial nature. Two years after this article was written, Campbell attempted to put to rest the question of whether or not parodies can also be commercial; however, this has not always been the case (see "**The Wind Done Gone, the Law Done Wrong?**").

Though many of the fair use considerations in the article are outmoded because it was written before the Campbell decision, the issue of competition is still valid. Farrell writes that "In the context of advertising, however, it is extremely unlikely that a parody would usurp the demand for the original work. Usually, advertisements are extremely brief and serve a very specialized purpose: promoting products. Consumers will rarely reduce consumption of a copyrighted work to consume more of an advertisement, especially given the common perception that most advertisements are forced upon the public" (III.D).

This is an interesting distinction between advertisements and other forms of creative work; the latter one must go and actively seek out, whereas the former is thrust upon the audience. In many ways, it can be thought that commercials may in fact grate on viewers and turn them off to the product being sold. The question then becomes this: are viewers turned off to the product being sold by the offending advertisement, or by the product being parodied? However, the fact

that many commercial parodies do not compete in the same market as the originals may still render the former question moot.